Decision of ct of chancery: Meadows v. Hervey / Hervey 1744 or 5

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31

ADVERTISEMENT.

IN this Volume the Cases reported in the last Folio Edition of the State Trials are brought to a termination; the Case of Horne, p. 651, *being the last contained in that Collection. After which commences the New Series of Proceedings, continuing that Edition to the present time.*

In order to render the present Work more applicable to those Law Books in which references are made to the Folio Edition, a TABLE *of* PARALLEL REFERENCE, *exhibiting at first sight the Pages in the present Edition corresponding with those of the Folio ones, is now in compilation, and will be published with the next Volume.*

FEB. 1814.

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A

COMPLETE COLLECTION

OF

State Trials

AND

PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS

FROM THE

EARLIEST PERIOD TO THE YEAR 1783,

WITH NOTES AND OTHER ILLUSTRATIONS:

COMPILED BY

T. B. HOWELL, Esq. F.R.S. F.S.A.

INCLUDING,

IN ADDITION TO THE WHOLE OF THE MATTER CONTAINED IN THE

FOLIO EDITION OF HARGRAVE,

UPWARDS OF TWO HUNDRED CASES NEVER BEFORE COLLECTED;

TO WHICH IS SUBJOINED

A TABLE OF PARALLEL REFERENCE,

RENDERING THIS EDITION APPLICABLE TO THOSE BOOKS OF AUTHORITY IN WHICH REFERENCES ARE MADE TO THE FOLIO EDITION.

IN TWENTY-ONE VOLUMES.

VOL. XX.

12—17 GEORGE III.....1772—1777.

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1816.

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TO

VOLUME XX.

REIGN OF KING GEORGE THE THIRD.

*** *This is the concluding Article of the Folio Edition.*

COMMENCEMENT OF THE NEW SERIES.

A COMPLETE COLLECTION

OF

STATE TRIALS,

&c. &c.

548. The Case of JAMES SOMMERSETT, a Negro, on a Habeas Corpus,* King's-Bench: 12 GEORGE III. A. D. 1771-72.

Of this Case only a Statement of the Facts, and Mr. Hargrave's learned Argument were inserted in the former edition of this Work. I have here added the other Arguments, and the Judgment of the Court, from Lofft's Reports, in which is a Note of the Case under the name of Sommersett against Stewart.

ON the 3d of December 1771, affidavits were made by Thomas Walklin, Elizabeth Cade, and John Marlow, that James Sommersett, a negro, was confined in irons on board a ship called the Ann and Mary, John Knowles commander, lying in the Thames, and bound for Jamaica; and lord Mansfield, on an application supported by these affidavits, allowed a writ of Habeas Corpus, directed to Mr. Knowles, and requiring him to return the body of Sommersett before his lordship, with the cause of detainer.

Mr. Knowles on the 9th of December produced the body of Sommersett before lord Mansfield, and returned for cause of detainer, that Sommersett was the negro slave of Charles Steuart, esq. who had delivered Sommersett

* The very important matters which this case involved, viz. first, The rights over the person of a negro resident here, claimed by another person as the owner of the negro; and, supposing such rights to exist, secondly, The extent of them; and thirdly, The means of inforcing them, were, I believe, never, except in this case, made the subject of a suit at law in England. But in Scotland two cases of this sort have occurred before the Court of Session; 1, That of Sheddan against Sheddan, A. D. 1756; 2, That of Knight against Wedderburn, A. D. 1775—1778.

Of these two cases the following reports are printed from the 'Dictionary of Decisions,' tit. 'Slave,' vol. 33, pp. 14,545, *et seq.*:

"Robert Sheddan *against* a Negro.—*July* 4, 1757.

"A Negro, who had been bought in Virginia, and brought to Britain to be taught a trade, and who had been baptized in Britain, having claimed his liberty, against his master Robert Sheddan, who had put him on board a ship, to carry him back to Virginia, the Lords appointed counsel for the negro, and ordered memorials, and afterwards a hearing in presence, upon the respective claims of liberty and servitude by the master and the negro.

"But, during the hearing in presence, the negro died; so the point was not determined."

"Joseph Knight, a Negro, *against* John Wedderburn.—*January* 15, 1778.

"The commander of a vessel, in the African trade, having imported a cargo of negroes into Jamaica, sold Joseph Knight, one of them, as a slave, to Mr. Wedderburn. Knight was then a boy, seemingly about twelve or thirteen years of age.

"Some time after, Mr. Wedderburn came over to Scotland, and brought this negro along with him, as a personal servant.

"The negro continued to serve him for several years, without murmuring, and married in the country. But, afterwards, prompted to assert his freedom, he took the resolution of leaving Mr. Wedderburn's service, who, being informed of it, got him apprehended, on a warrant of the justices of peace. Knight, on his examination, acknowledged his purpose. The justices found 'the petitioner entitled to 'Knight's services, and that he must continue 'as before.'

"Knight then applied to the sheriff of the county, (Perthshire), by petition, setting forth, 'That Mr. Wedderburn insisted on his con'tinuing a personal servant with him,' and prayed the sheriff to find, 'That he cannot be 'continued in a state of slavery, or compelled 'to perpetual service; and to discharge Mr. 'Wedderburn from sending the petitioner 'abroad.'

into Mr. Knowles's custody, in order to carry him to Jamaica, and there sell him as a slave. Affidavits were also made by Mr. Steuart and two other gentlemen, to prove that Mr. Steuart had purchased Sommersett as a slave in Virginia, and had afterwards brought him into England, where he left his master's service; and that his refusing to return, was the occasion of his being carried on board Mr. Knowles's ship.

"After some procedure in this process, the sheriff found, 'That the state of slavery is not 'recognized by the laws of this kingdom, and is 'inconsistent with the principles thereof; that 'the regulations in Jamaica, concerning slaves, 'do not extend to this kingdom; and repelled 'the defender's claim to a perpetual service.' Mr. Wedderburn having reclaimed, the sheriff found, 'That perpetual service, without 'wages, is slavery; and therefore adhered.'

"The defender removed the cause into the court by advocation. The lord ordinary took it to report, upon informations. Being a question of general importance, the Court ordered a hearing in presence, and afterwards informations of new, upon which it was advised.

"*Pleaded for the Master:* That he had a right either to the perpetual service of the negro in this country, or to send him back to the plantations from which he was brought. His claim over the negro, to this extent, was argued on the following grounds:

"The productions of the colonies, ever since they were settled, have been cultivated by the means of negro slaves imported from the coast of Africa. The supplying the colonies with these slaves has become an extensive trade; without which, the valuable objects of commerce, now furnished by the plantations, could not be cultivated. British statutes have given sanction to this trade, and recognized the property of the master in such slaves; 10th W. 3, c. 26; 5th Geo. 2, c. 7; 23d Geo. 2, c. 3.

"The property which, in Jamaica, was established in the master over the negro, under these statutes, and the municipal law there, cannot be lost by a mere change of place. On principles of equity, rights acquired under the laws of foreign countries are supported and inforced by the courts of law here. A right of property will be sustained in every country where the subject of it may come. The *status* of persons attend them wherever they go; Huber, lib. 1, t. 3, c. 12.

"The law of the colonies is not to be considered as unjust, in authorizing this condition of slavery. The statutes which encourage the African trade show, that the legislature does not look on it in that light. The state of slavery is not contrary to the law of nations. Writers upon that law have enumerated several just and lawful origins of slavery; such as contract, conquest in a just war, and punishment of crimes. In cases where slavery is authorized by the laws of Jamaica, it must be presumed to have proceeded on a lawful origin. The municipal law of no country will be presumed unjust.

"A state of slavery has been universally received in the practice of nations. It took place in all the ancient nations, and in all the modern European nations, for many ages. In some of them it still remains; and in none of them has it been abolished by positive enactments, declaring it unjust and illegal, but gone into disuse by degrees, in consequence of many different causes. Though, therefore, the municipal law of this country does not now admit of this state of slavery in the persons of citizens, yet, where foreigners, in that state, are brought into the country, the right of their masters over them ought not to be annihilated.

"In this case, the master is not insisting for the exercise of any rigorous powers. He only demands, that he shall be intitled to the personal services of the negro, in this country, during life. His right to this extent, at least, is not immoral or unjust; nor is it even reprobated by the municipal law of this country. A person may bind himself to a service for life; Ersk. Inst. b. 1, t. 7, § 62.

"But, in the last place, if this is denied, the master must, at least, be permitted to compel the negro to return to the plantations, from whence he was brought; otherwise he is intirely forfeited of his right.

"Some cases from the English law-books were adduced to show, that, in England, the master's right of property in his negro remains after he is brought into that country; Butts *contra* Penny, 1677; Keble's Rep. p. 3, p. 785. Gilly *contra* Cleves; 5th William and Mary, lord Raymond, Rep. 5, p. 147; and the opinion of two very eminent lawyers, in the year 1729, sir Philip Yorke, then attorney-general, and Mr. Talbot, solicitor-general, in these words: 'We are of opinion, that a 'slave, by coming from the West-Indies, 'either with or without his master, to Great 'Britain or Ireland, doth not become free; and 'that his master's property or right in him is 'not thereby determined or varied; and bap-'tism doth not bestow freedom on him, nor 'make any alteration in his temporal condition 'in these kingdoms. We are also of opinion, 'that the master may legally compel him to 'return to the plantations.'

"*Answered for the Negro:* The only title on which any right of dominion is claimed over this African, is the institution of the municipal law of Jamaica, which authorizes the slavery of Africans brought into that island. Under that law, this negro, a child when brought into Jamaica, while he remained there, was subjected to the unjust dominion which it gives over these foreigners; but the municipal law of the colonies has no authority in this country. On grounds of equity, the Court, in some cases, gives effect to the laws of other countries; but the law of Jamaica, in this instance, will not be supported by the Court; because it

Lord *Mansfield* chusing to refer the matter to the determination of the court of King's-bench, Sommersett with sureties was bound in a recognizance for his appearance there on the second day of the next Hilary term; and his lordship allowed till that day for settling the form of the return to the Habeas Corpus. Accordingly on that day Sommersett appeared in the court of King's-bench, and then the following return was read:

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is repugnant to the first principles of morality and justice.

"Subordination, to a certain extent, is necessary; but there are certain bounds, beyond which, if any institution, subjecting one individual to another, should go, the injustice and immorality of it cannot admit of a doubt. Such is the institution of slavery, depriving men of the most essential rights that attend their existence, and which are of a nature that admit not of any equivalent to be given for them. The most express consent, given in a voluntary contract, cannot authorize the assuming of these rights, or bind the consenting party to submit to the condition of a slave. A stipulation of that kind affords intrinsic evidence of an undue advantage taken, and is therefore sufficient to void the contract.

"But, although it were justifiable to admit of a slavery proceeding on a title of contract, of conquest, or of punishment, the law of Jamaica would not be the less unjust. In subjecting the Africans to slavery, that law requires no title under any of these grounds. The circumstance, that the negroes are brought into Jamaica, is all that is requisite to fix on them indiscriminately the condition of slavery. It is, therefore, a slavery established on force and usurpation alone, which no writer on the law of nations has vindicated as a justifiable origin of slavery.

"If the law of Jamaica had made any distinction, or required any title to the slavery of an African, this negro would never have been reduced by it to that state. Being a child when he was brought into Jamaica, he could enter into no contract, commit no crime, and conquest cannot give a right to kill or enslave children.

"The means by which those who carried this child from his own country got him into their hands, cannot be known; because the law of Jamaica makes no inquiry into that circumstance. But, whether he was ensnared, or bought from his parents, the iniquity is the same.—That a state of slavery has been admitted of in many nations, does not render it less unjust. Child-murder, and other crimes of a deep dye, have been authorised by the laws of different states. Tyranny, and all sorts of oppression, might be vindicated on the same grounds.—Neither can the advantages procured to this country, by the slavery of the negroes, be hearkened to, as any argument in this question, as to the justice of it. Oppression and iniquity are not palliated by the gain and advantage acquired to the authors of them. But the expediency of the institution, even for the subjects of Great Britain, is much doubted of by those who are best acquainted with the state of the colonies; and some enlightened men of modern times have thought, that sugar and tobacco might be cultivated without the slavery of negroes.

"The dominion, therefore, given by the law of Jamaica over the pursuer, a foreigner there, being unjust, can receive no aid from the laws of this country. The modification proposed of this claim of slavery, makes no difference on the merits of the question. It is plain, that, to give the defender any right over the pursuer, the positive law of Jamaica must always be resorted to; consequently, the question recurs, Whether that law ought to be enforced beyond its territory? But a service for life, without wages, is, in fact, slavery. The law of Scotland would not support a voluntary contract in these terms; and, even where wages are stipulated, such a contract has been voided by the Court; Allan and Mearns *contra* Skene and Burnet, No. 5, p. 9454, *voce* Pactum Illicitum.

"The answer was given to the other claim, of sending the negro out of this country, without his consent, that it supposes the dominion given over the pursuer by the law of Jamaica to be just. The negro is likewise protected against this by the statute 1701, c. 6, which expressly prohibits the carrying any persons out of the kingdom without their consent. The words are general, and apply to all persons within the realm.

"In support of this argument for the negro, authorities of French writers were adduced, to show, that formerly, by the laws of France, negroes brought into that country from the plantations became free. This was their law, until lately, that, by special edicts, some alterations were made upon it; Denisart, tom. 3, *v.* Negro. On the law of England, several cases were mentioned, in which different judges had expressed opinions, that a negro coming into England is free there; 1 Salk. 666, Smith *contra* Brown and Cooper; Shanley *contra* Nalvey, in Chancery 1762; Hargrave's Arg. p. 58.

"But the late case of Sommersett, the negro, decided in the King's-bench, in the year 1772, was chiefly relied on, and said to be in point; at least upon this question, Whether the negro could be sent out of England?

"The *Court* were of opinion, that the dominion assumed over this negro, under the law of Jamaica, being unjust, could not be supported in this country to any extent: that, therefore, the defender had no right to the negro's service for any space of time, nor to send him out of the country against his consent: that the negro was likewise protected under the act 1701, c. 6. [The 'Act for preventing wrongous imprisonment, and against 'undue delays in Trials,' more particularly

" J, John Knowles, commander of the vessel called the Ann and Mary in the writ hereunto annexed, do most humbly certify and return to our present most serene sovereign the king; that at the time herein after-mentioned of bringing the said James Sommersett from Africa, and long before, there were, and from thence hitherto there have been, and still are great numbers of

mentioned below] from being sent out of the country against his consent.—The judgments of the sheriff were approved of, and the Court 'remitted the cause *simpliciter*.'"

I have been favoured with the use of six 'Memorials' or 'Informations,' which in the course of these two litigations were delivered into the Court of Session. Five of them appear to have been prepared by men of very high eminence in their profession, one for Sheddan the negro by sir David Dalrymple, afterwards a judge with the title of lord Hailes; two for Knight the negro, by Mr. M'Laurin, afterwards lord Dreghorn, and Mr. Maconochie, now lord Meadowbank, and two for Wedderburn (Knight's master), by Mr. Ferguson, afterwards lord Pitfour, and Mr. Cullen, afterwards lord Cullen, respectively: they display a copiousness and variety of curious learning, ingenious reasoning, and acute argumentation, intimately connected with the case now before us.

With respect to 'Memorials' or 'Informations,' in causes depending in the Court of Session, and to the general course of proceeding in that court, see the Edinburgh Review for January 1807. For the alterations which in the year 1808 were made in the constitution of that court, see stat. 48 G. 3. c. 151.

Mr. Barrington, in his Observations on stat. 1 Rich. 2, (note [*y*] in the third edition) mentioned that "many of the labourers in the salt-works and collieries in Scotland still continue 'glebæ adscriptitii' and cannot be hired without the proprietor's consent." And as to this he referred to a case in the Dictionary of Decisions, vol. 1, p. 312. I know not what case that was. In Morison's Dictionary of Decisions there are under title Coalier twelve cases, in all of which the servile condition of the class is recognised.

In the Memorials which were presented in the case of Knight *v.* Wedderburn, the condition of the coalliers and salters of Scotland was considered. I will here insert what was said of it by lord Meadowbank and lord Pitfour.

"The defender," observed the first of those learned persons, "has mentioned the situation of coalliers and salters as an evidence, that the law of Scotland is not repugnant to slavery. It has been already shown, that although villenage still existed, although this high court would even now record an acknowledgment of villenage, and although other kinds of slavery were adopted by the laws of this country, yet that the common law could not be understood to favour the defender's claim. As long as the common law acknowledges the law of nature to be its great principal and rule, so long must it reject a claim to a right of property in a man, or in his labour and industry, founded in his being born of a captive or a criminal, or in his being seized on violently by a third person, and sold to the claimant. It has, however, been urged, that coalliers and salters are living proofs of the former prevalence of villenage: it is, therefore, not unnecessary to bestow a few observations on their situation; the use of pit-coal is of so late invention that villenage must, at any rate, have disappeared in Scotland long before the working of coal could have become a profession. Purchas (in vol. 3, p. 88, of his collection) giving an account of Marco Paolo's travels, has the following curious passage extracted from them: 'Throughout the whole 'province of Katai (China), certain black 'stones are digged out of the mountains, 'which, put into the fire, burn like wood, and 'being kindled, preserve fire a long time: as 'if they be kindled in the evening, they keep 'quick fire all the night; and many use those 'stones, because, that though they have store 'of wood yet there is such frequent use of 'stones and leathes thrice every week that the 'wood would not serve.' The same observation is transcribed into the Histoire Générale de Voyages, tom. 9, p. 356. It was one of the circumstances, which, at the publication of Paolo's travels, was considered as a proof that they were fabulous. There is a passage in Æneas Sylvius' (afterwards Pius 2.) account of Europe, which shows more directly, that the use of pit-coal must have been very rare and very inconsiderable in his time even in Scotland. Treating of Scotland, he observes, that he was here (as a legate) in the time of Jacobus quadratus, and enquired about a miraculous tree, which had been said to grow in Scotland: He adds, 'De quâ re cùm audivimus 'investigaremus [so in orig.] didicimus miracula 'semper remotiùs fugere, famosámque arborem 'non in Scotiâ, sed apud Orcades inveniri: 'Illud tamen in Scotiâ miraculum represen-'tatum est; nam pauperes penè nudos ad 'templa mendicantes acceptis lapidibus eleemo-'synæ gratiâ datis lætos abiisse conspeximus: 'id genus lapidis, sive sulphureâ sive aliâ 'pingui materiâ, pro ligno, quo regio nuda est, 'comburitur.' It is plain, from this account, that coals must have been very rare in Scotland. It otherwise would have been quite absurd to take notice of them only as used by beggars. Besides, he observes, that they were only used where the country was barren of wood; and it is well known, that Scotland was, during the reigns of the Jameses, very much covered with it; so there could be very little occasion for coals. On the other hand, as there are regular records extant, from the days of James 1, it is impossible that villenage could then have existed, without sufficient evidence concerning it appearing in the acts of parliament, charters, transfers of property, and various deeds among individuals, which are handed

negro slaves in Africa; and that during all the time aforesaid there hath been, and still is a trade, carried on by his majesty's subjects, from Africa to his majesty's colonies or plantations of Virginia and Jamaica in America, and other colonies and plantations belonging to his majesty in America, for the necessary supplying of the aforesaid colonies and plantations with

down to us. It is therefore plain, that the profession of coalliers did not commence early enough to have received the remains of the ancient villeins. The circumstances of a coallier likewise indicate a very different origin.

"Coalliers are not born *adscriptitii*. A coal hewer is a profession which is voluntarily embraced, and, like other professions, is regulated by particular laws, which are more or less strict, according as the interest of the public is thought to require. The wages of a coallier, like those of labourers in any other profession, that is by its nature exclusive, are higher than common workmen receive. He acquires property, and transmits it; and has been found, in the case of Rutherglen, decided 20 February 1747, intitled, as well as any other subject, to be a counsellor of a burgh; he must, with equal reason, be capable of being elected a member of parliament. These particulars are sufficient evidence, that the condition of a coallier is perfectly different from that of a villein. The art of working coal successfully requires long practice to attain, and is prejudicial to the health of those who are not early accustomed to it. It was, therefore, extremely natural, when coal works were begun to be set on foot, that the proprietors should, in return for the high wages they gave the workmen, take them bound to continue in their service for a long term of years, or for life; accordingly we find, that it was at first customary to take such bonds from coalliers; and, it is known, that the practice continued after the intervention of parliament had superseded the necessity of it.

"These observations, the pursuer humbly apprehends, sufficiently explain any thing particular in the state of coalliers. In the infancy of improvement men are apt to adopt expedients for removing the obstructions it meets with, and other evils which they feel, but the nature and effectual remedies of which they do not comprehend. Thus incorporations and monopolies on the one hand, and on the other, restraints on the members of incorporations and on monopolists have originated. In the same way it was very natural to seek a curb for the indolence or capriciousness of coalliers, whose high wages, like those of many other kinds of workmen, disposed them to idleness, faction, or arrogance. All regulations, however, framed with such views, are evidently commercial, and never can be construed as either favouring liberty or slavery, any more than the act of navigation, or any other thing of the same nature. It might be proved, that an advocate was a slave on the same principle as a coallier. The acts 1537, c. 64, and 1587, c. 91, oblige an advocate to plead causes whether he chooses or not; if, in the one case, a client, and in the other, the court pleases to insist on it: yet, it is not believed, that these statutes were ever urged as inductive of slavery. The same observations are in general so applicable to the state of salters, that it is unnecessary to consider it."

On the part of the defender it was argued by Mr. Ferguson (lord Pitfour,) "There still exists in this country a species of perpetual servitude, probably the remains of the original 'adscripti glebæ,' or villeins, which is supported by late statutes, and by daily practice, viz. That which takes place with regard to the coalliers and salters, where, from the single circumstance of entering to work after puberty, they are bound to perpetual service, and sold along with the works; and indeed, in our law, there are several other examples of persons being bound to servitude during their lives. The act of parliament 1597, cap. 272, enacts, 'That stark beggars and their bairns be employed in common works, and their service, mentioned in the act of parliament 1579, to be prorogate during their lifetimes.' And, without going further, it is the case with every soldier and sailor, the former of whom is shot, if he endeavours to make his escape at any period of his life, by express law; and the sailor is subjected, during the same space by a practice universally admitted, to be seized by force, and sent against his will to the remotest corners of the world.

"The pursuer is pleased to argue, that the coalliers and salters are not a remains of villenage; and his argument for this is, that the use of coal in Scotland is so late a discovery, that it must have taken place long after villenage disappeared: and to prove this, he cites a passage from Marco Paolo, and another from Æneas Sylvius; from which it would appear, that these authors had been unacquainted with that mineral, till the former saw it in China, and the latter in Scotland. And (the pursuer adds,) Æneas Sylvius observes, that coal was only used in Scotland where it was barren of wood; and as it is well known that, during the reign of the Jameses, Scotland was very much covered with wood, there could be very little occasion for coal.

"This circumstance seems to be little connected with the present question; but the pursuer's arguments appear to have no tendency to prove that the state of the coalliers in Scotland is not a continuation of the ancient villenage. By the charter above recited, that institution is traced down to the year 1368; and in all probability it continued a considerable time longer. Marco Paolo went to China about 100 years before that; so surely no inference can be drawn from the Italians being unacquainted with coal in the year 1270, that this mineral was not discovered in Scotland before the year 1368.

negro slaves; and that negro slaves, brought in the course of the said trade from Africa to Virginia and Jamaica aforesaid, and the said other colonies and plantations in America, by the laws of Virginia and Jamaica aforesaid and the said other colonies and plantations in America, during all the time aforesaid, have been, and are saleable and sold as goods and chattels,

"Æneas Sylvius was in Scotland in James the 1st's time. The defender does not know if the pursuer means by the expression of Jacobus quadratus to insinuate that it was in James the 4th's time; but if he does so, it's a mistake, for Æneas Sylvius died pope in the 5th year of James 3, viz. 23 years before James 4 succeeded; and there is no doubt that his journey to Scotland was in James the 1st's time, probably about the year 1430. He then describes coal to have been in common use in Scotland; and it would appear very odd if there had been no coal-pits in Scotland 60 years before that, to which the charter above recited brings down the existence of villeins or nativi.

"The quotation therefore from Æneas Sylvius is a proof of the direct contrary of what the pursuer endeavours to infer from it.

"The circumstance of two Italians being surprised at seeing pit-coal affords no presumption that it had not been used for many centuries in Scotland. It happens every day, that Englishmen are not believed in that country, when they describe our coal to them even at present.

"The defender does not know what the pursuer means by asserting, that it is well known, Scotland was very much covered with wood during the reigns of the Jameses. As Æneas Sylvius, who was an eye-witness, declares, that in the time of James 1, it was perfectly bare of wood; and it is exceedingly probable, that the immemorial use of pit-coal before that period, had induced the inhabitants to cut down all the wood, without leaving or providing sufficiently for that kind of fuel.

"It is needless to enter, with the pursuer, into the disquisition, whether the state of coalliers be a severe kind of slavery or not; as it is certainly much more so than that to which the defender claims to reduce him."

It is perhaps worthy of notice in this place, that though the memorial of Mr. Maconochie (lord Meadowbank) bears date April 25, 1775, and that of Mr. Ferguson (lord Pitfour) bears date July 4, 1775, no notice is taken of the statute 15 Geo. 3, c. 28, by which after reciting that by the statute law of Scotland, as explained by the courts of law there, many colliers and coal bearers, and salters, are in a state of slavery or bondage, bound to the collieries and salt works, where they work for life, transferable with the collieries and salt works, when their original masters have no farther use for them, it is enacted, that colliers, coal bearers, and salters, shall not be bound to any colliery or salt work, or to the owner thereof, in any way or manner different from what is permitted by the law of Scotland, with regard to servants and labourers.

This statute, it appears, by the Lords' Journal, was passed on the 23d day of May, 1775. After which, it seems (see Mr. Benet's account of Dudingston, in the 18th vol. of sir John Sinclair's Statistical Account of Scotland, p. 370,) that the coal masters strove to insure the dependence of their coalliers, and consequently the perpetuity of their services, by seducing them into their debt: to remedy which, by stat. 39 Geo. 3, c. 56, among other provisions respecting colliers in Scotland, it was enacted, 'That no action shall be competent for money advanced by, or on behalf of coal owners or lessees to colliers, except for support of their families in case of sickness,' in which case a specific mode of procedure is provided.

In the negro case in France, which, under the title of 'La Liberté reclamée par un négre contre son maitre qui l'a amené en France,' is reported in the 13th vol. of 'Les Causes Célébres,' &c. p. 492, edit. of 1747, and which I apprehend was determined in the year 1738, or soon afterwards, the questions before the Court appear to have been, 1st, Whether the party claiming the negro was such a person, as, by the French king's edict of October 1716, was permitted, under certain formally prescribed conditions, to bring negro slaves from the French West Indian colonies into France, and to retain them there: and 2dly, Whether he had performed those conditions; with respect to which it was provided in the edict, that, "faute par les mâitres des esclaves d'observer les formalités préscrites par les précedéns articles, les dits esclaves seront libres, et ne pourront être reclamés." For though M. le Clerc, Procureur du Roi, did indeed mention, that neither the edict of March 1685, nor that of October 1716, had been registered in the parliament of Paris, or transmitted to the proper officer of the court of admiralty, yet it very clearly appears, that he did not lay much stress on these topics.

But the eloquence of M. le Clerc and the other advocates who argued the case expatiated far beyond the narrow limits of the dry and uninteresting questions of mere positive law which I have stated. The powers of their learning and of their oratory were called forth in all their vigour, to describe the character and narrate the history of slavery, to display its incongruity with the benevolent doctrines of Christianity, and above all to impress upon their hearers, that slavery was utterly and irreconcilably opposite to the nature of France and of Frenchmen, and to the original principles and established administration of their constitution and government; insomuch, that to touch the soil or to inspire the air of France was to be free. Throughout the arguments this last position not only was undisputed by either party, but was by all parties either assumed, or admitted, as the incontrovertible as-

and upon the sale thereof have become and been, and are the slaves and property of the purchasers thereof, and have been, and are saleable and sold by the proprietors thereof as goods and chattels. And I do further certify and return to our said lord the king, that James

sertion of a notorious fact. Yet, at the same time, it was on all sides propounded and inculcated, with a diligence and copiousness of repetition, which is not commonly expended upon the maintenance of indisputable truths. I have extracted from the report the following passages, which, I believe, will sufficiently confirm what I have stated. They may also afford amusement, if not instruction, by exhibiting the complacency—perhaps I should rather say the triumph—with which, under the reign of Lewis the 15th, the descendants of the ancient Franks could rhapsodise concerning liberty:*

"Il s'est toujours regardé comme libre, depuis qu'il a mis le pied en France," p. 495.

"Dès qu'un esclave y" [sc. en France] "a mis le pied, il y acquiert la liberté," p. 504.

"Dès qu'un esclave est entré en France, il devient libre," p. 504.

"Il faut conclure que l'esclave est devenu libre, dès le premier instant de son arrivée en France," p. 508.

"L'entrée dans la ville de Paris assure le maintien, et devient l'asile, de la liberté.—'Est' [sc. Lutetia] 'sacro-sancta civitas, quæ præ-'bet omnibus libertatis atrium quoddam, asi-'liumque immunitatis,'" pp. 511. 526.

"Je ne me propose point ici, de porter la moindre atteinte au plus précieux de nos biens: je ne prétens point envier, à l'heureux climat que nous habitons, cette prérogative éminente, attachée à la seule entrée en ce royaume," [this phrase occurs again in p. 533.] "et qui forme le gage le plus assuré de la liberté, dont nous jouissons nous-mêmes," p. 512.

"Je ne craindrai pas d'avouer avec tous les auteurs, qu'on ne connôit point d'esclave en France, et que si tôt qu'un esclave étranger a mis le pied sur notre continent, il est gratifié de la liberté," p. 520.

"On ne connôit point d'esclave en France, et quiconque a mis le pied dans ce royaume, est gratifié de la liberté," p. 525.

"Testatur Benedictus, 'servos, qui Thole-'sam anfugerant, urbis ingressu ipso, liberos 'factos et cives,'" p. 527.

"Les maximes si précieuses du droit François accordent à la seule entrée dans ce royaume, au seul air qu'on y respire, le droit de la liberté, le don de la franchise; j'ai adopté ces maximes, je leur ai rendu tout l'hommage, qu'elles éxigent des cœurs vraiment François," p. 532.

"La France se fait gloire de communiquer le beau privilège d'affranchissement à tous les esclaves, lorsqu'ils entrent dans ce climat heureux, dont le seul nom répand de toute part la bonne odeur de la liberté," p. 539.

"Il n'est point d'esclave en France; nos constitutions, nos usages étendent la faveur de la liberté à tous les hommes en général qui l'habitent," p. 539.

"Il ne peut y avoir d'esclaves dans ce royaume, il suffit même d'y etre etabli, ou d'y faire sa résidence, pour acquérir le bien précieux de la liberté," p. 544.

"Nos privilèges ont effacé jusqu'à l'idée de l'esclavage en France," p. 546.

"Il n'y a en France aucuns esclaves; et la coutume y est telle, que non seulement les François, mais aussi les étrangers, prenant port en France, et criant *France et Liberté*, sont hors de la puissance de celui, qui la possédoit," p. 549.

"La France, mère de liberté, ne permet aucuns esclaves," p. 549.

"Les esclaves ont en France le privilège de se remettre en possession de leur liberté, au moment qu'ils sont entrés dans les terres de ce royaume," p. 551.

"De tems immémorial l'esclavage n'a point lieu en France, et l'esclave étranger devient libre, aussitôt qu'il y aborde," p. 551.

"Douter si en France un homme est libre, si un esclave acquiert sa liberté par son entrée en France, c'est attaquer l'autorité souveraine de nos rois, et faire injure à la nation," p. 498.

To these may be added the following more early authority:

"Toutes personnes sont franches en ce royaume, et sitost qu'un esclave a atteint les marches diceluy se faisant baptizer, il est affranchi." Institutes Coustumières, (published at Paris in 1679) p. 2, cited by Mr. Barrington in his Obs. on stat. 1 Rich. 2, where he has collected some curious particulars, relating to slavery.

M. Tribard, who pleaded against the pretensions of the negro, admitted and maintained the proposition that there were no slaves in France, as a general rule; but contended that the case of negroes, belonging to French West Indian colonists, was, by the edict of 1685, specifically excepted from its operation.

"Si en France," says he, "on ne connôit point d'esclaves, si la seule arrivée dans ce royaume, procure la liberté, ce privilège cesse à l'égard des esclaves négres François: quelle en est la raison? C'est qu'en France, c'est que par une loi de la France même, les esclaves négres de nos colonies sont constitués dans un esclavage nécessaire et autorisé," p. 529.

After noticing an 'Arrêt' of the parliament of Toulouse, reported by Bodin, he proceeds, "Quel peut être l'effet, quelle peut être l'in-

* Mr. Burke (Reflections on the Revolution in France, &c. 4th ed. p. 93) remarks, that "it was in the most patient period of Roman servitude that themes of tyrannicide made the ordinary exercise of boys at school—'cùm permitit sævos classis numerosa tyrannos.'" The line is in Juvenal, Sat. 7, v. 151.

Sommersett, in the said writ hereunto annexed named, is a negro, and a native of Africa; and that the said James Sommersett, long before the coming of the said writ to me, to wit, on the 10th day of March in the year of our Lord was a negro slave in Africa aforesaid, and afterwards, to wit, on the same day and year last aforesaid, being such negro slave,

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duction de cet arrêt, vis-à-vis d'un édit qui deux siècles après, pour soutenir la splendeur d'un état, les forces et la puissance de la nation, a établi une servitude nécessaire sur cette partie des sujets du roi?" p. 531.

Again "Voilà donc la seule induction, uniquement par rapport aux étrangers, et aux esclaves des étrangers," p. 527.

☞ It must be confessed that the pleading of M. Tribard was not very convincing. Of the style and cogency of his argumentation the following absurd false and despicable common places may suffice as samples: "Ceux qui l'infortune de la guerre assujetissoit aux vainqueurs furent appellés esclaves, *servi*, bien moins à *serviendo*, qu'à *servando*," p. 514.

"Neque enim libertas tutior ulla est, quàm domino servire bono," p. 538.

Judgment was given for the Negro.

The *Code Noir*, as it was called, was an edict bearing date in March 1685, which was issued by Lewis the 14th. It contains various regulations respecting the condition and treatment, the rights and duties of negro slaves, and freed negroes, and of the French West Indian colonies.* This 'Code Noir' is cited in the pleadings in the negro case reported in the 'Causes Célébres;' but I do not perceive that it at all concerns that particular case, except in so far as it recognizes, and establishes the *status* of slavery; on which account indeed much reliance was placed on it in the pleadings for the party who claimed to be owner of the negro.

In October 1716, Lewis the 15th published an edict, 'concernant les esclaves négres des colonies,' by which, after reciting, *inter alia*, "comme nous avons été informés, que plusieurs habitans de nos isles de l'Amérique désirent envoyer en France quelques uns de leurs esclaves, pour les confirmer dans les instructions et dans les éxercices de notre religion, et pour leur faire apprendre quelque art et métier, dont les colonies recevroient beaucoup d'utilité par le retour de ces esclaves; mais que ces habitans craignent que les esclaves ne prétendent être libres en arrivant en France, ce qui pourroit causer aux dits habitans une perte considérable, et les détourner d'un objet aussi pieux et aussi utile;"

"Le Roi ordonne que si quelques uns des habitans des colonies, ou des officiers employés dans l'état veulent amener avec eux des esclaves négres de l'un ou de l'autre sexe, en qualité de domestiques ou autrement, pour les fortifier dans la religion, &c. les propriétaires seront tenus d'en obtenir la permission des gouverneurs généraux ou commandans dans chaque isle, laquelle permission contiendra le nom du propriétaire, celui des esclaves, leur âge, et leur signalement.

"Les propriétaires des dits esclaves seront pareillement obligés de faire enregistrer ladite permission au greffe de la jurisdiction du lieu de leur résidence avant leur départ, et en celui de l'amirauté du lieu du débarquement, dans huitaine après leur arrivée en France."

The edict next proceeds to establish correspondent regulations for the case of negro slaves whom their owners shall send under the care of other persons from the colonies to France.

It then ordains that negroes so by their owners brought or sent into France shall not by reason thereof acquire any right to their freedom, but shall be compellable to return to the colonies at the will of their owners: it is provided however, that in case the owners have neglected to comply with the prescribed regulations, the negroes shall become free, and the owners shall lose all property in them.

The remainder of the edict does not affect the case before us.

Mr. Baron Maseres (Historiæ Anglicanæ Selecta Monumenta, pp. 13, 331,) observes of a passage in the Encomium Emmæ that "it plainly shews that there were at this time in Denmark several men in a state of slavery, called in this passage *servi*; and others that were freed-men, or that, after having been slaves, had been made free, *ex servis liberti*; and a third set of men who had always been free, but were not noble, and who are in this passage called *ignobiles*, and probably were the husbandmen and handycraftsmen of the country; and, lastly, a fourth set, who were called noblemen, *nobiles*, and who seem to have been the warriors, or military part of the people, and who must have been very numerous, since all the whole army of Canute the Dane, when he invaded England after the death of king Swein, his father, is said to have been composed of men of this class,

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* In Mr. Hargrave's Argument in the text, this edict is said to have been made in May 1685, but in the copy of the edict which is inserted in the 13th volume of the "Causes Célébres," the date is twice mentioned to be March 1685. In that volume the edict bears the following title, "Le Code Noir ou Edit du Roi servant de réglement pour le gouvernement et l'administration de la justice et de police des Isles Françoises de l'Amérique, et pour la discipline et le commerce des négres et esclaves dans le dit pays." In the preamble the objects of the edict are stated to be "y maintenir la disciplins de l'église catholique, apostolique, et romaine, et y régler ce qui concerne l'état et la qualité de nos esclaves dans nos dites isles." And accordingly all its provisions relate to the concerns of religion, of slaves, or of freed persons. In the month of August, 1685, the king issued another edict for the establishment of courts of justice in St. Domingo.

was brought in the course of the said trade as a negro slave from Africa aforesaid to Virginia aforesaid, to be there sold; and afterwards, to *wit*, on the 1st day of August in the year last aforesaid, the said James Sommersett, being and continuing such negro slave, was sold in Virginia aforesaid to one Charles Steuart, esq. who then was an inhabitant of Virginia afore-

'omnes enim erant nobiles.' And the people of England were, probably, at this period distinguished into different classes of nearly the same kinds. At least, it is certain, that, before the Norman Conquest as well as after it, the great body of the cottagers and handycraftsmen (such as blacksmiths, millers, and cart-wrights) in country villages were slaves, or what our old law books called 'villeins regardant,' or belonging to the manor, or *servi adscriptitii glebæ*, and were alienated, as such, by name, together with their families, and all the goods and chattels they were possessed of, by their lords or owners," and he has transcribed from Ingulphus a grant made by Thorold in the year 1051 to the abbey of Crowland of "totum manerium meum, &c. cum omnibus appendiciis suis; scilicet, Colgrimum præpositum meum, Item Hardingum fabrum, Item Lestanum carpentarium, (and eleven others) et totas sequelas suas, cum omnibus bonis et catallis, quæ habent in dictâ villâ, et in campis ejus, et in mariscis, absque ullo de omnibus retinemento."

As to Wales, Rowlands, in recounting the observations respecting the "true state and condition of the British government," and of "the ancient British tenures, and the former customs and usages thereof," which he had collected from those materials of information, which "our own careless neglect had omitted, but, as a just reproach to our wretched oscitancy and remissness, the covetousness of our more watchful conquerors took care to record and preserve for us; that is the English monarchs, when they got themselves seised of the last remains of our British royalties, and found or made themselves intitled or interested by descent or conquest to the ancient revenues of our British princes," says (Mona Antiqua Restaurata, 4to. 2d edition, London 1766; the former edition was published in Dublin, in 1723, the year of the author's death:) "We find, that the tenants of bond-lands and villanages, as they were of a quality below and inferior to freeholders, so they were obliged to greater drudgeries, and employed in more servile works, and were to be disposed of in many things, as their lords and princes pleased to use them. And of these some were free natives, and some pure natives. The free natives, I take to be those, who had some degree of freedom, who might go where they would, might buy and sell, and had many immunities; but the pure natives (as they were called) were the peculium of their proprietory lords or princes, to be disposed of as they listed. And I remember to have met, in sir William Gruffyth's* book, with an abstract of a deed, where the natives of the townsbip of Porthaethwy, many years after the time of the British princes, were sold as part of the estate of those lands they belonged to; and of which, and of others of that sort I have given elsewhere large instances. And I have by me a copy of injunction, issued out by Henry the seventh, king of England, commanding escheators, and all other ministerial officers, to see that the king's native tenants kept within their proper limits; and if any of them were found to stray and wander from their home, to drive them back, like beasts to their pinfolds, with the greatest severity."

And in a book intitled Beauties of England and Wales, vol. xvii, by the Rev. J. Evans, 8vo, 1812, I have met with the following passage:

"Among the boons bestowed upon the corporation of Beaumaris, so late even as the fourth year of Elizabeth's reign, the following grant appears: 'All and singular the king's 'lands, tenements, and hereditaments in Bodi-'new, and his villagers (cultivators) in the same 'town, if any be, with their offspring.' But this was probably no more than an exemplification of a grant, made long before, by way of confirmation.

"The following is one, out of three documents, adduced by Mr. Rowlands. 'Edynfed Vychan ap Edynfed, alias dictus Edwyfed ap Arthelw oz Davydd ap Gruffyd et Howel ap Davydd ap Ryryd, alias dictus Howel ap Arthelw uz Davydd ap Gryffydd, Liberi tenentes D'ni Regis villæ de Rhandei Gadog, &c. dedimus et confirmavimus Willimo ap Gryffydd ap Gwilim armigero et libero tenenti de Porthamel, &c. septem nativos nostros; viz. Howel ap Davydd Dew, Matto ap Davydd Dew, Jevan ap Evan Ddu, Llewelyn ap Davydd Dew, Davydd ap Matto ap Davydd Dew, Howel ap Matto ap Davydd Dew, et

&c. says (p. 120.) "For what light we have from these records, we ought to be much obliged to the generous care and industry of that very worthy and deservedly celebrated person, sir William Gruffydd of Penryhon, knight and chamberlain of North Wales; who preserved these records from perishing, by collecting so many of them as he could retrieve from moth and corruption; and then causing those scattered rolls and fragments which he could meet with, to be fairly written by one Jenkyn Gwyn, in two large books of parchment, for the information of posterity. One whereof is that book, kept always in the Chamberlain's office, called by the name of the Extent of North Wales; and the other he transmitted into the Auditor's office at London, where it is preserved to this day."

* Rowlands, speaking of the old returns and verdicts which had been made by jurors to the king's commissioners of enquiry into tenures,

said; and that the said James Sommerzett thereupon then and there became, and was the negro slave and property of the said Charles Steuart, and hath not at any time since been manumitted, enfranchised, set free, or discharged; and that the same James Sommersett, so being the negro slave and property of him the said Charles Steuart, and the said

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Llewelyn ap Evan Coke, cum eorum sequelis tàm procreatistàm procreandis ac omnibus bonis, catallis, &c. habend, &c. prædictos nativos nostros, &c. præfato Willimo Gruffyd ap Gwilim hæredibus et assignatis suis in perpetuum. Datum apud Rhandir Gadog, 20 die Junii, an. Henr. 6ti 27mo. [Manuscript Hist. of Anglesea.]"

In a note to the 'Beauties, &c.' it is stated that "in the western parts of England, if some estates are sold or let, an usual condition is, to take all the apprentices upon them, male and female." This the writer denominates "an evident though laggering proof of persons being attached to the soil."

The whole of Mr. Burnett's sixteenth chapter (Treatise on the Criminal Law of Scotland) is a commentary, extending through seventy-one 4to pages, upon the 'Act' (already noticed) 'for preventing wrongous imprison-'ment, and against undue delays in trials' (chap. 6 of the eighth and ninth sessions of king William's parliament 1701). He says of it that it comprises (in some respects with greater security to the liberty of the subjects) the provisions of all the several statutes which the legislature of England has passed for the personal liberty of the subject, and that therefore it justly may be termed the Magna Charta of Scotland. And in the case of Andrew against Murdoch, the lord justice clerk, Hope (now, 1812, lord president) said "Our Act 1701 is greatly more favourable to the liberty of the subject in every respect than the Habeas Corpus Act of England."

Of a law thus celebrated, the provisions will naturally excite in the mind of every lover of his country a warmth of interested curiosity.

The enactments of this statute are numerous, extensive, and minute. The statute itself is therefore very long. I recollect not any account of it in Mr. Laing's History. Mr. Burnett exhibits a brief history of its origin, and analysis of its provisions; which I will substitute for the copiousness and particularity of the act itself.

"The Convention of Estates of Scotland, in the year 1689, declared, among other things, that, 'exacting exorbitant bail, and imprisoning 'persons without expressing the reason there-'of, and delaying to put them to trial, are con-'trary to the known laws, statutes, and freedom 'of the realm,' and the redress of this they claimed as their undoubted right and privilege; and farther, 'that no declarations, doings or 'proceedings, to the prejudice of the people, 'in any of the said premises, ought in any 'ways to be decisive hereafter in consequence 'or example.' These grievances, in a subsequent letter to the king (1689, chap. 17.) the estates prayed his majesty to redress by wholesome laws in his first parliament.

"In the first parliament, accordingly, most of these grievances were redressed, and particularly, the exacting of exorbitant bail, imprisoning persons without expressing the cause, and delaying to put them to trial, by the well known statute 1701, cap. 6, which the people in this part of the united kingdom must view as one of the greatest benefits conferred on them by the Revolution, whether it be held as a law declaratory only of their former rights; or as introducing provisions in favour of the subject, which had not previously been either so well defined, or observed in practice.

"The objects indeed of this statute are of the first importance to the security and happiness of every individual of the community; inasmuch as the injury of unjust and illegal confinement, while it is often the most difficult to guard against, is in its nature the most oppressive and the most likely to be resorted to by an arbitrary government. Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. Without accusation or trial to bereave a man of life, or by violence to confiscate his estate, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person by secretly hurrying to jail, where the sufferings of the party are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. (Blackst. Comm. book 1, chap. 1.)

"The statute proceeds accordingly on the preamble of the previous declaration by the Claim of Right, and the interest which all his majesty's subjects have, 'that the liberty of 'their persons be duly secured;' and contains in its enactment almost every provision, which has at any period, or almost in any system of law, been deemed most conducive to the personal liberty of the subject; at the same time, it introduces regulations and exceptions, which, while they are the best calculated to ensure that object, render it nowise inconsistent with the safety of the public.

"It sets out by providing against the first steps towards an illegal confinement, the apprehending of the persons without a regular information and a special warrant, and guards against any confinement, that is not necessary to ensure the attendance of the party on the day of trial. In the next place it declares what crimes shall be bailable, and directs the speediest mode of finding bail; and to prevent the possibility of any vague discretion being

Charles Steuart having occasion to transact certain affairs and business of him the said Charles Steuart in this kingdom, he the said Charles Steuart, before the coming of the said writ to me, to wit, on the first day of October in the year of our Lord 1769, departed from America aforesaid, on a voyage for this kingdom, for the purpose of transacting his aforesaid affairs and business, and with an intention to return to America, as soon as the said affairs and business of him the said Charles Steuart in this kingdom should be transacted; and afterwards, to wit, on the 10th day of November in the same year, arrived in this kingdom, to wit, in London, that is to say, in the parish of St. Mary-le-Bow in the ward of Cheap; and that the said Charles Steuart brought the said James Sommersett, his negro slave and property, along with him in the said voyage, from America aforesaid to this kingdom, as the negro slave and property of him the said Charles Steuart, to attend and serve him, during his stay and abiding in this kingdom, on the occasion aforesaid, and with an intent to carry the said James Sommersett back again into America, with him the said Charles Steuart, when the said affairs and business of the said Charles Steuart should be transacted; which said affairs and business of the said Charles Steuart are not yet transacted, and the intention of the said Charles Steuart to return to America as aforesaid hitherto hath continued, and still continues. And I do further certify to our said lord the king, that the said James Sommersett did accordingly attend and serve the said Charles Steuart in this kingdom, from the time of his said arrival, until the said James Sommersett's departing and absenting himself from the service of the said Charles Steuart herein after-mentioned, to wit, at London aforesaid in the parish and ward aforesaid; and that before the coming of this writ to me, to wit, on the first day of October in the year of our Lord 1771, at London aforesaid, to wit, in the parish and ward aforesaid, the said James Sommersett, without the consent, and against the will of the said Charles Steuart, and without any lawful authority whatsoever, departed and absented himself from the service of the said Charles Steuart, and absolutely refused to return into the service of the said Charles Steuart, and serve the said Charles Steuart, during his stay and abiding in this kingdom, on the occasion aforesaid: whereupon the said Charles Steuart afterwards and before the coming of this writ to me, to wit on the 26th day of November in the year of our Lord 1771, on board the said vessel called the Ann and Mary, then and still lying in the river Thames, to wit at London aforesaid, in the parish and ward aforesaid, and then and still bound upon a voyage for Jamaica aforesaid, did deliver the said James Sommersett unto me, who then was, and yet am master and commander of the said vessel, to be by me safely and securely kept and carried and conveyed, in the said vessel, in the said voyage to Jamaica aforesaid, to be there sold as the slave and property of the said Charles Steuart; and that I did thereupon then and there, to wit at London aforesaid in the parish and ward aforesaid, receive and take, and have ever since kept and detained the said James Sommersett in my care and custody, to be carried by me in the said voyage to Jamaica aforesaid, for the purpose aforesaid. And this is the cause of my taking and detaining the said James Sommersett, whose body I have now ready as by the said writ I am commanded."

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exercised in fixing its amount, which might defeat the whole provisions of the law, it ascertains the *maximum* of bail in each case, according to the rank of the person in custody for trial; and imposes high penalties on the judge who shall delay modifying the amount, or refuse to accept of sufficient bail, when offered. The act, however, would have been greatly defective had it stopped here, for of what use would have been the precautions already mentioned, if in cases either where bail could not be found by the party entitled to it, or when it could not be received, owing to the nature of the crime, the person imprisoned might be wrongously detained, in consequence of a delay in putting him to trial by a certain day; the act therefore directs, that in such cases, the party shall have right to insist, that within a certain time a diet shall be fixed for his trial, and the trial carried through and concluded by a determinate day, otherwise he is to be set at liberty, under the penalty of wrongous imprisonment, and is not to be again incarcerate, unless on new criminal letters raised against him, before the lords of Justiciary; in which last case, his trial must be concluded in another day, particularly fixed by the enactment, otherwise the prisoner is to be set at liberty, and to be for ever free from all question or process for that crime. Certain exceptions are then introduced with respect to treason, and some other offences more immediately affecting the public security; and a provision annexed, that no person shall be 'transported furth of 'this kingdom,' except with his own consent, given before a judge or by legal sentence, under the certification, that any judge or magistrate, who shall give order for such transportation, or any one, who shall so transport another, shall not only be liable in the pecuniary pains of wrongous imprisonment, as declared by the act, but shall lose their offices, and be declared incapable of all public trust. These are the general outlines of this important statute; the value of which cannot be too highly prized by the people of Scotland, nor its observance too strictly maintained by the judges and magistrates."

By the act of the 39th of George 3, persons accused of sedition are excepted from certain provisions contained in the act against wrongous imprisonment. As to this, see the Cases of the Rioters against the Militia Law, A. D. 1798.

After the reading of the return, Mr. Serjeant Davy, one of the counsel for Sommersett the negro, desired time to prepare his argument against the return; and on account of the importance of the case, the Court postponed hearing the objections against the return, till the 7th of February, and the recognizance for the negro's appearance was continued accordingly. On that day Mr. Serj. Davy and Mr. Serj. Glynn argued against the return, and the farther argument was postponed till Easter term, when Mr. Mansfield, Mr. Alleyne, and Mr. Hargrave, were also heard on the same side. Afterwards Mr. Wallace and Mr. Dunning argued in support of the return, and Mr. Serjeant Davy was heard in reply to them. The determination of the Court was suspended till the following Trinity term; and then the Court was unanimously of opinion against the return, and ordered that Sommersett should be discharged.

ARGUMENT OF MR. HARGRAVE FOR THE NEGRO.*

Though the learning and abilities of the gentlemen, with whom I am joined on this occasion, have greatly anticipated the arguments prepared by me; yet I trust, that the importance of the case will excuse me, for disclosing my ideas of it, according to the plan and order, which I originally found it convenient to adopt.

Short state of the case.

The case before the Court, when expressed in few words, is this. Mr. Steuart purchases a negro slave in Virginia, where by the law of the place negroes are slaves, and saleable as other property. He comes into England, and brings the negro with him. Here the negro leaves Mr. Steuart's service without his consent; and afterwards persons employed by him seize the negro, and forcibly carry him on board a ship bound to Jamaica, for the avowed purpose of transporting him to that island, and there selling him as a slave. On an application by the negro's friends, a writ of Habeas Corpus is granted; and in obedience to the writ he is produced before this court, and here sues for the restitution of his liberty.

Importance of the case.

The questions, arising on this case, do not merely concern the unfortunate person, who is the subject of it, and such as are or may be under like unhappy circumstances. They are highly interesting to the whole community, and cannot be decided, without having the most general and important consequences; without extensive influence on private happiness and public security. The right claimed by Mr. Steuart to the detention of the negro, is founded on the condition of slavery, in which he was before his master brought him into England; and if that right is here recognised, domestic slavery, with its horrid train of evils, may be lawfully imported into this country, at the discretion of every individual foreign and native. It will come not only from our own colonies, and those of other European nations; but from Poland, Russia, Spain, and Turkey, from the coast of Barbary, from the western and eastern coasts of Africa, from every part of the world, where it still continues to torment and dishonour the human species. It will be transmitted to us in all its various forms, in all the gradations of inventive cruelty: and by an universal reception of slavery, this country, so famous for public liberty, will become the chief seat of private tyranny.

Points which arise in the case.

In speaking on this case, I shall arrange my observations under two heads. First, I shall consider the right, which Mr. Steuart claims in the person of the negro. Secondly, I shall examine Mr. Steuart's authority to enforce that right, if he has any, by imprisonment of the negro and transporting him out of this kingdom. The Court's opinion in favour of the negro, on either of these points, will entitle him to a discharge from the custody of Mr. Steuart.

(1st Point) on the right claimed in the negro's person.

(1st.) The first point, concerning Mr. Steuart's right in the person of the negro, is the great one, and that which, depending on a variety of considerations, requires the peculiar attention of the Court. Whatever Mr. Steuart's right may be, it springs out of the condition of slavery, in which the negro was before his arrival in England, and wholly depends on the continuance of that relation; the power of imprisoning at pleasure here, and of transporting into a foreign country for sale as a slave, certainly not being exerciseable over an ordinary servant. Accordingly the return fairly admits slavery to be the sole foundation of Mr. Steuart's claim; and this brings the question, as to the present lawfulness of slavery in England, directly before the Court. It would have been more artful to have asserted Mr. Steuart's claim in terms less explicit, and to have stated the slavery of the negro before his coming into England, merely as a ground for claiming him here, in the relation of a servant bound to follow wherever his master should require his service. The case represented in this disguised way, though in substance the same, would have been less alarming in its first appearance, and might have afforded a better chance of evading the true question between the parties. But this artifice, however convenient Mr. Steuart's counsel may find it in argument, has not been adopted in the return; the case being there stated as it really is, without any suppression

Slavery the foundation of the claim to the negro.

* The following Argument, on the behalf of the negro, is not to be considered as a speech actually delivered: for though the author of it, who was one of the counsel for the negro, did deliver one part of his Argument in court without the assistance of notes; yet his Argument, as here published, is entirely a written composition. This circumstance is mentioned, lest the author should be thought to claim a merit to which he has not the least title. *Hargrave.*

of facts to conceal the great extent of Mr. Stewart's claim, or any colouring of language to hide the odious features of slavery in the feigned relation of an ordinary servant.

General observations on domestic slavery.

Before I enter upon the enquiry into the present lawfulness of slavery in England, I think it necessary to make some general observations on slavery. I mean however always to keep in view slavery, not as it is in the relation of a subject to an absolute prince, but only as it is in the relation of the lowest species of servant to his master, in any state, whether free or otherwise in its form of government. Great confusion has ensued from discoursing on slavery, without due attention to the difference between the despotism of a sovereign over a whole people and that of one subject over another. The former is foreign to the present case; and therefore when I am describing slavery, or observing upon it, I desire to be understood as confining myself to the latter; though from the connection between the two subjects, some of my observations may perhaps be applicable to both.

Difficulty of defining slavery.

Slavery has been attended in different countries with circumstances so various, as to render it difficult to give a general description of it. The Roman lawyer (*a*) calls slavery, a constitution of the law of nations, by which one is made subject to another contrary to nature. But this, as has been often observed by the commentators, is mistaking the law, by which slavery is constituted, for slavery itself, the cause for the effect; though it must be confessed, that the latter part of the definition obscurely hints at the nature of slavery. Grotius (*b*) describes slavery to be, an obligation to serve another for life, in consideration of being supplied with the bare necessaries of life. Dr. Rutherford (*c*) rejects this definition, as implying a right to direct only the labors of the slave, and not his other actions. He therefore, after defining despotism to be an alienable right to direct all the actions of another, from thence concludes, that perfect slavery is an obligation to be so directed. This last definition may serve to convey a general idea of slavery; but like that by Grotius, and many other definitions which I have seen, if understood strictly, will scarce suit any species of slavery, to which it is applied. Besides, it omits one of slavery's severest and most usual incidents; the quality, by which it involves all the issue in the misfortune of the parent. In truth, as I have already hinted, the variety of forms, in which slavery appears, makes it almost impossible to convey a just notion of it in the way of definition. There are however certain properties, which have accompanied slavery in most places; and by attending to these, we may always distinguish it, from the mild species of domestic service so common and well known in our own country. I shall shortly enumerate the most remarkable of those properties; particularly, such as characterize the species of slavery adopted in our American colonies, being that now under the consideration of this court. This I do, in order that a just conception may be formed, of the propriety with which I shall impute to slavery the most pernicious effects. Without such a previous explanation, the most solid objections to the permission of slavery will have the appearance of unmeaning, though specious, declamation.

Properties usually incident to slavery.

Slavery always imports an obligation of perpetual service; an obligation, which only the consent of the master can dissolve.—It generally gives to the master, an arbitrary power of administering every sort of correction, however inhuman, not immediately affecting the life or limb of the slave: sometimes even these are left exposed to the arbitrary will of the master; or they are protected by fines, and other slight punishments, too inconsiderable to restrain the master's inhumanity.—It creates an incapacity of acquiring, except for the master's benefit.—It allows the master to alienate the person of the slave, in the same manner as other property.—Lastly, it descends from parent to child, with all its severe appendages.—On the most accurate comparison, there will be found nothing exaggerated in this representation of slavery. The description agrees with almost every kind of slavery, formerly or now existing; except only that remnant of the ancient slavery, which still lingers in some parts of Europe, but qualified and moderated in favour of the slave by the humane provision of modern times.

Bad effects of slavery.

From this view of the condition of slavery, it will be easy to derive its destructive consequences.—It corrupts the morals of the master, by freeing him from those restraints with respect to his slave, so necessary for controul of the human passions, so beneficial in promoting the practice and confirming the habit of virtue.—It is dangerous to the master; because his oppression excites implacable resentment and hatred in the slave, and the extreme misery of his condition continually prompts him to risk the gratification of them, and his situation daily furnishes the opportunity.—To the slave it communicates all the afflictions of life, without leaving for him scarce any of its pleasures; and it depresses the excellence of his nature, by denying the ordinary means and motives of improvement. It is dangerous to the state, by its corruption of those citizens on whom its prosperity depends; and by admitting within it a multitude of persons, who being excluded from the common benefits of the constitution, are interested in scheming its destruction.—Hence it is, that slavery, in whatever light we view it, may be deemed a most pernicious in-

(*a*) Dig. lib. 1, tit. 5, l. 4, s. 1. 'Servitus 'est constitutio juris gentium, quâ quis domi-'nio alieno contra naturam subjicitur.'

(*b*) Jur. Bell. lib. 2, c. 5, s. 27.

(*c*) Inst. Nat. L. b. 1, c. 20, p. 474.

stitution: immediately so, to the unhappy person who suffers under it; finally so, to the master who triumphs in it, and to the state which allows it.

Opinion of some modern writers in favour of the utility of slavery, but under many restrictions.

However, I must confess, that notwithstanding the force of the reasons against the allowance of domestic slavery, there are civilians of great credit, who insist upon its utility; founding themselves chiefly, on the supposed increase of robbers and beggars in consequence of its disuse. This opinion is favoured by Puffendorf (*d*) and Ulricus Huberus (*e*). In the dissertation on slavery prefixed to Potgiesserus on the German law 'de statu servorum,' the opinion is examined minutely and defended. To this opinion I oppose those ill consequences, which I have already represented as almost necessarily flowing from the permission of domestic slavery; the numerous testimonies against it, which are to be found in ancient and modern history; and the example of those European nations, which have suppressed the use of it, after the experience of many centuries and in the more improved state of society. In justice also to the writers just mentioned I must add, 'that though they contend for the advantages of domestic slavery, they do not seem to approve of it, in the form and extent in which it has generally been received, but under limitations, which would certainly render it far more tolerable. Huberus in his Eunomia Romana (*f*) has a remarkable passage, in which, after recommending a mild slavery, he cautiously distinguishes it from that cruel species, the subject of commerce between Africa and America. His words are, 'loquor de servitute, qualis apud civiliores populos in usu fuit; nec enim exempla barbarorum, vel quæ nunc ab Africâ in Americam fiunt hominum commercia, velim mihi quisquam objiciat.'

Origin of slavery, and its general lawfulness considered.

The great origin of slavery is captivity in war, though sometimes it has commenced by contract. It has been a question much agitated, whether either of these foundations of slavery is consistent with natural justice. It would be engaging in too large a field of enquiry, to attempt reasoning on the general lawfulness of slavery. I trust too, that the liberty, for which I am contending, doth not require such a disquisition; and am impatient to reach that part of my argument, in which I hope to prove slavery reprobated by the law of England as an inconvenient thing. Here therefore I shall only refer to some of the most eminent writers, who have examined, how far slavery founded on captivity or contract is conformable to the law of nature, and shall just hint at the reasons, which influence their several opinions. The antient writers suppose the right of killing an enemy vanquished in a just war; and thence infer the right of enslaving him. In this opinion, founded, as I presume, on the idea of punishing the enemy for his injustice, they are followed by Albericus Gentilis (*g*), Grotius (*h*), Puffendorf (*i*), Bynkershoek (*j*), and many others. But in 'The Spirit of Laws' (*k*) the right of killing is denied, except in case of absolute necessity and for self-preservation. However, where a country is conquered, the author seems to admit the conqueror's right of enslaving for a short time, that is, till the conquest is effectually secured. Dr. Rutherforth, (*l*) not satisfied with the right of killing a vanquished enemy, infers the right of enslaving him, from the conqueror's right to a reparation in damages for the expences of the war. I do not know, that this doctrine has been examined; but I must observe, that it seems only to warrant a temporary slavery, till reparation is obtained from the property or personal labour of the people conquered. The lawfulness of slavery by contract is assented to by Grotius and Puffendorf (*m*), who found themselves on the maintenance of the slave, which is the consideration moving from the master. But a very great writer of our own country, who is now living, controverts (*n*) the sufficiency of

(*d*) Law of Nature and Nations, b. 6, c. 3, s. 10.

(*e*) Prælect. Jur. Civ. p. 16.

(*f*) See page 48.

(*g*) De Jur. Gent. cap. de servitute.

(*h*) De Jur. Bell. l. 3, c. 7, s. 5.

(*i*) Law of Nature and Nations, b. 6, c. 3, s. 6.

(*j*) Quæst. Jur. Publ. l. 1, t. 3.

(*k*) B. 15, c. 2.

(*l*) See his Inst. Nat. Law, vol. 2, p. 573, and vol. 1, p. 481.

(*m*) See Grot. Jur. Bell. l. 2, c. 5, s. 1, 2, and Puff. Law of Nature and Nations, b. 6, c. 3, s. 4.

(*n*) See Blackst. Comment. 1st ed. vol. 1, p. 412.

The authority of Mr. Justice Blackstone having been cited both for and against the rights of persons claiming to be the owners of slaves in Great Britain, I have thought it worth while to insert together all that I find relating to the subject in his Commentaries:

"The spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman; though the master's right to his service may possibly still continue." Vol. 1, p. 127.

"I have formerly observed that pure and proper slavery does not, nay cannot, subsist in England; such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where. The three origins of the right of slavery, assigned by Justinian, are all of them built upon false foundations. As, first, slavery is held to arise 'jure gentium,' from a state of captivity in war; whence slaves are called

such a consideration. Mr. Locke has framed another kind of argument against slavery

'nuncipia, quasi manu capti.' The conqueror, say the civilians, had a right to the life of his captive; and, having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that, by the law of nature or nations, a man may kill his enemy: he has only a right to kill him, in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners but merely to disable them from doing harm to us, by confining their persons: much less can it give a right to kill, torture, abuse, plunder, or even to enslave, an enemy, when the war is over. Since therefore the right of making slaves by captivity depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fall likewise. But, secondly, it is said that slavery may begin 'jure civili;' when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very just: but when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a 'quid pro quo,' an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life, and liberty, both of which (in absolute slavery) are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he becomes his slave. In this case therefore the buyer gives nothing, and the seller receives nothing: of what validity then can a sale be, which destroys the very principles upon which all sales are founded? Lastly, we are told, that besides these two ways by which slaves 'fiunt,' or are acquired, they may also be hereditary: 'servi nascuntur;' the children of acquired slaves are, 'jure naturæ' by a negative kind of birthright, slaves also. But this, being built on the two former rights, must fall together with them. If neither captivity, nor the sale of one's self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.

"Upon these principles the law of England abhors, and will not endure the existence of, slavery within this nation: so that when an attempt was made to introduce it, by statute 1 Edw. 6, c. 3, which ordained, that all idle vagabonds should be made slaves, and fed upon bread, water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition, even in the most abandoned rogues; and by contract (*o*); and the substance of it is, that a right of preserving life is unalienable; that freedom from arbitrary power is essential to the exercise of that right; and therefore, that no man can by compact enslave himself. Dr. Rutherforth (*p*) endeavours to answer Mr. Locke's objection, by insisting on various limitations to the despotism of the master; particularly, that he has no right to dispose of the slave's life at pleasure. But the misfortune of this reasoning is, that though the contract cannot justly convey an arbitrary power over the slave's life, yet it generally leaves him without a security against the exercise of that or any other power. I shall say nothing of slavery by birth; except that the slavery of the child must be unlawful, if that of the parent cannot be justified; and that when slavery is extended to the issue, as it usually is, it may be unlawful as to them, even though it is not so as to their parents. In respect to slavery used for the punishment of crimes against civil society, it is founded on the same necessity, as the right of inflicting other punishments; never extends to the offender's issue; and seldom is permitted to be domestic, the objects of it being generally employed in public works, as the galley-

therefore this statute was repealed in two years afterwards. And now it is laid down, that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before; for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term. Hence too it follows, that the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection, to a Jew, a Turk, or a Heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties: but the slave is entitled to the same protection in England before, as after, baptism; and, whatever service the heathen negro owed of right to his American master, by general not by local law, the same (whatever it be) is he bound to render when brought to England and made a Christian." Vol. 1, p. 423.

In these passages, there appears to be somewhat of very subtle distinction, if not rather of contradiction.

(*o*) See Locke on Governm. 8vo edit. b. 2, c. 4, p. 213.

(*p*) See his Inst. Nat. Law, vol. 1, p. 480.

slaves are in France. Consequently this kind of slavery is not liable to the principal objections, which occur against slavery in general(*q*). Upon the whole of this controversy concerning slavery, I think myself warranted in saying, that the justice and lawfulness of every species of it, as it is generally constituted, except the limited one founded on the commission of

(*q*) Some writers there are, who deduce the lawfulness of domestic slavery from the practice of it amongst the Jews, and from some passages in the Old Testament which are thought to countenance it. See Vinn. in Instit. Heinecc. ed. l. 1, t. 3, p. 31. There are others who attempt to justify slavery by the New Testament, because it contains no direct precepts against it. See Tayl. Elem. Civ. L. 434. —I shall not attempt to examine either of these opinions.—*Hargrave.*

In the discussions respecting the African slave trade, which were maintained during several years preceding the abolition of that traffic (by stat. 46 Geo. 3, c. 52, see also c. 119, and 51 G. 3, c. 23), the authority of the scriptures was appealed to by the oppugners and defenders of the trade. On June 24, 1806, the learned and eloquent Dr. Horsley, bishop of St. Asaph, delivered in the House of Lords upon the subject, a very powerful speech, from which I have extracted the following passages.

"My rev. brother" (the bishop of London) "told your lordships, that perpetual slavery was not permitted by the Jewish law. That a native Jew could be held in slavery for seven years only, at the longest. For he had a right to his freedom upon the first return of the sabbatical year. And that a foreign slave purchased in the market, or captivated in war, could be held in slavery for fifty years only, at the longest. For the foreign slave had a right to his freedom upon the first return of the year of Jubilee. And from these premises, my rev. brother concluded, that perpetual slavery was unknown among the Jews.

"I confess, I was carried away by the fair appearance of my rev. brother's arguments, till, to my great surprise and his utter confusion, the noble earl (of Westmoreland) rose, with his Bible in his hand, and quoted chapter and verse against him!

"My lords, with respect to the native Hebrew slave, we have this law, which was quoted by my rev. brother: 'If thy brother, 'an Hebrew man, or an Hebrew woman, be 'sold unto thee, and serve thee six years, then 'in the seventh thou shalt let him go free from 'thee. And when thou sendest him out free 'from thee, thou shalt not let him go away 'empty. Thou shalt furnish him liberally 'out of thy flock, and out of thy floor, and out 'of thy wine-press. Of that wherewith the 'Lord thy God hath blessed thee, thou shalt 'give unto him.' Deut. xv. 12—14.

"And with respect to the foreign slave, we have this law, quoted likewise by my rev. brother: 'Thou shalt number unto thee seven 'sabbaths of years, forty and nine years. Then 'shalt thou cause the trumpet of the jubilee to 'sound throughout all the land. And ye shall 'hallow the fiftieth year, and proclaim liberty 'throughout all the land, to all the inhabitants 'thereof.' Lev. xxv. 8—10.

"The manumission of the Hebrew slave on the seventh year, was provided for by the other law. Under the expression, therefore, of all the inhabitants, foreign slaves must be comprehended; for none but foreign slaves could remain to be manumitted in the fiftieth year.

"My lords, there is a circumstance not touched upon by my rev. brother; but there is a passage in the law, which I have always considered, as a strong argument of the lenity, with which slaves were treated among the Jews, and of the efficacy of the provisions the law had made, to obviate the wrongs and injuries to which the condition is obnoxious.—My lords, I am afraid I cannot, by memory, refer exactly to the place. But the noble earl there, with his Bible, I am sure will have the goodness to help me out and turn up the passage for me. My lords, it is a passage, in which the law provides for the case, of a slave, who should be so attached to his master, that when the term of manumission, fixed by the law should arrive, the slave should be disinclined to take advantage of it, and wish to remain with his master. And the law prescribes the form, in such case to be used, by which the master and the slave should reciprocally bind themselves, the slave to remain with his master for life, and the master to maintain him. This I have always considered as a strong indication of the kindness, with which slaves were treated among the Jews; else whence should arise that attachment, which this law supposes?" [Query if the bishop had in his mind the beginning of the 21st chapter of Exodus, if so, the words are 'he shall serve him for ever.']

"But we are all in the wrong, it seems—my rev. brother and I—we reason from specious premises, but to false conclusions. The noble earl has produced to your lordships a passage in the Levitical law, which enacts that the foreign slave should be the property of his master for ever. Whence the noble earl concludes that the perpetual servitude of foreign slaves was actually sanctioned by the law. But, my lords, I must tell the noble earl, and I must tell your lordships, that the noble earl has understanding at all of the technical terms of the Jewish law. In all the laws relating to the transfer of property, the words 'for ever,' signify only 'to the next jubilee.' That is the longest 'for ever' which the Jewish law knows with respect to property. And this law, which makes the foreign slave the property of his master for ever, makes him no longer the master's property than to the next jubilee. And, with the great attention the noble earl has given to the laws and history of the Jews, he must know, that when they were carried into captivity, they were told by their prophets, that

crimes against civil society, is at least doubtful; that if in any case lawful, such circumstances are necessary to make it so, as seldom concur, and therefore render a just commencement of it barely possible; and that the oppressive manner in which it has generally commenced, the cruel means necessary to enforce its continuance, and the mischiefs ensuing from the permission of it, furnish very strong presumptions against its justice, and at all events evince the humanity and policy of those states, in which the use of it is no longer tolerated.

Universality of domestic slavery amongst the ancients.

But however reasonable it may be, to doubt the justice of domestic slavery, however convinced we may be of its ill effects, it must be confessed, that the practice is antient, and has been almost universal. Its beginning may be dated from the remotest period, in which there are any traces of the history of mankind. It commenced in the barbarous state of society, and was retained, even when men were far advanced in civilization. The nations of antiquity most famous for countenancing the system of domestic slavery were the Jews, the Greeks, the Romans, and the antient Germans (*r*); amongst all of whom it prevailed, but in various degrees of severity. By the antient Germans it was continued in the countries they over-run; and so was transmitted to the various kingdoms and states, which arose in Europe out of the ruins of the Roman empire. At length however it fell into decline in most parts of Europe; and amongst the various

Decline of slavery in Europe.

causes, which contributed to this alteration, none were probably more effectual, than experience of the disadvantages of slavery; the difficulty of continuing it; and a persuasion that the cruelty and oppression almost necessarily incident to it were irreconcilable with the pure morality of the Christian dispensation. The history of its decline in Europe has been traced by many eminent writers, particularly Bodin (*s*), Albericus Gentilis (*t*), Potgiesserus (*u*), Dr. Robertson (*w*), and Mr. Millar (*x*). It is sufficient here to say, that this great change began in Spain, according to Bodin, about the end of the eighth century, and was become general before the middle of the fourteenth century. Bartolus, the most famed commentator on the civil law in that period, represents slavery as in disuse; and the succeeding commentators hold much the same language. However, they must be understood with many restrictions and exceptions; and not to mean, that slavery was completely and universally abolished in Europe. Some modern civilians, not sufficiently attending to this circumstance, rather too hastily reprehend their predecessors for representing slavery as disused in Europe. The truth is, that the ancient species of slavery by frequent emancipations became greatly diminished in extent; the remnant of it was considerably abated in severity; the disuse of the practice of enslaving captives taken in the wars between Christian powers assisted in preventing the future increase of domestic slavery; and in some countries of Europe, particularly England, a still more effectual method, which I shall explain hereafter, was thought of to perfect the suppression of it. Such was the expiring state of domestic slavery in Europe at the commencement of the sixteenth century, when the discovery of America and of the western and eastern coasts of Africa gave occasion to the introduction of a new species of slavery. It took its rise from the Portuguese, who, in order to supply the Spaniards with persons able to sustain the fatigue of cultivating their new possessions in America, particularly the islands, opened a trade between Africa and America for the sale of negro slaves. This disgraceful commerce in the human species is said to have begun in the year 1508, when the first importation of negro slaves was made into Hispaniola from the Portuguese settlements on the western coasts of Africa (*y*). In 1540 the emperor Charles the fifth endeavoured to stop the progress of the negro slavery, by orders that all

Revival of domestic slavery in America.

one of the crimes which drew down that judgment upon them, was their gross neglect and violation of these merciful laws respecting manumission. And that, in contempt and defiance of the law, it had been their practice to hold their foreign slaves in servitude beyond the year of jubilee."

"——My lords, although we have no explicit prohibition of the slave trade in the New Testament, we have a most express reprobation of the trade in slaves, even in that milder form, in which it subsisted in ancient times. Such a reprobation of it as leaves no believer at liberty to say, that the slave trade is not condemned by the gospel. The reverend prelate near me has cited the passage [1 Tim. i, 9—10] in which St. Paul mentions 'menstealers' among the greatest miscreants. 'Menstealers,' so we read in our English Bible. But the word in the original is ἀνδραποδισταῖς. Ἀνδραποδιστὴς is literally a 'slave trader,' and no other word in the English language, but slave trader, precisely renders it. It was indeed the technical name for a slave trader in the Attic law."

(*r*) It appears by Cæsar and Tacitus, that the ancient Germans had a kind of slaves before they emigrated from their own country. See Cæs. de Bell. Gall. lib. 6, cap. 13, et Tac. de Mor. German. cap. 24, et 25, et Potgiess. de stat. servor. ap. Germ. lib. 1, cap. 1.

(*s*) See his book De Republicâ, cap. 5, de imperio servili.

(*t*) Jur. Gent. cap. de servitute.

(*u*) Jur. Germ. de statu servorum.

(*w*) Life of the emperor Charles the 5th, vol. 1.

(*x*) Observations on the distinction of ranks in civil society. See also Tayl. Elem. Civ. L. 434 to 439.

(*y*) Ander. Hist. Comm. v. 1, p. 336.

slaves in the American isles should be made free; and they were accordingly manumitted by Lagasca the governor of the country, on condition of continuing to labour for their masters. But this attempt proved unsuccessful, and on Lagasca's return to Spain domestic slavery revived and flourished as before (*x*). The expedient of having slaves for labour in America was not long peculiar to the Spaniards; being afterwards adopted by the other Europeans, as they acquired possessions there. In consequence of this general practice, negroes are become a very considerable article in the commerce between Africa and America; and domestic slavery has taken so deep a root in most of our own American colonies, as well as in those of other nations, that there is little probability of ever seeing it generally suppressed.

The attempt to introduce the slavery of negroes into England examined.

Here I conclude my observations on domestic slavery in general. I have exhibited a view of its nature, of its bad tendency, of its origin, of the arguments for and against its justice, of its decline in Europe, and the introduction of a new slavery by the European nations into their American colonies. I shall now examine the attempt to obtrude this new slavery into England. And here it will be material to observe, that if on the declension of slavery in this and other countries of Europe, where it is discountenanced, no means had been devised to obstruct the admission of a new slavery, it would have been vain and fruitless to have attempted superseding the ancient species. But I hope to prove,

Arguments to prove, that the law of England will not admit a new slavery.

that our ancestors at least were not so short-sighted; and that long and uninterrupted usage has established rules, as effectual to prevent the revival of slavery, as their humanity was successful in once suppressing it. I shall endeavour to shew, that the law of England never recognized any species of domestic slavery, except the ancient one of villenage now expired, and has sufficiently provided against the introduction of a new slavery under the name of villenage (*a*) or any other denomination whatever. This proposition I hope to demonstrate from the following considerations.

1. Argument from the manner of making title of a villein.

1. I apprehend, that this will appear to be the law of England from the manner of making title to a villein.

The only slavery our law-books take the least notice of is that of a villein; by whom was meant, not the mere tenant by villein services, who might be free in his person, but the villein in blood and tenure; and as the English law has no provisions to regulate any other slavery, therefore no slavery can be lawful in England, except such as will consistently fall under the denomination of villenage.

The condition of a villein had most of the incidents which I have before described in giving the idea of slavery in general. His service was uncertain and indeterminate, such as his lord thought fit to require; or, as some of our ancient writers (*b*) express it, he knew not in the evening what he was to do in the morning, he was bound to do whatever he was commanded. He was liable to beating, imprisonment, and every other chastisement his lord might prescribe, except killing and maiming (*c*). He was incapable of acquiring property for his own benefit, the rule being 'quicquid acquiritur servo, acquiritur domino' (*d*). He was himself the subject of property; as such saleable and transmissible. If he was a villein regardant, he passed with the manor or land to which he was annexed, but might be severed at the pleasure of his lord (*e*) If he was a villein in gross, he was an hereditament or a chattel real according to his

The condition of a villein.

(*x*) See Bodin de Republic. lib. 1, c. 5.

(*a*) Villenage is used to express sometimes the tenure of lands held by villein-services, and sometimes the personal bondage of the villein; but throughout this argument it is applied in the latter sense only.

(*b*) See the extracts from them in Co. Litt. 116, b.

(*c*) See Termes de la Ley, edit. of 1567, voc. Villenage—Old Tenures, cap. Villenage—Fitzh. Abr. Coron. 17.—2 Ro. Abr. 1.—2 Inst. 45.—and Co. Litt. 126, 127.

(*d*) Co. Litt. 117, a.—The words, in pleading seizin of villein-service, are very expressive of the lord's power over the villein's property. In 1 E. 2, 4, it is pleaded, that the lord was seized of the villein and his ancestors 'come affaire rechat de char et de sank et de 'fille marier et de eux tailler haut et bas, &c.' The form in 5 E. 2, 157, is, 'come de nos vi-'leynes en fesant de luy notre provost en 'p'nant de luy rechat de char et de saunk et 'redemption pur fille et fitz marier de luy et 'de ces aunc et a tailler haut et bas a notre 'volente.' In the first of the above forms there is evidently a misprint; and the reading should be 'a faire rechat' instead of 'affaire 'rechat.' As to the word 'provost' in the second form, it seems to signify 'plunder,' and perhaps the print should be 'proie' or 'proye' instead of 'provost.' I was led to this conjecture by the following proverb in Cotgrave's French Dictionary, 'qui a le vilain il a sa 'proye.' See Cotgr. edit. of 1673, voc. proye. However, in the Latin Entries the word 'pro-'vost' is translated 'propositum,' which in a barbarous sense of the word may be construed to signify 'will' or 'pleasure,' and will make the passage intelligible. In some Entries 'pro-'vost' is translated 'præpositus;' but this word cannot be understood in any sense that will make this use of it intelligible.

The forms of pleading seizin of villein-services in the Latin Entries are very similar to those I have extracted from the year-books. See Rast. Entr. 401, a.

(*e*) Litt. sect. 181.

lord's interest; being descendible to the heir where the lord was absolute owner, and transmissible to the executor where the lord had only a term of years in him (*f*). Lastly, the slavery extended to the issue, if both parents were villeins, or if the father only was a villein; our law deriving the condition of the child from that of the father, contrary to the Roman law, in which the rule was *partus sequitur ventrem* (*g*).

The origin of villenage. The origin of villenage is principally (*h*) to be derived from the wars between our British, Saxon, Danish and Norman ancestors, whilst they were contending for the possession of this country. Judge Fitzherbert, in his reading on the 4th of Edw. 1, stat. 1. entitled *Extenta manerii*, supposes villenage to have commenced at the Conquest, by the distribution then made of the forfeited lands and of the vanquished inhabitants resident upon them (*i*). But there were many bondmen in England before the Conquest, as appears by the Anglo Saxon laws regulating them; and therefore it would be nearer the truth to attribute the origin of villeins, as well to the preceding wars and revolutions in this country, as to the effects of the Conquest (*k*).

Decline of villenage. After the Conquest many things happily concurred, first to check the progress of domestic slavery in England, and finally to suppress it. The cruel custom of enslaving captives in war being abolished, from that time the accession of a new race of villeins was prevented, and the humanity, policy, and necessity of the times were continually wearing out the ancient race. Sometimes, no doubt, manumissions were freely granted; but they probably were much oftener extorted during the rage of the civil wars, so frequent before the reign of Henry the 7th, about the forms of the constitution of the succession to the crown. Another cause, which greatly contributed to the extinction of villenage, was the discouragement of it by the courts of justice. They always presumed in favour of liberty, throwing the 'onus probandi' upon the lord, as well in the writ of Homine Replegiando, where the villein was plaintiff, as in the Nativo Habendo, where he was defendant (*l*). Nonsuit of the lord after appearance

(*f*) Bro. Abr. Villenage, 60.—Co. Litt. 117.

(*g*) Co. Litt. 123. Antiently our law seems to have been very uncertain in this respect. See Glanv. lib. 5, c. 6. Mirr. c. 2, s. 38. Britt. c. 31. But the writers in the reign of Henry the 6th agree, that our law was as here represented; and from the plea of bastardy, which was held to be a peremptory answer to the allegation of villenage so early as the reign of Edward the 3d, I conjecture, that the law was settled in the time of his father. See Fortesc. Laud. Leg. Angl. c. 42. Litt. sect. 187. —43 E. 3, 4, and Bro. Abr. Villenage, 7.

(*h*) I do not say wholly, because probably there were some slaves in England before the first arrival of the Saxons; and also they and the Danes might bring some few from their own country.

(*i*) See the extract from Fitzherbert's reading in Barringt. Observations on Ant. Stat. 2d edit. p. 237.*

(*k*) See Spelm. Gloss. voc. Lazzi et Servus. Somn. on Gavelk. 65, and the index to Wilk. Leg. Saxon. tit. Servus.

(*l*) See Lib. Intrat. 176, a. 177, b. & Bro. Abr. Villenage, 66. It seems however, that if after a Nativo Habendo brought by the lord, the villein, instead of waiting for the lord's proceeding upon it, sued out a Libertate Probanda to remove the question of villenage for trial before the justices in eyre, on the return of it he was to produce some proof of his free condition; and that if he failed, he and his pledges were amerced. But this failure did not entitle the lord to any benefit from his Nativo Habendo, and therefore, if he proceeded in it, and could not prove the villenage, the judgment was for the villein; or if the lord did not proceed, a nonsuit, which was equally fatal to the lord's claim, was the necessary consequence. See 47 H. 3. It. Dev. Fitz. Abr. Villenage, 39. In truth, the requisition of proof from the villein on the Libertate Probanda, and the amercement for want of it, seem to have been mere form; for, as Fitzherbert says, in explaining the effect of the Libertate Probanda, "the record shall be sent before the justices in eyre, and the lord shall declare thereupon, and the villein shall make his defence and plead thereunto, and the villein shall not declare upon the writ de Libertate Probanda, nor shall any thing be done thereupon; for that writ is but a Supersedeas to surcease for the time, and to adjourn the record and the writ of Nativo Habendo, before the justices in eyre." Fitz. Nat. Br. 77, D. Upon the whole therefore it may I think be safely asserted, that in all cases of villenage the 'onus probandi' was laid upon the lord.

The several remedies against and for one claimed as a villein are now so little understood, that perhaps a short account of them may be acceptable; more particularly as, by a right conception of them, it will be more easy to determine on the force of the argument drawn against the revival of slavery from the rules concerning villenage.

The lord's remedy for a fugitive villein was, either by seizure, or by suing out a writ of Nativo Habendo, or Neifty, as it is sometimes called.

1. If the lord seized, the villein's most effectual mode of recovering liberty was by the writ of Homine Replegiando; which had great advantage over the writ of Habeas Corpus. In the Habeas Corpus the return cannot be contested by pleading against the truth of it, and consequently on a Habeas Corpus the

* Concerning the antiquity of villenage, see something in "A Discourse of Tenures," said to be written by sir Walter Raleigh, published in Gutch's Collectanea Curiosa, vol. 1, p. 50.

in a Nativo Habendo, which was the writ for asserting the title of slavery, was a bar to another Nativo Habendo, and a perpetual enfranchisement; but nonsuit of the villein after appearance in a Libertate Probanda, which was one of the writs for asserting the claim of liberty against the lord, was no bar to another writ of the like kind (*m*). If two plaintiffs joined in a Nativo Habendo, nonsuit of one was a nonsuit of both; but it was otherwise in a Libertate Probanda (*n*). The lord could not prosecute for more than two villeins in one Nativo Habendo; but any number of villeins of the same blood might join in one Libertate Probanda (*o*). Manumissions were inferred from the slightest circumstances of mistake or negligence in the lord, from every act or omission which legal refinement could strain into an acknowledgment of the villein's liberty. If the lord vested the ownership of lands in the villein, received homage from him, or gave a bond to him, he was enfranchised. Suffering the villein to be on a jury, to enter into religion and be professed, or to stay a year and a day in ancient demesne without claim, were enfranchisements. Bringing ordinary actions against him, joining with him in actions, answering to his actions without protestation of villenage, imparling in them or assenting to his imparlance, or suffering him to be vouched without counter-pleading the voucher, were also enfranchisements by implication of law (*p*). Most of the constructive manumissions I have mentioned were the received law, even in the reign of the first Edward (*q*). I have been the more particular in enumerating these instances of extraordinary favour to liberty; because the anxiety of our ancestors to emancipate the ancient villeins, so well accounts for the establishment of any rules of law calculated to obstruct the introduction of a new stock. It was natural, that the same opinions, which influenced to discountenance the former, should lead to the prevention of the latter.

When villenage expired.

I shall not attempt to follow villenage in the several stages of its decline; it being sufficient here to mention the time of its extinction, which, as all agree, happened about the latter end of Elizabeth's reign or soon after the accession of James (*r*). One of the last instances, in which villenage was insisted upon, was Crouch's case reported in Dyer and other books (*s*). An entry having been made by one Butler on some lands purchased by Crouch, the question was, whether he was Butler's villein regardant; and on two special verdicts, the one in ejectment Mich. 9th and 10th Eliz. and the other in assize Easter 11th Eliz. the claim of villenage was disallowed, one of the reasons given for the judgment in both being the want of seizing of the villein's person within 60 (*t*) years, which is the time limited by the 32d of Hen. 8, chap. 2, in all cases of hereditaments

question of liberty cannot go to a jury for trial; though indeed the party making a false return is liable to an action for damages, and punishable by the Court for a contempt; and the Court will hear affidavits against the truth of the return, and if not satisfied with it restore the party to his liberty. Therefore, if to a Habeas Corpus villenage was returned as the cause of detainer, the person for whom the writ was sued at the utmost could only have obtained his liberty for the time, and could not have had a regular and final trial of the question. But in the Homine Replegiando it was otherwise; for if villenage was returned, an Alias issued directing the sheriff to replevy the party on his giving security to answer the claim of villenage afterwards, and the plaintiff might declare for false imprisonment and lay damages, and on the defendant's pleading the villenage had the same opportunity of contesting it, as when impleaded by the lord in a Nativo Habendo. See Fitzh. N. Br. 66. F. et Lib. Intrat. 176, a. 177, b.

2. If the lord sued out a Nativo Habendo, and the villenage was denied, in which case the sheriff could not seize the villein, the lord was then to enter his plaint in the county court; and as the sheriff was not allowed to try the question of villenage in his court, the lord could not have any benefit from the writ, without removing the cause by the writ of Pone into the King's-bench or Common Pleas. [For the count, pleading and judgment in the Nativo Habendo after the removal, see Rast. Entr. 436, 437.] It is to be observed, that the lord's right of seizure continued notwithstanding his having sued out a Nativo Habendo, unless the villein brought a Libertate Probanda. This writ, which did not lie except upon a Nativo Habendo previously sued out, was for removal of the lord's plaint in the Nativo Habendo for trial before the justices in eyre or those of the King's-bench, and also for protecting the villein from seizure in the mean time. This latter effect seems to have been the chief reason for suing out the Libertate Probanda; and therefore after the 25th of Edw. 3, stat. 5, c. 18, which altered the common law, and gives a power of seizure to the lord, notwithstanding the pendency of a Libertate Probanda, that writ probably fell much into disuse, though subsequent cases, in which it was brought, are to be found in the year-books. See Fitzh. Nat. 77, to 79, and 11 Hen. 4, 49.

(*m*) Co. Litt. 139.

(*n*) Co. Litt. 139.

(*o*) Fitzh. Nat. Br. 78, C. D.

(*p*) See Litt. sect. 202 to 209, and 2 Ro. Abr. 735, 736, and 737.

(*q*) See Britt. cap. 31, and Mirr. cap. 2, sect. 38.

(*r*) See sir Thomas Smith's Commonwealth, b. 2, c. 10, and Barringt. Observ. on Ant. Stat. 2d ed. p. 232.

(*s*) See Dy. 266, pl. 11, and 283, pl. 32.

(*t*) Accord. Bro. Read. on the Stat. of Limitat. 32 Hen. 8, page 17.

claimed by prescription (*u*). This is generally said to have been the last case of villenage; but there are four subsequent cases in print. One was in Hilary 18th of Elizabeth (*w*); another was a judgment in Easter 1st of James (*x*); the third, which was never determined, happened in Trinity 8th of James (*y*); and the fourth was so late as Hilary 15th of James (*z*). From the 15th of James the 1st, being more than 150 years ago, the claim of villenage has not been heard of in our courts of justice; and nothing can be more notorious, than that the race of persons, who were once the objects of it, was about that time completely worn out by the continual and united operation of deaths and manumissions.

But though villenage itself is obsolete, yet fortunately those rules, by which the claim of it was regulated, are not yet buried in oblivion. These the industry of our ancestors has transmitted; nor let us their posterity despise the reverend legacy. By a strange progress of human affairs, the memory of slavery expired now furnishes one of the chief obstacles to the introduction of slavery attempted to be revived; and the venerable reliques of the learning relative to villenage, so long consigned to gratify the investigating curiosity of the antiquary, or used as a splendid appendage to the ornaments of the scholar, must now be drawn forth from their faithful repositories for a more noble purpose; to inform and guide the sober judgment of this Court, and as I trust to preserve this country from the miseries of domestic slavery.

Manner of making title to a villein explained.

Littleton (*a*) says, every villein is either a villein by title of prescription, to wit that he and his ancestors have been villeins time out of memory, or he is a villein by his own confession in a court of record. And in another place (*b*), his description of a villein regardant and of a villein in gross shews, that title cannot be made to either without prescription or confession. Time whereof no memory runs to the contrary, is an inseparable incident to every prescription (*c*); and therefore, according to Littleton's account of villenage, the lord must prove the slavery ancient and immemorial; or the villein must solemnly confess it to be so in a court of justice. A still earlier writer lays down the rule in terms equally strong. No one, says Britton (*d*), can be a villein except of ancient nativity, or by acknowledgment. All the proceedings in cases of villenage, when contested, conform to this idea of remote antiquity in the slavery, and are quite irreconcileable with one of modern commencement.

1. The villein in all such suits (*e*) between him and his lord was stiled *nativus* as well as *villanus*; our ancient (*f*) writers describe a female slave by no other name than that of neif; and the technical name of the only writ in the law for the recovery of a villein is equally remarkable, being always called the Nativo Habendo, or writ of neifty. This peculiarity of denomination, which implies that villenage is a slavery by birth, might perhaps of itself be deemed too slight a foundation for any solid argument; but when combined with other circumstances more decisive, surely it is not without very considerable force.

2. In pleading villenage where it had not been confessed on some former occasion, the lord always founded his title on prescription. Our year books, and books of entries, are full of the forms used in pleading a title to villeins regardant. In the Homine Replegiando, and other actions where the plea of villenage was for the purpose of shewing the plaintiff's disability to sue, if the villein was regardant, the defendant alledged, that he was seized of such a manor, and that the plaintiff and his ancestors had been villeins belonging to the manor time out of mind, and that the defendant and his ancestors and all those whose estate he had in the manor, had been seized of the plaintiff and all his ancestors as of villeins belonging to it (*g*). In the Nativo Habendo the form of making title to a villein regardant was in substance the same (*h*). In fact, regardancy necessarily implies prescription, being where one and his ancestors have been annexed to a manor time out of the memory of man (*i*). As to villeins in gross, the cases relative to them are very few; and I am inclined to think, that there never was any great number of them in England. The author of the Mirroir (*k*), who wrote in the reign of Edward the 2d, only mentions villeins regardant: and sir Thomas Smith, who was secretary of state in the reign of Edward the 6th, says, that in his time he never knew a villein in gross throughout the realm (*l*). However,

(*u*) Before this statute of Hen. the 8th, the time of limitation seems to have been the coronation of Hen. 3, as appears by the form of the Nativo Habendo; though in other writs of right the limitation by 31 E. 1, c. 39, was from the commencement of the reign of Rich. the 1st.

(*w*) See Co. Entr. 406, b.

(*x*) Yelv. 2.

(*y*) This case is only to be found in Hughes's Abridgment, tit. Villenage, pl. 23.

(*z*) Noy, 27.

(*a*) Sect. 175.

(*b*) Sect. 181, 182, & 185.

(*c*) Litt. sect. 170.

(*d*) 'Nul ne poit estre villeyn forsque de 'anncienne nativite ou par recognizance.' Britt. Wing. ed. cap. 31, p. 78.

(*e*) See the form of the writs of Nativo Habendo and Libertate Probanda, and also of the Alias Homine Replegiando, where on the first writ the sheriff returns the claim of villenage.

(*f*) Brit. cap. 31 & Litt. sect. 186.

(*g*) See Rast. Entr. tit. Homine Replegiando, 373, & Lib. Intrat. 56.

(*h*) See the form in Lib. Intrat. 97, & Rast. Entr. 401.

(*i*) This is agreeable to what Littleton says in sect. 182.

(*k*) Mirr. c. 2, § 38.

(*l*) Smith's Commonwealth, b. 2, c. 10.

after a long search, I do find places in the year-books, where the form of alledging villenage in gross is expressed, not in full terms, but in a general way; and in all the cases I have yet seen, the villenage is alledged in the ancestors of the person against whom it was pleaded (*m*), and in one of them the words 'time beyond memory' (*n*) are added. But if precedents had been wanting, the authority of Littleton, according to whom the title to villenage of each kind, unless it has been confessed must be by prescription, would not have left the least room for supposing the pleading of a prescription less necessary on the claim of villeins in gross than of those regardant.

3. The kind of evidence, which the law required to prove villenage, and allowed in disproof of it, is only applicable to a slavery in blood and family, one uninterruptedly transmitted through a long line of ancestors to the person against whom it was alleged. On the lord's part, it was necessary that he should prove the slavery against his villein by other villeins of the same blood (*o*), such as were descended from the same common male stock, and would acknowledge themselves villeins to the lord (*p*), or those from whom he derived his title; and at least two witnesses (*q*) of this description were requisite for the purpose.

(*m*) See 1 E. 2, 4.—5 E. 2, 15.—7 E. 2, 242, & 11 E. 2, 344. In 13 E. 4, 2, b. pl. 4, & 3 b. pl. 11, there is a case in which villenage in gross is pleaded, where one became a villein in gross by severance from the manor to which he had been regardant. This being the only case of the kind I have met with, I will state so much of it from the year-book as is necessary to shew the manner of pleading. In trespass the defendant pleads, that a manor, to which the plaintiff's father was a villein regardant, was given to an ancestor of the defendant in tail; and that the manor descended to Cecil and Catharine; and that on partition between them, the villein with some lands was allotted to Cecil, and the manor to Catharine; and then the defendant conveyed the villein from Cecil to himself as heir.

(*n*) 11 E. 2, 344.

(*o*) See Bro. Abr. Villenage, 66 Reg. Br. 87, a. Old Nat. Br. 43, b. Fitz. Abr. Villenage, 38, 39. A bastard was not receivable to prove villenage, 13 E. 1. It. North. Fitzh. Abr. 36, & Britt. Wing. edit. 82, a.

(*p*) In Fitzherbert's Natura Brevium, 79. B. it is said, that the witnesses must acknowledge themselves villeins to the plaintiff in the Nativo Habendo; and there are many authorities which favour the opinion. See Glanv. lib. 5, c. 4. Britt. Wing. ed. 81, a. 19 Hen. 6, 32, b. Old Tenures, chap. Villenage; and the form in which the confession of villenage by the plaintiff's witnesses is recorded, in Rast. Entr. tit. Nativo Habendo, 401, a. However, it must be confessed, that in Fitzherbert the opinion is delivered with a *quære;* and it is so irreconcilable with the lord's right of granting villeins, as it is stated by Littleton, sect. 181, that I will not insist upon it here.

(*q*) Fitzh. Nat. Br. 78, H. & Fitzh. Abr. Villenage, 36 & 37.—Also Britton says, 'un 'masle sauns plusurs nest mie receivable.' Britt. Wingate's ed. p. 82. It is remarkable that females, whether sole or married, were not receivable to prove villenage against men. 'Saunk de un home ne puit ne doit estre trie 'par femmes.' Britt. Wing. ed. p. 82. The reason assigned is more antient than polite. It is said to be 'pur lour fraylte,' and also because a man 'est plus digne person que une 'feme' 13 E. 1. Fitzh. Abr. Villenage, 37.*

* "Antiently in Scotland the testimony of women was not admitted in any case. 'Ane 'woman may not pass upon assize or be witness, 'nather in ony instrument or contract, nor zit 'for preiving of ane persoun's age. Nevertheless gif thair be ony contraverser tuiching the 'age of ony persoun, the mother or the nurice 'may be ressavit as witnessis for preiving thair-'of.'" Balfour's Practicks, p. 378.

"By our constant usage, women are not admitted as instrumentary witnesses, and as universal custom is law, so I doubt not but it will be a nullity in any writing that is attested by witnesses, who are both or even one of them women. And though the act 1681, mentions a subscribing witness with the masculine particle (he), yet that without the subsequent usage is not exclusive of women." Bankton's Inst. b. 1, tit. 1, sect. 7.

"Of old, women were rejected in most cases, but they are for most part admitted, unless where the parties ought to have called witnesses, for then they have themselves to blame that did not make use of others; and therefore women are altogether incompetent witnesses to deeds of parties, testaments, or instruments of notaries." Bankton, book 4, tit. 33, s. 20.

So Stair (book 4, tit. 43, s. 9,) says, that in civil cases women are not to be admitted as witnesses, except necessary.

Sir George Mackenzie (Probation by Witnesses) says, "Women *regulariter* are not witnesses, neither in civil or criminal cases with us, nor should they make as much faith with us, in *criminalibus*. The reason why women are excluded from witnesing, must be either that they are subject to too much compassion, and so ought not to be more received in criminal cases, than in any civil cases; or else the law was unwilling to trouble them, and thought it might learn them too much confidence, and make them subject to too much familiarity with men, and strangers, if they were necessitated to vague up and down at all courts, upon all occasions." See his Criminals, title 26, s. 4.

Erskine (book 4, tit. 2, sect. 22,) instructs us, that women were rather exempted than debarred from giving testimony.

Of the progress of the relaxation of this rule I know not of any circumstantial history.

Mr. Hume (Comm. chap. 13,) and Mr. Bur-

Nay, so strict was the law in this respect, that in the Nativo Habendo the defendant was not obliged to plead to the claim of villenage, unless the lord at the time of declaring on his title brought his witnesses with him into court, and they acknowledged themselves villeins, and swore to their consanguinity with the defendant (*r*); and if the plaintiff failed in adducing such previous evidence, the judgment of the court was, that the defendant should be free for ever, and the plaintiff was amerced for his false claim (*s*). In other actions the production of suit or witnesses by the plaintiff, previously to the defendant's pleading, fell into disuse some time in the reign of Edward the third; and ever since, the entry of such production on the rolls of the court has been mere form, being always with an &c. and without naming the witnesses. But in the Nativo Habendo the actual production of the suit, and also the examination of them, unless the defendant released (*t*) it, in court, continued to be indispensable even down to the time when villenage (*u*) expired.—Such was the sort of testimony, by which only the lord could support the title of slavery; nor were the means of defence on the part of the villein less remarkable. If he could prove that the slavery was not in his blood and family, he intitled himself to liberty. The author of the Mirroir (*w*) expressly says, that proof of a free stock was an effectual defence against the claim of villenage; and even in the time of Henry the second the law of England was in this respect the same, as appears by the words of Glanville. In his chapter of the trial (*x*) of liberty, he says, that the person claiming it shall produce 'plures de proximis et consanguineis de eodem stipite unde ipse exierat exeuntes; per quorum libertates, si fuerint in curiâ recognitæ et probatæ, liberabitur à jugo servitutis qui ad libertatem proclamatur.' But the special defences which the law permitted against villenage are still more observable; and prove it beyond a contradiction to be what the author of the Mirroir emphatically stiles it (*y*), a slavery of so great an antiquity that no free stock can be found by human remembrance. Whenever the lord sued to recover a villein by a Nativo Habendo, or alledged villenage in other actions as a disability to sue, the person claimed as a villein might either plead generally that he was of free condition, and on the trial of this general issue avail himself of every kind of defence which the law permits against villenage; or he might plead specially any single fact or thing, which if true was of itself a legal bar to the claim of villenage, and in that case the lord was compellable to answer the special matter. Of this special kind were the pleas of bastardy and adventif. The former was an allegation by the supposed villein that either himself or his father, grand-father or other male ancestor, was born out of matrimony; and this plea, however remote the ancestor in whom the bastardy was alleged, was peremptory to the lord; that is, if true it destroyed the claim of villenage, and therefore the lord could only support his title by denying the fact of bastardy. This appears to have been the law from a great variety of the most ancient authorities. The first of them is a determined case so early as the 13th of Edward the second (*z*), and in all the subsequent cases (*a*) the doctrine is received for law without once being drawn into question. In one of them (*b*) the reason why bastardy is a good plea in a bar against villenage is expressed in a very peculiar manner; for the words of the book are, "when one claims any man as his villein, it shall be intended always that he is his villein by reason of stock, and this is the reason that there shall be an answer to the special matter where he alleges bastardy; because if his ancestor was a bastard, he can never be a villein, unless by sub-

(*r*) Fitz. Nat. Br. 78, H. Fitzh. Abr. Villenage, 32 Lib. Intrat. 97. Rast. Entr. 401. Reg. Br. 87.

(*s*) In Fitzh. Abr. Villenage, 38, there is an instance of such a judgment, merely for the plaintiff's failure in the production of his witnesses at the time of declaring on his title.

(*t*) See 19 H. 6, 32 b. a case in which the defendant releases the examination of the suit.

(*u*) The last entry in print of the proceedings in a Nativo Habendo contains the names of the secta or suit produced, and their acknowledgment of villenage on oath. See the case of Jerney against Finch, Hill. 18 Eliz. C. B. Co. Entr. 406, b.

(*w*) Mirr. c. 2, § 28.

(*x*) Glanv. lib. 5, c. 4.

(*y*) 'Est subjection issuant de cy grand antiquite, que nul franke ceppe purra estre trove per humaine remembrance.' Mirr. c. 2, § 28.

(*z*) 13 E. 2, 408.

(*a*) Hill. 19 E. 2. Fitzh. Abr. Villenage, 32.—39 E. 3, 36.—43 E. 3, 4.—19 Hen. 6, 11 & 12.—19 Hen. 6, 17.—Old Tenures, chap. Villenage.—Co. Litt. 123, a. In the case 19 H. 6, 17, there is something on the trial of bastardy in cases of villenage, explaining when it shall be tried by the bishop's certificate and when by a jury. See on the same subject Fitzh. Abr. Villenage, 32, & Lib. Intrat. 35, a. which latter book contains the record of a case where the trial was by the bishop.

(*b*) 43 E. 3, 4.

nett (Treatise on var. branch. of the Crim. Law of Scotland, chap. 17,) have cited several cases, and quoted other authorities, from which it appears that the rule was recognized to so late a period as the beginning of the 18th century. It is now abrogated (how or when I have not been distinctly stated) "except" says Mr. Burnett, "in the case of instrumentary witnesses, where women are in practice still excluded. I know of no case, however, where this point was ever argued, or received a decision: and it is doubtful whether such an objection would now be sustained."

sequent acknowledgment in a court of record." The force of this reason will appear fully on recollection, that the law of England always derives the condition of the issue from that of the father, and that the father of a bastard being in law uncertain (*c*), it was therefore impossible to prove a bastard a slave by descent. In respect to the plea of adventif, there is some little confusion in the explanation, our year-books give us, of the persons to whom the description of adventif is applicable; but the form of the plea will best shew the precise meaning of it. It alledged (*d*), that either the person himself who was claimed as a villein regardant to a manor, or one of his ancestors, was born in a county different from that in which the manor was, and so was free, which was held to be a necessary conclusion to the plea. This in general was the form of the plea, but sometimes it was more particular, as in the following case (*e*). In trespass, the defendant pleads that the plaintiff is his villein regardant to his manor of Dale; the plaintiff replies, that his great-grandfather was born in C, in the county of N, and from thence went into the county of S, and took lands held in bondage within the manor to which the plaintiff is supposed to be a villein regardant, and so after time of memory his great-grandfather was adventif. It is plain from this case, that the plea of adventif was calculated to destroy the claim to villenage regardant, by shewing that the connection of the supposed villein and his ancestors with the manor to which they were supposed to be regardant, had begun within time of memory; and as holding lands by villein-services was anciently deemed a mark (*f*), though not a certain one, of personal bondage, I conjecture that this special matter was never pleaded, except to distinguish the mere tenant by villein services from the villein in blood as well as tenure. But whatever might be the cases proper for the plea of adventif, it is one other incontrovertible proof, in addition to the proofs already mentioned, that no slavery having had commencement within time of memory was lawful in England; and that if one ancestor could be found whose blood was untarnished with the stain of slavery, the title of villenage was no longer capable of being sustained.

(*c*) Co. Litt. 123, a.

(*d*) 13 E. 1. It. North. Fitz. Abr. Villenage 36. 19 E. 2. Fitz. Abr. Villenage 32. 33 E. 3. Fitz. Abr. Visne 2.—39 E. 3, 36.—41 E. 3. Fitz. Abr. Villenage 7.—43 E. 3, 31.—50 E. 3. Fitz. Abr. Villenage, 24.—19 H. 6, 11.—19 H. 6, 17.

(*e*) 31 E. 3. Fitz. Abr. Visne 1.

(*f*) Fitzherbert says, "if a man dwells on lands which have been held in villenage time out of mind, he shall be a villein, and it is a good prescription; and against this prescription it is a good plea to say that his father or grandfather was adventif," &c. Fitz. Abr. Villenage 24.

How it is that the rules of law concerning villenage exclude a new slavery.

Such were the striking peculiarities in the manner of making title to a villein, and of contesting the question of liberty; and it is scarce possible to attend to the enumeration of them, without anticipating me in the inferences I have to make.—The law of England only knows slavery by birth; it requires prescription in making title to a slave; it receives on the lord's part no testimony except such as proves the slavery to have been always in the blood and family, on the villein's part every testimony which proves the slavery to have been once out of his blood and family; it allows nothing to sustain the slavery except what shews its commencement beyond the time of memory, every thing to defeat the slavery which evinces its commencement within the time of memory. But in our American colonies and other countries slavery may be by captivity or contract as well as by birth; no prescription is requisite; nor is it necessary that slavery should be in the blood and family, and immemorial. Therefore the law of England is not applicable to the slavery of our American colonies, or of other countries.—If the law of England would permit the introduction of a slavery commencing out of England, the rules it prescribes for trying the title to a slave would be applicable to such a slavery; but they are not so; and from thence it is evident that the introduction of such a slavery is not permitted by the law of England.—The law of England then excludes every slavery not commencing in England, every slavery though commencing there not being antient and immemorial. Villenage is the only slavery which can possibly answer to such a description, and that has long expired by the deaths and emancipations of all those who were once the objects of it. Consequently there is now no slavery which can be lawful in England, until the legislature shall interpose its authority to make it so.

This is plain, unadorned, and direct reasoning; it wants no aid from the colours of art, or the embellishments of language; it is composed of necessary inferences from facts and rules of law, which do not admit of contradiction; and I think, that it must be vain to attempt shaking a superstructure raised on such solid foundations.

As to the other arguments I have to adduce against the revival of domestic slavery, I do confess that they are less powerful, being merely presumptive. But then I must add, that they are strong and violent presumptions; such as furnish more certain grounds of judicial decision, than are to be had in many of the cases which become the subjects of legal controversy. For

2dly. I infer that the law of England will not permit a new slavery, from the fact of there never yet having been any slavery but villenage, and from the actual extinction of that antient slavery. If a new slavery could have law-

2d. Argument against a new slavery from the fact of there never having been any slavery but villenage, and from the extinction of that slavery.

fully commenced here, or lawfully have been introduced from a foreign country, is there the most remote probability, that in the course of so many centuries a new slavery should never have arisen? If a new race of slaves could have been introduced under the denomination of villeins, if a new slavery could have been from time to time engrafted on the antient stock, would the laws of villenage have once become obsolete for want of objects, or would not a successive supply of slaves have continued their operation to the present times? But notwithstanding the vast extent of our commercial connections, the fact is confessedly otherwise. The antient slavery has once expired; neither natives nor foreigners have yet succeeded in the introduction of a new slavery; and from thence the strongest presumption arises, that the law of England doth not permit such an introduction.

3d. Argument against a new slavery from the rules of law against slavery by contract.

3dly. I insist, that the unlawfulness of introducing a new slavery into England, from our American colonies or any other country, is deducible from the rules of the English law concerning contracts of service. The law of England will not permit any man to enslave himself by contract. The utmost, which our law allows, is a contract to serve for life; and some perhaps may even doubt the validity of such a contract, there being no determined cases directly affirming its lawfulness. In the reign of Henry the 4th (*g*), there is a case of debt, brought by a servant against the master's executors, on a retainer to serve for term of life in peace and war for 100 shillings a-year; but it was held, that debt did not lie for want of a speciality; which, as was agreed, would not have been necessary in the case of a common labourer's salary, because, as the case is explained by Brooke in abridging it, the latter is bound to serve by statute (*h*). This case is the only one I can find, in which a contract to serve for life is mentioned; and even in this case, there is no judicial decision on the force of it. Nor did the nature of the case require any opinion upon such a contract; the action not being to establish the contract against the servant, but to enforce payment against the master's executors for arrears of salary in respect of service actually performed; and therefore this case will scarce bear any inference in favour of a contract to serve for life. Certain also it is, that a service for life in England is not usual, except in the case of a military person; whose service, though in effect for life, is rather so by the operation of the yearly acts for regulating the army, and of the perpetual act for governing the navy, than in consequence of any express agreement. However, I do not mean absolutely to deny the lawfulness of agreeing to serve for life; nor will the inferences I shall draw from the rules of law concerning servitude by contract, be in the least affected by admitting such agreements to be lawful. The law of England may perhaps give effect to a contract of service for life; but that is the *ne plus ultra* of servitude by contract in England. It will not allow the servant to invest the master with an arbitrary power of correcting, imprisoning, (*i*) or alienating him; it will not permit him to renounce the capacity of acquiring and enjoying property, or to transmit a contract of service to his issue (*k*). In other words, it will not permit the servant to incorporate into his contract the ingredients of slavery. And why is it that the law of England rejects a contract of slavery? The only reason to be assigned is, that the law of England, acknowledging only the antient slavery which is now expired, will not allow the introduction of a new species, even though founded on consent of the party. The same reason operates with double force against a new slavery founded on captivity in war, and introduced from another country. Will the law of England condemn a new slavery commencing by consent of the party, and at the same time approve of one founded on force, and most probably on oppression also? Will the law of England invalidate a new slavery commencing in this country, when the title to the slavery may be fairly examined; and at the same time give effect to a new slavery introduced from another country, when disproof of the slavery must generally be impossible? This would be rejecting and receiving a new slavery at the same moment; rejecting slavery the least odious, receiving slavery the most odious: and by such an inconsistency, the wisdom and justice of the English law would be completely dishonoured. Nor will this reasoning be weakened by observing that our law permitted villenage, which was a slavery confessed to originate from force and captivity in war; because that was a slavery coeval with the first formation of the English constitution, and consequently had a commencement here prior to the establishment of those rules which the common law furnishes against slavery by contract.

Examination of the cases on the subject of slavery since or just before the

Having thus explained the three great arguments which I oppose to the introduction of domestic slavery from our American colonies,

(*g*) 2 H. 4, 14. (*h*) Bro. Abr. Dett. 53.

(*i*) Lord Hobart says, "the body of a freeman cannot be made subject to distress or imprisonment by contract, but only by judgment." Hob. 61. I shall have occasion to make use of this authority again in a subsequent part of this argument.

(*k*) Mr. Molloy thinks, that servants may contract to serve for life; but then he adds, "but at this day there is no contract of the ancester can oblige his posterity to an hereditary service; nor can such as accept those servants exercise the ancient right or dominion over them, no not so much as to use an extraordinary rigour, without subjecting themselves to the law." Moll. de Jur. Marit. 1st ed. b. 3, c. 1, s. 7, p. 388.

Extinction of villenage.

or any foreign country, it is now proper to enquire, how far the subject is affected by the cases and judicial decisions since or just before the extinction of villenage.

The first case on the subject is one mentioned in Mr. Rushworth's Historical Collections (*l*); and it is there said, That in the 11th of Elizabeth, one Cartwright brought a slave from Russia, and would scourge him; for which he was questioned; and it was resolved, that England was too pure an air for a slave to breathe in. In order to judge what degree of credit is due to the representation of this case, it will be proper to state from whom Mr. Rushworth reports it. In 1637, there was a proceeding by information in the Star-Chamber against the famous John Lilburne, for printing and publishing a libel; and for his contempt in refusing to answer interrogatories, he was by order of the Court imprisoned till he should answer, and also whipped, pilloried, and fined. His imprisonment continued till 1640, when the Long Parliament began. He was then released, and the House of Commons impeached the judges of the Star-Chamber for their proceedings against Lilburne. In speaking to this impeachment, the managers of the Commons cited the case of the Russian slave. Therefore the truth of the case doth not depend upon John Lilburne's assertion, as the learned observer on the antient statutes (*m*) seems to apprehend; but rests upon the credit due to the managers of the Commons. When this is considered, and that the year of the reign in which the case happened is mentioned, with the name of the person who brought the slave into England; that not above 72 or 73 years had intervened between the fact and the relation of it; and also that the case could not be supposed to have any influence on the fate of the impeachment against the judges; I see no great objection to a belief of the case. If the account of it is true, the plain inference from it is, that the slave was become free by his arrival in England. Any other construction renders the case unintelligible, because scourging, or even correction of a severer kind, was allowed by the law of England to the lord in the punishment of his villein; and consequently, if our law had recognized the Russian slave, his master would have been justified in scourging him.

The first case in our printed Reports is that of Butts against Penny (*n*), which is said to have been adjudged by the Court of King's-bench in Trinity term, 29th of Charles the 2d. It was an action of trover for ten (*o*) negroes; and there was a special verdict, finding, that the negroes were infidels, subjects to an infidel prince, and usually bought and sold in India as merchandize by the custom amongst merchants, and that the plaintiff had bought them, and was in possession of them; and that the defendant took them out of his possession. The Court held, that negroes being usually bought and sold amongst merchants in India, and being infidels (*p*), there might be a property in them sufficient to maintain the action; and it is said that judgment Nisi was given for the plaintiff, but that on the prayer of the counsel for the defendant to be further heard in the case, time was given till the next term. In this way our reporters state the case; and if nothing further appeared, it might be cited as an authority, though a very feeble one, to shew that the master's property in his negro slaves continues after their arrival in England, and consequently that the negroes are not emancipated by being brought here. But having a suspicion of some defect in the state of the case, I desired an examination of the Roll (*q*); and according to the account of it given to me, though the declaration is for negroes generally in London, without any mention of foreign parts, yet from the special verdict it appears, that the action was really brought to recover the value of negroes, of which the plaintiff had been possessed, not in England, but in India. Therefore this case would prove nothing in favour of slavery in England, even if it had received the Court's judgment, which however it never did receive, there being only an 'ulterius consilium' on the Roll.

The next case of trover was between Gelly and Cleve in the Common-Pleas, and was ad-

(*l*) Rushw. v. 2, p. 466.

(*m*) Barr. Observ. on Ant. Stat. 2d edit. p. 241.

(*n*) 2 Lev. 201, and 3 Keb. 785. See Hill. 29 Char. 2, B. R. Rot. 1116.

(*o*) According to Levinz, the action was for 200 negroes; but it is a mistake, the record only mentioning 10.

(*p*) According to this reasoning, it is lawful to have an infidel slave, but not a Christian one. This distinction, between persons of opposite persuasions in religion, is very ancient. Amongst the Jews, the condition of the Hebrew slave had many advantages over that of a slave of foreign extraction. [See sect. 37, of the Dissertation on Slavery prefixed to Potgiesser. Jus Germ. de Stat. Serv.] Formerly too the Mahometans pretended, that their religion did not allow them to enslave such as should embrace it; but, as Bodin says, the opinion was little attended to in practice. (See Bodin, de Republica, lib. 1, cap. 5, de imperio servili.) A like distinction was made in very early times amongst Christians; and the author of the Mirroir in one place expresses himself, as if the distinction had been adopted by the law of England. (See the Mirr. c. 2, s. 28.) But our other ancient writers do not take the least notice of such a distinction, nor do I find it once mentioned in the year-books; which are therefore strong presumptive evidence against the reception of it in our courts of justice as law, however the opinion may have prevailed amongst divines and others in speculation. See Barr. Observ. Ant. Stat. 2 edit. p. 239.

(*q*) The Roll was examined for me by a friend.

judged in Michaelmas term 5th of William and Mary. In the report of this case (r), the Court is said to have held, that trover will lie for a negroboy, because negroes are heathens; and therefore a man may have property in them, and the Court without averment will take notice that they are heathens. On examination of the Roll (s), I find that the action was brought for various articles of merchandize as well as the negro; and I suspect, that in this case, as well as the former one of Butts and Penny, the action was for a negro in America; but the declaration being laid generally, and there being no special verdict, it is now too late to ascertain the fact. I will therefore suppose the action to have been for a negro in England, and admit that it tends to shew the lawfulness of having negro slaves in England. But then if the case is to be understood in this sense, I say that it appears to have been adjudged without solemn argument; that there is no reasoning in the report of this case to impeach the principles of law, on which I have argued against the revival of slavery in England; that unless those principles can be controverted with success, it will be impossible to sustain the authority of such a case; and further, that it stands contradicted by a subsequent case; in which the question of slavery came directly before the Court.

The only other reported case of trover is that of Smith against Gould, which was adjudged, Mich. 4 Ann, in the King's-bench. In trover (t) for several things, and among the rest for a negro, not guilty was pleaded, and there was a verdict for the plaintiff with several damages, 20*l.* being given for the negro; and after argument on a motion in arrest of judgment, the Court held, that trover did not lie for a negro. If in this case the action was for a negro in England, the judgment in it is a direct contradiction to the case of Gelly and Cleve. But I am inclined to think, that in this, as well as in the former cases of trover, the negroes for which the actions were brought, were not in England; and that in all of them the question was not on the lawfulness of having negro slaves in England, but merely whether trover was the proper kind of action for recovering the value of a negro unlawfully detained from the owner in America and India. The things, for which trover in general lies, are those in which the owner has an absolute property, without limitation in the use of them; whereas the master's power over the slave doth not extend to his life, and consequently the master's property in the slave is in some degree qualified and limited. Supposing therefore the cases of trover to have been determined on this distinction, I will not insist upon any present benefit from them in argument; though the last of them, if it will bear any material inference, is certainly an authority against slavery in England.

The next case I shall state is a judgment by the King's bench in Hilary 6th and 9th of William the 3d, Trespass *vi et armis* was brought by Chamberlain (u) against Harvey, for taking a negro of the value of 100*l.* and by the special verdict it appears, that the negro, for which the plaintiff sued, had been brought from Barbadoes into England, and was here baptized without the plaintiff's consent, and at the time when the trespass was alleged, was in the defendant's service, and had 6*l.* a-year for wages. In the argument of this case, three questions were made. One was, whether the facts in the verdict sufficiently shewed that the plaintiff had ever had a vested property in the negro (w): another was, whether that property was not devested by bringing the negro into England: and the third was, whether trespass for taking a man of the value of 100*l.* was the proper action. After several arguments, the Court gave judgment against the plaintiff. But I do confess, that in the reports we have of the case, no opinion on the great question of slavery is mentioned; it becoming unnecessary to declare one, as the Court held, that the action should have been an action to recover damages for the loss of the service, and not to recover the value of the slave. Of this case, therefore, I shall not attempt to avail myself.

But the next case, which was an action of Indebitatus Assumpsit in the King's-bench by Smith against Browne and Cowper (x), is more to the purpose. The plaintiff declared for 20*l.* for a negro sold by him to the defendants in London; and on motion in arrest of judgment, the Court held, that the plaintiff should have averred in the declaration, that the negro at the time of the sale was in Virginia, and that negroes by the laws and statutes of Virginia are saleable (y). In these words there is a direct opinion against the slavery of negroes in England: for if it was lawful, the negro would have been saleable and transferable here, as well as in Virginia; and stating, that the negro at the time of the sale was in Virginia, could not have been essential to the

(r) 1 L. Raym. 147.
(s) See Trin. 5 W. & M. C. B. Roll, N° 467.
(t) 2 Salk. 666.—See also, 1 L. Raym. 137.

(u) 1 L. Raym. 146. Carth. 396, and 5 Mod. 186.
(w) The facts which occasioned this question, I have omitted in the state of the case; because they are not material to the question of slavery in England.
(x) 2 Salk. 666. The case is not reported in any other book; and in Salkeld the time when the case was determined is omitted. But it appears to have been in the King's-bench, by the mention of lord chief justice Holt and Mr. J. Powell.
(y) The reporter adds, that the Court directed, that the plaintiff should amend his declaration. But after verdict it cannot surely be the practice to permit so essential an amendment; and therefore the reporter must have misunderstood the Court's direction.

sufficiency of the declaration. But the influence of this case, on the question of slavery, is not by mere inference from the Court's opinion on the plaintiff's mode of declaring in his action. The language of the judges, in giving that opinion, is remarkably strong against the slavery of negroes, and every other new slavery attempted to be introduced into England. Mr. Justice Powell says, "In a villein the owner has a property; the villein is an inheritance; but the law takes no notice of a negro." Lord Chief Justice Holt is still more explicit; for he says, that "one may be a villein in England;" but that "as soon as a negro comes into England, he becomes free." The words of these two great judges contain the whole of the proposition, for which I am contending. They admit property in the villein; they deny property in the negro. They assent to the old slavery of the villein: they disallow the new slavery of the negro.

I beg leave to mention one other case, chiefly for the sake of introducing a strong expression of the late lord chancellor Northington. It is the case of Shanley and Hervey, which was determined in Chancery some time in March 1762. The question was between a negro and his former master, who claimed the benefit of a 'donatio mortis causâ' made to the negro by a lady, on whom he had attended as servant for several years by the permission of his master. Lord Northington, as I am informed by a friend who was present at the hearing of the cause, disallowed the master's claim with great warmth, and gave costs to the negro. He particularly said, "As soon as a man puts foot on English ground, he is free: a negro may maintain an action against his master for ill usage, and may have a Habeas Corpus, if restrained of his liberty" (*s*).

Objections likely to be made to the arguments against the present lawfulness of slavery in England, stated and answered.

Having observed upon all the cases, in which there is any thing to be found relative to the present lawfulness of slavery in England; it is time to consider the force of the several objections, which are likely to be made, as well to the inferences I have drawn from the determined cases, as to the general doctrine I have been urging.

1. It may be asked, why it is that the law should permit the ancient slavery of the villein, and yet disallow a slavery of modern commencement?

To this I answer, that villenage sprung up amongst our ancestors in the early and barbarous state of society; that afterwards more humane customs and wiser opinions prevailed, and by their influence rules were established for checking the progress of slavery; and that it was thought most prudent to effect this great object, not instantaneously by declaring every slavery unlawful, but gradually by excluding a new race of slaves, and encouraging the voluntary emancipation of the ancient race. It might have seemed an arbitrary exertion of power, by a retrospective law to have annihilated property, which, however inconvenient, was already vested under the sanction of existing laws, by lawful means; but it was policy without injustice to restrain future acquisitions.

2. It may be said, that as there is nothing to hinder persons of free condition from becoming slaves by acknowledging themselves to be villeins, therefore a new slavery is not contrary to law.

The force of this objection arises from a supposition, that confession or acknowledgment of villenage is a legal mode of creating slavery; but on examining the nature of the acknowledgment, it will be evident, that the law doth not permit villenage to be acknowledged for any such purpose. The term itself imports something widely different from creation; the acknowledgment, or confession of a thing, implying that the thing acknowledged or confessed has a previous existence; and in all cases, criminal as well as civil, the law intends, that no man will confess an untruth to his own disadvantage, and therefore never requires proof of that which is admitted to be true by the person interested to deny it. Besides, it is not allowable to institute a proceeding for the avowed and direct purpose of acknowledging villenage; for the law will not allow the confession of it to be received, except where villenage is alledged in an adverse way; that is, only (*a*) when villenage was pleaded by the lord against one whom he claimed as his villein; or by the villein against strangers, in order to excuse himself from defending actions to which his lord only was the proper party; or when one villein was produced to prove villenage against another of the same blood who denied the slavery. If the acknowledgment had been permitted as a creation of slavery, would the law have required, that the confession should be made in a mode so indirect and circuitous as a suit professedly commenced for a different purpose? If confession is a creation of slavery, it certainly must be deemed a creation by consent; but if confession had been adopted as a voluntary creation of slavery,

(*s*) In the above enumeration of cases, I have omitted one, which was sir Thomas Grantham's case in the Common-Pleas, Hilary 2 & 3 Jam. 2. Being short, I shall give it in the words of the Report. "He bought a monster in the Indies, which was a man of that country, who had the shape of a child growing out of his breast as an excrescency all but his head. This man he brought hither, and exposed to the sight of the people for profit. The Indian turns Christian and was baptized, and was detained from his master, who brought a Homine Replegiando. The sheriff returned, that he had replevied the body; but doth not say the body in which sir Thomas claimed a property; wherenpon he was ordered to amend his return, and then the Court of Common-Pleas bailed him." 3 Mod. 120. It doth not appear, that the return was ever argued, or that the Court gave any opinion on this case; and therefore nothing can be inferred from it.

(*a*) Co. Litt. 121, b.

would the law, have restrained the courts of justice from receiving confession, except in an adverse way? If confession had been allowed as a mode of creating slavery, would the law have received the confession of one person as good evidence of slavery in another of the same blood, merely because they were descended from the same common ancestor? This last circumstance is of itself decisive; because it necessarily implied, that a slavery confessed was a slavery by descent.

On a consideration of these circumstances attending the acknowledgment of villenage, I think it impossible to doubt its being merely a confession of that antiquity in the slavery, which was otherwise necessary to be proved. But if a doubt can be entertained, the opinions of the greatest lawyers may be produced to remove it, and to shew, that, in consideration of law, the person confessing was a villein by descent and in blood. In the year-book of 43 E. 3, (*b*), it is laid down as a general rule, "that when one claims any man as his villein, it shall be intended always that he is his villein by reason of stock." Lord chief justice Hobart considers villenage by confession in this way, and says (*c*), "the confession in the court of record is not so much a creation, as it is in supposal of law a declaration of rightful villenage before, as a confession in other actions." Mr. Serjeant Rolle too, in his abridgment, when he is writing on villenage by acknowledgment, uses very strong words to the same effect. He says in one place (*d*), "it seems intended that title is made that he should be a villein by descent," and in another place (*e*), "it seems intended that title is made by prescription, wherefore the issue should also be villeins." The only instance I can find, of a Native Habendo founded on a previous acknowledgment of villenage, is a strong authority to the same purpose. In the 19th of Edward 2, (*f*) the dean and chapter of London brought a writ of Neifty to recover a villein, and concluded their declaration with mentioning his acknowledgment of the villenage on a former occasion, instead of producing their suit, or witnesses, as was necessary when the villenage had not been confessed: but notwithstanding the acknowledgment, the plaintiffs alledged a seizin of the villein with *esplees*, or receipt of profits from him, in the usual manner. This case is another proof, that a seizin previous to the acknowledgment was the real foundation of the lord's claim, and that the acknowledgment was merely used to estop the villein from contesting a fact which had been before solemnly confessed. However, I do admit, that under the form of acknowledgment there was a possibility of collusively creating slavery. But this was not practicable without the concurrence of the person himself who was to be the sufferer by the fraud; and it was not probable, that many persons should be found so base in mind, so false to themselves, as to sell themselves and their posterity, and to renounce the common protection and benefit of the law for a bare maintenance, which, by the wise provision of the law in this country, may always be had by the most needy and distressed, on terms infinitely less ignoble and severe. It should also be remembered, that such a collusion could scarcely be wholly prevented, so long as any of the real and unmanumitted descendants from the antient villeins remained; because there would have been the same possibility of defrauding the law on the actual trial of villenage, as by a previous acknowledgment. Besides, if collusions of this sort had ever become frequent, the legislature might have prevented their effect by an extraordinary remedy. It seems, that antiently such frauds were sometimes practised; and that free persons, in order to evade the trial of actions brought against them, alledged that they were villeins to a stranger to the suit, which, on account of the great improbability that a confession so disadvantageous should be void of truth, was a plea the common law did not suffer the plaintiff to deny. But a remedy was soon applied, and the statute of (*g*) 37 E. 3, was made, giving to the plaintiff a liberty of contesting such an allegation of villenage. If in these times it should be endeavoured to revive domestic slavery in England, by a like fraudulent confession of villenage, surely so unworthy an attempt, so gross an evasion of the law, would excite in this court the strongest disapprobation and resentment, and from parliament would receive an immediate and effectual remedy; I mean, a law declaring that villenage, as is most notoriously the fact, has been long expired for want of real objects, and therefore making void all precedent confessions of it, and prohibiting the courts of justice from recording a confession of villenage in future.

3. It may be objected, that though it is not usual in the wars between Christian powers to enslave prisoners, yet that some nations, particularly the several states on the coast of Barbary, still adhere to that inhuman practice; and that in case of our being at war with them, the law of nations would justify our king in retaliating; and consequently, that the law of England has not excluded the possibility of introducing a new slavery, as the arguments against it suppose.

But this objection may be easily answered; for if the arguments against a new slavery in England are well founded, they reach the king as well as his subjects. If it has been at all times the policy of the law of England not to recognize any slavery but the antient one of the villein, which is now expired; we cannot consistently attribute to the executive power a prerogative of rendering that policy ineffectual. It is true, that the law of nations may

(*b*) 43 E. 3. 4. (*c*) Hob. 99.
(*d*) 2 Ro. Abr. 732. pl. 6.
(*e*) Ib. pl. 8.
(*f*) Fitz. Abr. Villenage, 34.
(*g*) 37 E. 3, c. 16.

give a right of retaliating on an enemy, who enslaves his captives in war; but then the exercise of this right may be prevented or limited by the law of any particular country. A writer of eminence (*k*) on the law of nations, has a passage very applicable to this subject. His words are, "If the civil law of any nation does not allow of slavery, prisoners of war who are taken by that nation cannot be made slaves." He is justified in his observation not only by the reason of the thing, but by the practice of some nations, where slavery is as unlawful as it is in England. The Dutch (*i*) when at war with the Algerines, Tunisians, or Tripolitans, make no scruple of retaliating on their enemies; but slavery not being lawful in their European dominions, they have usually sold their prisoners of war as slaves in Spain, where slavery is still permitted. To this example I have only to add, that I do not know an instance, in which a prerogative of having captive slaves in England has ever been assumed by the crown; and it being also the policy of our law not to admit a new slavery, there appears neither reason nor fact to suppose the existence of a royal prerogative to introduce it.

4. Another objection will be, that there are English acts of parliament, which give a sanction to the slavery of negroes; and therefore that it is now lawful, whatever it might be antecedently to those statutes.

The statutes in favour of this objection are the 5 Geo. 2, c. 7, (*k*) which makes negroes in America liable to all debts, simple-contract as well as speciality, and the statutes regulating the African trade, particularly the 23 Geo. 2, c. 31, which in the preamble recites, that the trade to Africa is advantageous to Great Britain, and necessary for supplying its colonies with negroes. But the utmost which can be said of these statutes is, that they impliedly authorize the slavery of negroes in America; and it would be a strange thing to say, that permitting slavery there, includes a permission of slavery here. By an unhappy concurrence of circumstances, the slavery of negroes is thought to have become necessary in America; and therefore in America our legislature has permitted the slavery of negroes. But the slavery of negroes is unnecessary in England, and therefore the legislature has not extended the permission of it to England; and not having done so, how can this court be warranted to make such an extension?

5. The slavery of negroes being admitted to be lawful now in America, however questionable its first introduction there might be, it may be urged, that the *lex loci* ought to prevail, and that the master's property in the negro as a slave, having had a lawful commencement in America, cannot be justly varied by bringing him into England.

I shall answer this objection by explaining the limitation, under which the *lex loci* ought always to be received. It is a general rule (*l*), that the *lex loci* shall not prevail, if great inconveniences will ensue from giving effect to it. Now I apprehend, that no instance can be mentioned, in which an application of the *lex loci* would be more inconvenient, than in the case of slavery. It must be agreed, that where the *lex loci* cannot have effect without introducing the thing prohibited in a degree either as great, or nearly as great, as if there was no prohibition, there the greatest inconvenience would ensue from regarding the *lex loci*, and consequently it ought not to prevail. Indeed, by receiving it under such circumstances, the end of a prohibition would be frustrated, either entirely or in a very great degree; and so the prohibition of things the most pernicious in their tendency would become vain and fruitless. And what greater inconveniences can we imagine, than those, which would necessarily result from such an unlimited sacrifice of the municipal law to the law of a foreign country? I will now apply this general doctrine to the particular case of our own law concerning slavery. Our law prohibits the commencement of domestic slavery in England; because it disapproves of slavery, and considers its operation as dangerous and destructive to the whole community. But would not this prohibition be wholly ineffectual, if slavery could be introduced from a foreign country? In the course of time, though perhaps in a progress less rapid, would not domestic slavery become as general, and be as completely revived in England by introduction from our colonies and from foreign countries, as if it was permitted to revive by commencement here; and would not the same inconveniences follow? To prevent the revival of domestic slavery effectually, its introduction must be resisted universally, without regard to the place of its commencement; and therefore in the instance of slavery, the *lex loci* must yield to the municipal law. From the fact of there never yet having been any slavery in this country except the old and now expired one of villenage, it is evident, that hitherto our law has uniformly controlled the *lex loci* in this respect; and so long as the same policy of ex-

(*k*) Rutherf. Inst. Nat. L. v. 2, p. 576.

(*i*) 'Quia ipsa servitus inter Christianos 'ferè exolevit, eâ quoque non utimur in hostes 'captos. Possumus tamen, si ita placeat; imo 'utimur quandoque adversus eos, qui in nos 'utuntur. Quare et Belgæ quos Algerienses, 'Tunisanos, Tripolenses, in Oceano aut Mari 'Mediterraneo capiunt, volent in servitutem 'Hispanis vendere, nam ipsi Belgæ servos non 'habent, nisi in Asiâ Africâ et Americâ. Quin 'anno 1661, Ordines Generales Admiralio suo 'mandârunt, piratas captos in servitutem ven-'derent. Idemque observatum est anno 1664.' Bynkershoek Quæst. Jur. Publ. lib. 1, c. 3.

(*k*) 5 G. 2, c. 7, s. 4.

(*l*) See the chapter 'de conflictu legum di-'versarum in diversis imperiis,' in Huber. Prælect. p. 538.

abiding slavery is retained by the law of England, it must continue intitled to the same preference. Nor let it be thought a peculiar want of complaisance in the law of England, that disregarding the *lex loci* in the case of slaves, it gives immediate and entire liberty to them, when they are brought here from another country. Most of the other European states, in which slavery is discountenanced, have adopted a like policy.

In Scotland domestic slavery is (*m*) unknown, except so far as regards the (*n*) coalhewers and salt-makers, whose condition, it must be confessed, bears some resemblance to slavery; because all who have once acted in either of these capacities are compellable to serve, and fixed to their respective places of employment during life. But with this single exception, there is not the least vestige of slavery; and so jealous is the Scotch law of every thing tending to slavery, that it has been held to disallow contracts of service for life, or for a very long term; as, for sixty years (*o*). However, no particular case has yet happened, in which it has been necessary to decide, whether a slave of another country acquires freedom on his arrival in Scotland. In 1757 this question was depending in the Court of Session in the case of a negro; but the negro happening to die during the pendency of the cause, the question was not (*) determined. But when it is considered, that in the time of sir Thomas Craig, who wrote at least 150 years ago, slavery was even then a thing unheard of in Scotland, and that there are no laws (*p*) to regulate slavery, one can scarce doubt what opinion the lords of session would have pronounced, if the negro's death had not prevented a decision.

In the United Provinces slavery having fallen into disuse (*q*), all their writers agree, that slaves from another country become free the moment they enter into the Dutch territories (*r*). The same custom prevails in some of the neighbouring countries, particularly Brabant, and other parts of the Austrian Netherlands; and Gudelinus, an eminent civilian, who was formerly professor of law at Louvain in Brabant, relates from the annals of the supreme council at Mechlin, that, in the year 1531, an application for apprehending and surrendering a fugitive slave from Spain was on this account rejected (*s*).

In France the law is particularly explicit against regarding the *lex loci* in the case of domestic slavery: and though, in some of the provinces, a remnant of the antient slavery is still to be seen in the persons of the 'serfs' or 'gens de main-morte,' who are attached to particular lands (*t*), as villeins regardant formerly were in England; yet all the writers on the law of France agree, that the moment a slave arrives there from another country he acquires liberty, not in consequence of any written law, but merely by long usage having the force of law. There are many remarkable instances in which this rule against the admission of slaves from foreign countries has had effect in France. Two are mentioned by (*u*) Bodin; one being the case of a foreign merchant who had purchased a slave in Spain, and afterwards carried him into France; the other being the case of a Spanish ambassador, whose slave was declared free, notwithstanding the high and independent character of the slave's owner. This latter case has been objected to by some writers (*w*) on the law of nations, who do not disapprove of the general principle on

(*m*) See Crag. Jus Feud. lib. 1, dieges. 11, s. 32. Stair's Instit. b. 1, t. 2, s. 11, 12.

(*n*) Forb. Inst. part 1, b. 2, t. 3. Macdoual. Instit. vol. 1, p. 68.

(*o*) Macdoual. Instit. vol. 1, p. 68. But I must observe, that in the case relied on by Mr. Macdoual, the term of service was not the only material circumstance. The contract was between the masters and the crews of some fish boats; the latter binding themselves for a yearly allowance to serve in their respective boats during three times nineteen years, so that not one of them, during all that time, could remove from a particular village, or so much as from one boat to another. See Dict. Decis. tit. Pactum illicitum.

(*) Walk. Instit. Law of Scotl. chap. on master and servant.

(*p*) Sir Thomas Craig, mentioning the English villenage, says, 'Nullus est apud nos ejus 'usus, et mancipium nomen, nisi quod nonnulla 'in libro Regiæ Majestatis de nativis et ad li-'bertatem proclamantibus proponantur; quæ 'et ab Anglorum moribus sunt recepta, et nun-'quam in usum nostrum deducta.' Crag. Jus Feud. lib. 1, dieges. 11, s. 32.

(*q*) 'Belgæ servos non habent, nisi in Asiâ, 'Africâ, et Americâ.' Bynkersh. Quæst. Jur. Pub. lib. 1, c. 3. Another great Dutch lawyer adds, 'Nec cuiquam mortalium nunc licet 'sese venundare, aut aliâ ratione servitutis jure 'semel alteri addicere.' Voet Commentar. ad Pandect. lib. 1, tit. 5, s. 3.

(*r*) 'Servitus paulatim ab usu recessit, ejus-'que nomen hodie apud nos exolevit; adeo 'quidem ut servi, qui aliunde huc adducuntur, 'simul ac imperii nostri fines intrârunt, invitis 'ipsorum dominis ad libertatem proclamare 'possint: id quod et aliarum Christianârum 'gentium moribus receptum est.' Grœnewegen de Leg. Abrogat. in Hollandiâ, &c. p. 5. John Voet, in the place cited in the preceding note, expresses himself to the same effect.

(*s*) Gudelin. de Jur. Noviss. lib. 1, c. 5, et Vinn. in Instit. lib. 1, tit. 3, p. 32, edit. Heinecc.

(*t*) See Inst. au droit Franc. par M. Argou, ed. 1753, liv. 1, chap. 1, p. 4.

(*u*) Bodin. de Republic. lib. 1, cap. 5, de imperio herili. See several other instances mentioned in the Negro cause in the 13th volume of the Causes Celebres.

(*w*) Kirchner, de Legat. lib. 2, c. 1, num. 233; and after him Bynkershoek Juge Compet. des Ambassad. ed. par Barbeyr. c. 15, s. 9.

which liberty is given to slaves brought from foreign countries, but only complain of its application to the particular case of an ambassador. But, on the other hand, Wicquefort (*x*) blames the states of Holland for not following the example of the French, in a case which he mentions. After the establishment of the French colonies in South America, the kings of France thought fit to deviate from the strictness of the antient French law, in respect to slavery, and in them to permit and regulate the possession of negro slaves. The first edict for this purpose is said to have been one in April 1615, and another was made in May 1685 (*y*), which is not confined to negroes, but regulates the general police of the French islands in America, and is known by the name of the Code Noir. But notwithstanding these edicts, if negro slaves were carried from the French American islands into France, they were intitled to the benefit of the ancient French law, and became free on their arrival in France (*z*). To prevent this consequence, a third edict was made in October 1716, which permits the bringing of negro slaves into France from their American islands. The permission is granted under various restrictions; all tending to prevent the long continuance of negroes in France, to restrain their owners from treating them as property whilst they continue in their mother country, and to prevent the importation of fugitive negroes; and with a like view, a royal declaration was made in December 1738 (*a*), containing an exposition of the edict of 1716, and some additional provisions. But the antient law of France in favour of slaves from another country, still has effect, if the terms of the edict of 1716, and of the declaration of 1738 are not strictly complied with; or if the negro is brought from a place, to which they do not extend. This appears from two cases adjudged since the edict of 1716. In one (*b*) of them, which happened in 1738, a negro had been brought from the island of St. Domingo without observing the terms of the edict of 1716; and in the other (*c*), which was decided so late as in the year 1758, a slave had been brought from the East Indies, to which the edict doth not extend: and in both these cases the slaves were declared to be free.

Such are the examples drawn from the laws and usages of other European countries; and they fully evince, that wherever it is the policy to discountenance slavery, a disregard of the *lex loci*, in the case of slavery, is as well justified by general practice, as it is really founded on necessity. Nor is the justice of such proceeding less evident; for how can it be unjust to devest the master's property in his slave, when he is carried into a country, in which, for the wisest and most humane reasons, such property is known to be prohibited, and consequently cannot be lawfully introduced?

6. It may be contended, that though the law of England will not receive the negro as a slave, yet it may suspend the severe qualities of the slavery whilst the negro is in England, and preserve the master's right over him in the relation of a servant, either by presuming a contract for that purpose, or, without the aid of such a refinement, by compulsion of law grounded on the condition of slavery in which the negro was previous to his arrival here.

But insuperable difficulties occur against modifying and qualifying the slavery by this artificial refinement. In the present case, at all events, such a modification cannot be allowable; because, in the return, the master claims the benefit of the relation between him and the negro in the full extent of the original slavery. But for the sake of shewing the futility of the argument of modification, and in order to prevent a future attempt by the masters of negroes to avail themselves of it, I will try its force.

As to the presuming a contract of service against the negro, I ask at what time is its commencement to be supposed? If the time was before the negro's arrival in England, it was made when he was in a state of slavery, and consequently without the power of contracting. If the time presumed was subsequent, the presumption must begin the moment of the negro's arrival here, and consequently be founded on the mere fact of that arrival, and the consequential enfranchisement by operation of law. But is not a slavery, determined against the consent of the master, a strange foundation for presuming a contract between him and the slave? For a moment, however, I will allow the reasonableness of presuming such a contract, or I will suppose it to be reduced into writing; but then I ask, what are the terms of this contract? To answer the master's purpose, it must be a contract to serve the master here; and when he leaves this country to return with him into America, where the slavery will again attach upon the negro. In plain terms, it is a contract to go into slavery whenever the master's occasions shall require. Will the law of England disallow the introduction of slavery, and therefore emancipate the negro from it; and yet give effect to a contract founded solely upon slavery, in slavery ending? Is it possible, that the

(*x*) Wicq. Embassador, Engl. ed. p. 268.

(*y*) Decisions Nouvelles, par M. Denisart, tit. Negres.—Denisart mentions, that the edict of 1685 is registered with the sovereign council at Domingo, but has never been registered in any of the French parliaments.

(*z*) Nouvelles Decisions par M. Denisart, tit. Negres, s. 27.

(*a*) M. Denisart observes, that the edict of 1716, and the declaration of 1738, do not appear to have been ever registered by the parliament of Paris, because they are considered as contrary to the common law of the kingdom.—See his Nouvelles Decisions, tit. Negres. And see above, p. 12.

(*b*) See Causes Celebres, vol. 13, p. 492.

(*c*) Nouvelles Decisions par M. Denisart, tit. Negres, s. 147.

law of England can be so insulting to the negro, so inconsistent with itself?

The argument of modification, independently of contract, is equally delusive.—There is no known rule by which the Court can guide itself in a partial reception of slavery. Besides, if the law of England would receive the slavery of the negro in any way, there can be no reason why it should not be admitted in the same degree as the slavery of the villein; but the argument of modification necessarily supposes the contrary; because, if the slavery of the negro was received in the same extent, then it would not be necessary to have recourse to a qualification. There is also one other reason still more repugnant to the idea of modifying the slavery. If the law of England would modify the slavery, it would certainly take away its most exceptionable qualities, and leave those which are least oppressive. But the modification required will be insufficient for the master's purpose, unless the law leaves behind a quality the most exceptionable, odious and oppressive; an arbitrary power of reviving the slavery in its full extent, by removal of the negro to a place, in which the slavery will again attach upon him with all its original severity (*d*).

From this examination of the several objections in favour of slavery in England, I think myself well warranted to observe, that instead of being weakened, the arguments against slavery in England have derived an additional force. The result is, not merely that negroes become free on being brought into this country, but that the law of England confers the gift of liberty entire and unincumbered; not in name only, but really and substantially; and consequently that Mr. Steuart cannot have the least right over Sommersett the negro, either in the open character of a slave, or in the disguised one of an ordinary servant.

(2.) In the outset of the argument I made a second question on Mr. Steuart's authority to enforce his right, if he has any, by transporting the negro out of England. Few words will be necessary on this point, which my duty as counsel for the negro requires me to make, in order to give him every possible chance of a discharge from his confinement, and not from any doubt of success on the question of slavery.

(2) Point on Mr. Steuart's authority to enforce his right to the negro by transporting him out of England.

If in England the negro continues a slave to Mr. Steuart, he must be content to have the negro subject to those limitations which the laws of villenage imposed on the lord in the enjoyment of his property in the villein; there being no other laws to regulate slavery in this country. But even those laws did not permit that high act of dominion which Mr. Steuart has exercised; for they restrained the lord from forcing the villein out of England. The law, by which the lord's power over his villein was thus limited, has reached the present times. It is a law (*e*) made in the time of the first William, and the words of it are, 'probibemus ut nullus vendat hominem extra patriam' (*f*).

If Mr. Steuart had claimed the negro as a servant by contract, and in his return to the Habeas Corpus had stated a written agreement to leave England as Mr. Steuart should require, signed by the negro, and made after his arrival in England, when he had a capacity of contracting, it might then have been a question, whether such a contract in writing would have warranted Mr. Steuart in compelling the performance of it, by forcibly transporting the negro out of this country? I am myself satisfied, that no contract, however solemnly entered into, would have justified such violence. It is contrary to the genius of the English law, to allow any enforcement of agreements or contracts, by any other compulsion, than that from our courts of justice. The exercise of such a power is not lawful in cases of agreements for property; much less ought it to be so for enforcing agreements against the person. Besides, is it reasonable to suppose, that the law of England would permit that against the servant by contract, which is denied against the slave? Nor are great authorities wanting to acquit the law of England of such an inconsistency, and to shew, that a contract will not warrant a compulsion by imprisonment, and consequently much less by transporting the party out of this kingdom. Lord Hobart, whose extraordinary learning, judgment, and abilities, have always ranked his opinion amongst the highest authorities of law, expressly says (*g*), that the body of a freeman cannot be made subject to distress or imprisonment by contract, but only by judgment. There is, however, one case, in which it is said that the performance of a service to be done abroad, may be compelled without the

(*d*) This answer to the argument of modification, includes an answer to the supposition, that an action of trespass 'per quod servitium 'amisit,' will lie for loss of a negro's service. I am persuaded, that the case, in which that remedy was loosely suggested, was one in which the question was about a negro being out of England. I mean the case of Smith and Gould, 2 Salk. 667. Another writ, hinted at in the same case, is the writ of trespass, 'quare 'captivum suum cepit;'—which is not in the least applicable to the negro, or any other slave. It supposes the plaintiff to have had one of the king's enemies in his custody as a prisoner of war, and to have had a right of detaining him till payment of a ransom. See Reg. Br. 102, b. and 2 Salk. 667.

(*e*) Wilk. Leg. Saxon. p. 229, et cap. 65, Leg. Gulielm. 1.

(*f*) This law furnishes one more argument against slavery imported from a foreign country. If the law of England did not disallow the admission of such a slavery, would it restrain the master from taking his slave out of the kingdom?

(*g*) Hob. 61.

intervention of a court of justice; I mean the case of an infant-apprentice, bound by proper indentures to a mariner or other person, where the nature of the service imports, that it is to be done out of the kingdom (*h*), and the party, by reason of his infancy, is liable to a coercion not justifiable in ordinary cases. The Habeas Corpus Act (*i*) goes a step further; and persons who, by contract in writing, agree with a merchant or owner of a plantation, or any other person, to be transported beyond sea, and receive earnest on such agreements, are excepted from the benefit of that statute. I must say, that the exception appears very unguarded; and if the law as it was previous to this statute, did entitle the subject to the Habeas Corpus in the case which the statute excepts, it can only operate in excluding him in that particular case from the additional provisions of the statute, and cannot, I presume, be justly extended to deprive him of the Habeas Corpus, as the common law gave it before the making of the statute.

Conclusion. Upon the whole, the return to the Habeas Corpus in the present case, in whatever way it is considered, whether by inquiry into the foundation of Mr. Steuart's right to the person and service of the negro, or by reference to the violent manner in which it has been attempted to enforce that right, will appear equally unworthy of this court's approbation. By condemning the return, the revival of domestic slavery will be rendered as impracticable by introduction from our colonies and from other countries, as it is by commencement here. Such a judgment will be no less conducive to the public advantage, than it will be conformable to natural justice, and to principles and authorities of law; and this court, by effectually obstructing the admission of the new slavery of negroes into England, will in these times reflect as much honour on themselves, as the great judges, their predecessors, formerly acquired, by contributing so uniformly and successfully to the suppression of the old slavery of villenage.

ARGUMENTS OF THE OTHER COUNSEL.

Mr. *Alleyne*.—Though it may seem presumption in me to offer any remarks, after the elaborate discourse just now delivered, yet I hope the indulgence of the Court; and shall confine my observations to some few points, not included by Mr. Hargrave. It is well known to your lordships, that much has been asserted by the ancient philosophers and civilians, in defence of the principles of slavery: Aristotle has particularly enlarged on that subject. An observation still it is, of one of the most able, most ingenious, most convincing writers of modern times, whom I need not hesitate, on this occasion, to prefer to Aristotle, the great Montesquieu, that Aristotle, on this subject, reasoned very unlike the philosopher. He draws his precedents from barbarous ages and nations, and then deduces maxims from them, for the contemplation and practice of civilized times and countries. If a man who in battle has had his enemy's throat at his sword's point, spares him, and says therefore he has power over his life and liberty, is this true? By whatever duty he was bound to spare him in battle, (which he always is, when he can with safety) by the same he obliges himself to spare the life of the captive, and restore his liberty as soon as possible, consistent with those considerations from whence he was authorised to spare at first; the same indispensible duty operates throughout. As a contract: in all contracts there must be power on one side to give, on the other to receive; and a competent consideration. Now, what power can there be in any man to dispose of all the rights vested by nature and society in him and his descendants? He cannot consent to part with them, without ceasing to be a man; for they immediately flow from, and are essential to, his condition as such: they cannot be taken from him, for they are not his, as a citizen or a member of society merely; and are not to be resigned to a power inferior to that which gave them. With respect to consideration, what shall be adequate? As a speculative point, slavery may a little differ in its appearance, and the relation of master and slave, with the obligations on the part of the slave, may be conceived; and merely in this view, might be thought to take effect in all places alike; as natural relations always do. But slavery is not a natural, it is a municipal relation; an institution therefore confined to certain places, and necessarily dropt by passage into a country where such municipal regulations do not subsist. The negro making choice of his habitation here, has subjected himself to the penalties, and is therefore entitled to the protection of our laws. One remarkable case seems to require being mentioned: some Spanish criminals having escaped from execution, were set free in France. [Lord *Mansfield*.—Note the distinction in the case: in this case, France was not bound to judge by the municipal laws of Spain; nor was to take cognizance of the offences supposed against that law.] There has been started an objection, that a company having been established by our government for the trade of slaves, it were unjust to deprive them here.—No: the government incorporated them with such powers as individuals had used by custom, the only title on which that trade subsisted; I conceive, that had never extended, nor could extend, to slaves brought hither; it was not enlarged at all by the incorporation of that company, as to the nature or limits of its authority. It is said, let slaves know they are all free as soon as arrived here, they will flock over in vast numbers, over-run this country, and desolate the plantations. There are too strong penalties by which they will be kept in; nor are the persons who might convey them over much induced to attempt it; the depica-

(*h*) Hob. 134. (*i*) 31 Cha. 2, c. 2, § 13.

ble condition in which negroes have the misfortune to be considered, effectually prevents their importation in any considerable degree. Ought we not, on our part, to guard and preserve that liberty by which we are distinguished by all the earth! to be jealous of whatever measure has a tendency to diminish the veneration due to the first of blessings? The horrid cruelties, scarce credible in recital, perpetrated in America, might, by the allowance of slaves amongst us, be introduced here. Could your lordship, could any liberal and ingenuous temper, endure, in the fields bordering on this city, to see a wretch bound for some trivial offence to a tree, torn and agonizing beneath the scourge? Such objects might by time become familiar, become unheeded by this nation; exercised, as they are now, to far different sentiments, may those sentiments never be extinct! the feelings of humanity! the generous sallies of free minds! May such principles never be corrupted by the mixture of slavish customs! Nor can I believe, we shall suffer any individual living here to want that liberty, whose effects are glory and happiness to the public and every individual.

Mr. Wallace.—The question has been stated, whether the right can be supported here; or, if it can, whether a course of proceedings at law be not necessary to give effect to the right? It is found in three quarters of the globe, and in part of the fourth. In Asia the whole people; in Africa and America far the greater part; in Europe great numbers of the Russians and Polanders. As to captivity in war, the Christian princes have been used to give life to the prisoners; and it took rise probably in the Crusades, when they gave them life, and sometimes enfranchised them, to inlist under the standard of the cross, against the Mahometans. The right of a conqueror was absolute in Europe, and is in Africa. The natives are brought from Africa to the West Indies; purchase is made there, not because of positive law, but there being no law against it. It cannot be in consideration by this or any other court, to see, whether the West India regulations are the best possible; such as they are, while they continue in force as laws, they must be adhered to. As to England not permitting slavery, there is no law against it; nor do I find any attempt has been made to prove the existence of one. Villenage itself has all but the name. Though the dissolution of monasteries, amongst other material alterations, did occasion the decay of that tenure, slaves could breathe in England: for villeins were in this country, and were mere slaves, in Elizabeth. Sheppard's Abridgment, afterwards, says they were worn out in his time. [Lord Mansfield mentions an assertion, but does not recollect the author, that two only were in England in the time of Charles the 2d, at the time of the abolition of tenures.] In the cases cited, the two first directly affirm an action of trover, an action appropriated to mere common chattels. Lord Holt's opinion, is a mere *dictum*, a decision unsupported by precedent. And if it be objected, that a proper action could not be brought, it is a known and allowed practice in mercantile transactions, if the cause arises abroad, to lay it within the kingdom: therefore the contract in Virginia might be laid to be in London, and would not be traversable. With respect to the other cases, the particular mode of action was alone objected to; had it been an action 'per quod servitium amisit,' for loss of service, the Court would have allowed it. The Court called the person, for the recovery of whom it was brought, a slavish servant, in Chamberlayne's case. Lord Hardwicke, and the afterwards lord chief justice Talbot, then attorney and solicitor-general, pronounced a slave not free by coming into England. It is necessary the masters should bring them over; for they cannot trust the whites, either with the stores or the navigating the vessel. Therefore, the benefit taken on the Habeas Corpus Act ought to be allowed.

Lord *Mansfield* observes, The case alluded to was upon a petition in Lincoln's Inn Hall, after dinner; probably, therefore, might not, as he believes the contrary is not unusual at that hour, be taken with much accuracy. The principal matter was then, on the earnest solicitation of many merchants, to know, whether a slave was freed by being made a Christian? And it was resolved, not. It is remarkable, though the English took infinite pains before to prevent their slaves being made Christians, that they might not be freed, the French suggested they must bring their's into France, (when the edict of 1706 was petitioned for,) to make them Christians. He said, the distinction was difficult as to slavery, which could not be resumed after emancipation, and yet the condition of slavery, in its full extent, could not be tolerated here. Much consideration was necessary, to define how far the point should be carried.

The Court must consider the great detriment to proprietors, there being so great a number in the ports of this kingdom, that many thousands of pounds would be lost to the owners, by setting them free. (A gentleman observed, no great danger; for in a whole fleet, usually, there would not be six slaves.) As to France, the case stated decides no farther than that kingdom; and there freedom was claimed, because the slave had not been registered in the port where he entered, conformably to the edict of 1706. Might not a slave as well be freed by going out of Virginia to the adjacent country, where there are no slaves, if change to a place of contrary custom was sufficient? A statute by the legislature, to subject the West India property to payment of debts, I hope, will be thought some proof; another act devests the African company of their slaves, and vests them in the West India Company: I say, I hope these are proofs the law has interfered for the maintenance of the trade in slaves, and the transferring of slavery. As for want of application properly to a court of justice; a common servant may be corrected

here by his master's private authority. Habeas Corpus acknowledges a right to seize persons by force employed to serve abroad. A right of compulsion there must be, or the master will be under the ridiculous necessity of neglecting his proper business, by staying here to have their service, or must be quite deprived of those slaves he has been obliged to bring over. The case, as to service for life, was not allowed, merely for want of a deed to pass it.'

The Court approved Mr. Alleyne's opinion of the distinction, how far municipal laws were to be regarded: instanced the right of marriage; which, properly solemnized, was in all places the same, but the regulations of power over children from it, and other circumstances, very various; and advised, if the merchants thought it so necessary, to apply to parliament, who could make laws.

Adjourned till that day se'nnight.

Mr. *Dunning*.—It is incumbent on me to justify captain Knowles's detainer of the negro; this will be effected, by proving a right in Mr. Steuart; even a supposed one: for till that matter was determined, it were somewhat unaccountable that a negro should depart his service, and put the means out of his power of trying that right to effect, by a flight out of the kingdom. I will explain what appears to me the foundation of Mr. Steuart's claim. Before the writ of Habeas Corpus issued in the present case, there was, and there still is, a great number of slaves in Africa, (from whence the American plantations are supplied) who are saleable, and in fact sold. Under all these descriptions is James Sommersett. Mr. Steuart brought him over to England; purposing to return to Jamaica, the negro chose to depart the service, and was stopt and detained by captain Knowles, until his master should set sail and take him away to be sold in Jamaica. The gentlemen on the other side, to whom I impute no blame, but on the other hand much commendation, have advanced many ingenious propositions; part of which are undeniably true, and part (as is usual in compositions of ingenuity) very disputable. It is my misfortune to address an audience, the greater part of which, I fear, are prejudiced the other way. But wishes, I am well convinced, will never enter into your lordships' minds, to influence the determination of the point: this cause must be what in fact and law it is; its fate, I trust, therefore, depends on fixt invariable rules, resulting by law from the nature of the case. For myself, I would not be understood to intimate a wish in favour of slavery, by any means; nor on the other side to be supposed the maintainer of an opinion contrary to my own judgment. I am bound by duty to maintain those arguments which are most useful to captain Knowles, as far as is consistent with truth; and if his conduct has been agreeable to the laws throughout, I am under a farther indispensible duty to support it. I ask no other attention than may naturally result from the importance of the question: less than this I have no reason to expect; more, I neither demand nor wish to have allowed. Many alarming apprehensions have been entertained of the consequence of the decision, either way. About 14,000 slaves, from the most exact intelligence I am able to procure, are at present here; and some little time past, 166,914 in Jamaica; there are, besides, a number of wild negroes in the woods. The computed value of a negro in those parts 50*l*. a head. In the other islands I cannot state with the same accuracy, but on the whole they are about as many. The means of conveyance, I am told, are manifold; every family almost brings over a great number; and will, be the decision on which side it may. Most negroes who have money (and that description I believe will include nearly all) make interest with the common sailors to be carried hither. There are negroes not falling under the proper denomination of any yet mentioned, descendants of the original slaves, the aborigines, if I may call them so; these have gradually acquired a natural attachment to their country and situation; in all insurrections they side with their masters: otherwise the vast disproportion of the negroes to the whites, (not less probably than that of 100 to one) would have been fatal in its consequences. There are very strong and particular grounds of apprehension, if the relation in which they stand to their masters is utterly to be dissolved on the instant of their coming into England. Slavery, say the gentlemen, is an odious thing; the name is: and the reality; if it were as one has defined, and the rest supposed it. If it were necessary to the idea and the existence of James Sommersett, that his master, even here, might kill, nay, might eat him, might sell living or dead, might make him and his descendants property alienable, and thus transmissible to posterity; this, how high soever my ideas may be of the duty of my profession, is what I should decline pretty much to defend or assert, for any purpose, seriously; I should only speak of it to testify my contempt and abhorrence. But this is what at present I am not at all concerned in; unless captain Knowles, or Mr. Steuart, have killed or eat him. Freedom has been asserted as a natural right, and therefore unalienable and unrestrainable; there is perhaps no branch of this right, but in some at all times, and in all places at different times, has been restrained: nor could society otherwise be conceived to exist. For the great benefit of the public and individuals, natural liberty, which consists in doing what one likes, is altered to the doing what one ought. The gentlemen who have spoke with so much zeal, have supposed different ways by which slavery commences; but have omitted one, and rightly; for it would have given a more favourable idea of the nature of that power against which they combat. We are apt (and great authorities support this way of speaking) to call those nations universally, whose internal police we are ignorant of, barbarians; (thus the Greeks, part

tinction, stiled many nations, whose customs, generally considered, were far more justifiable and commendable than their own :) unfortunately, from calling them barbarians, we are apt to think them so, and draw conclusions accordingly. There are slaves in Africa by captivity in war, but the number far from great; the country is divided into many small, some great territories, who do, in their wars with one another, use this custom. There are of these people, men who have a sense of the right and value of freedom; but who imagine that offences against society are punishable justly by the severe law of servitude. For crimes against property, a considerable addition is made to the number of slaves. They have a process by which the quantity of the debt is ascertained; and if all the property of the debtor in goods and chattels is insufficient, he who has thus dissipated all he has besides, is deemed property himself; the proper officer (sheriff we may call him) seizes the insolvent, and disposes of him as a slave. We don't contend under which of these the unfortunate man in question is; but his condition was that of servitude in Africa; the law of the land of that country disposed of him as property, with all the consequences of transmission and alienation; the statutes of the British legislature confirm this condition; and thus he was a slave both in law and fact. I do not aim at proving these points; not because they want evidence, but because they have not been controverted, to my recollection, and are, I think, incapable of denial. Mr. Stewart, with this right, crossed the Atlantic, and was not to have the satisfaction of discovering, till after his arrival in this country, that all relation between him and the negro, as master and servant, was to be matter of controversy, and of long legal disquisition. A few words may be proper, concerning the Russian slave, and the proceedings of the House of Commons on that case. It is not absurd in the idea, as quoted, nor improbable as matter of fact; the expression has a kind of absurdity. I think, without any prejudice to Mr. Stewart, or the merits of this cause, I may admit the utmost possible to be desired, as far as the case of that slave goes. The master and slave were both, (or should have been at least) on their coming here, new creatures. Russian slavery, and even the subordination amongst themselves, in the degree they use it, is not here to be tolerated. Mr. Alleyne justly observes, the municipal regulations of one country are not binding on another; but does the relation cease where the modes of creating it, the degrees in which it subsists, vary? I have not heard, nor, I fancy, is there any intention to affirm, the relation of master and servant ceases here? I understand the municipal relations differ in different colonies, according to humanity, and otherwise. A distinction was endeavoured to be established between natural and municipal relations; but the natural relations are not those only which attend the person of the man, political do so too; with which the municipal are most closely connected: municipal laws, strictly, are those confined to a particular place; political, are those in which the municipal laws of many states may and do concur. The relation of husband and wife, I think myself warranted in questioning, as a natural relation: does it subsist for life; or to answer the natural purposes which may reasonably be supposed often to terminate sooner? Yet this is one of those relations which follow a man every where. If only natural relations had that property, the effect would be very limited indeed. In fact, the municipal laws are principally employed in determining the manner by which relations are created; and which manner varies in various countries, and in the same country at different periods; the political relation itself continuing usually unchanged by the change of place. There is but one form at present with us, by which the relation of husband and wife can be constituted; there was a time when otherwise: I need not say other nations have their own modes, for that and other ends of society. Contract is not the only means, on the other hand, of producing the relation of master and servant; the magistrates are empowered to oblige persons under certain circumstances to serve. Let me take notice, neither the air of England is too pure for a slave to breathe in, nor have the laws of England rejected servitude. Villenage in this country is said to be worn out; the propriety of the expression strikes me a little. Are the laws not existing by which it was created? A matter of more curiosity than use, it is, to enquire when that set of people ceased. The statute of tenures did not however abolish villenage in gross; it left persons of that condition in the same state as before; if their descendants are all dead, the gentlemen are right to say the subject of those laws is gone, but not the law; if the subject revives, the law will lead the subject. If the statute of Charles the 2d, ever be repealed, the law of villenage revives in its full force. If my learned brother the serjeant, or the other gentlemen who argued on the supposed subject of freedom, will go through an operation my reading assures me will be sufficient for that purpose, I shall claim them as property. I won't, I assure them, make a rigorous use of my power; I will neither sell them, eat them, nor part with them. It would be a great surprize, and some inconvenience, if a foreigner bringing over a servant, as soon as he got hither, must take care of his carriage, his horse, and himself in whatever method he might have the luck to invent. He must find his way to London on foot. He tells his servant, Do this; the servant replies, Before I do it, I think fit to inform you, Sir, the first step on this happy land sets all men on a perfect level; you are just as much obliged to obey my commands. Thus, neither superior, or inferior, both go without their dinner. We should find singular comfort, on entering the limits of a foreign country, to be thus at once devested of all attendance and all accommoda-

tion. The gentlemen have collected more reading than I have leisure to collect, or industry (I must own) if I had leisure: very laudable pains have been taken, and very ingenious, in collecting the sentiments of other countries, which I shall not much regard, as affecting the point or jurisdiction of this court. In Holland, so far from perfect freedom, (I speak from knowledge) there are, who without being conscious of contract, have for offences perpetual labour imposed, and death the condition annexed to non-performance. Either all the different ranks must be allowed natural, which is not readily conceived, or there are political ones, which cease not on change of soil. But in what manner is the negro to be treated? How far lawful to detain him? My footman, according to my agreement, is obliged to attend me from this city, or he is not; if no condition, that he shall not be obliged, from hence he is obliged, and no injury done.

A servant of a sheriff, by the command of his master, laid hand gently on another servant of his master, and brought him before his master, who himself compelled the servant to his duty; an action of assault and battery, and false imprisonment, was brought; and the principal question was, on demurrer, whether the master could command the servant, though he might have justified his taking of the servant by his own hands? The convenience of the public is far better provided for, by this private authority of the master, than if the lawfulness of the command were liable to be litigated every time a servant thought fit to be negligent or troublesome.

Is there a doubt, but a negro might interpose in the defence of a master, or a master in defence of a negro? If to all purposes of advantage, mutuality requires the rule to extend to those of disadvantage. It is said, as not formed by contract, no restraint can be placed by contract. Whichever way it was formed, the consequences, good or ill, follow from the relation, not the manner of producing it. I may observe, there is an establishment, by which magistrates compel idle or dissolute persons, of various ranks and denominations, to serve. In the case of apprentices bound out by the parish, neither the trade is left to the choice of those who are to serve, nor the consent of parties necessary; no contract therefore is made in the former instance, none in the latter; the duty remains the same. The case of contract for life quoted from the year-books, was recognized as valid; the solemnity only of an instrument judged requisite. Your lordships, (this variety of service, with divers other sorts, existing by law here,) have the option of classing him amongst those servants which he most resembles in condition: therefore, (it seems to me) are by law authorised to enforce a service for life in the slave, that being a part of his situation before his coming hither; which, as not incompatible, but agreeing with our laws, may justly subsist here: I think, I might say, must necessarily subsist, as a consequence of a previous right in Mr. Steuart, which our institutions, not dissolving, confirm. I don't insist on all the consequences of villenage; enough is established for our cause, by supporting the continuance of the service. Much has been endeavoured, to raise a distinction, as to the lawfulness of the negro's commencing slave, from the difficulty or impossibility of discovery by what means, under what authority, he became such. This, I apprehend, if a curious search were made, not utterly inexplicable; nor the legality of his original servitude difficult to be proved. But to what end? Our legislature, where it finds a relation existing, supports it in all suitable consequences, without using to enquire how it commenced. A man enlists for no specified time; the contract in construction of law, is for a year: the legislature, when once the man is enlisted, interposes annually to continue him in the service, as long as the public has need of him. In times of public danger he is forced into the service; the laws from thence forward find him a soldier, make him liable to all the burden, confer all the rights (if any rights there are of that state) and enforce all penalties of neglect of any duty in that profession, as much and as absolutely, as if by contract he had so disposed of himself. If the Court see a necessity of entering into the large field of argument, as to right of the unfortunate man, and service appears to them deducible from a discussion of that nature to him, I neither doubt they will, nor wish they should not. As to the purpose of Mr. Steuart and captain Knowles, my argument does not require trover should lie, as for recovering of property, nor trespass: a form of action there is, the writ Per Quod Servitium Amisit, for loss of service, which the Court would have recognized; if they allowed the means of suing a right, they allowed the right. The opinion cited, to prove the negroes free on coming hither, only declares them not saleable; does not take away their service. I would say, before I conclude, not for the sake of the court, of the audience; the matter now in question, interests the zeal for freedom of no person, if truly considered; it being only, whether I must apply to a court of justice, (in a case, where if the servant was an Englishman I might use my private authority to enforce the performance of the service, according to its nature,) or may, without force or outrage, take my servant myself, or by another. I hope, therefore, I shall not suffer in the opinion of those whose honest passions are fired at the name of slavery. I hope I have not transgressed my duty to humanity; nor doubt I your lordship's discharge of yours to justice.

Davy, Serj.—My learned friend has thought proper to consider the question in the beginning of his speech, as of great importance: it is indeed so; but not for those reasons principally assigned by him. I apprehend, my lord, the honour of England, the honour of

the laws of every Englishman, here or abroad, is now concerned. He observes, the number is 14,000 or 15,000; if so, high time to put an end to the practice; more especially, since they must be sent back as slaves, though servants here. The increase of such inhabitants, not interested in the prosperity of a country, is very pernicious; in an island, which can, as such, not extend its limits, nor consequently maintain more than a certain number of inhabitants, dangerous in excess. Money from foreign trade (or any other means) is not the wealth of a nation; nor conduces any thing to support it, any farther than the produce of the earth will answer the demand of necessaries. In that case money enriches the inhabitants, as being the common representative of those necessaries; but this representation is merely imaginary and useless, if the encrease of people exceeds the annual stock of provisions requisite for their subsistence. Thus, foreign superfluous inhabitants augmenting perpetually, are ill to be allowed; a nation of enemies in the heart of a state, still worse. Mr. Dunning availed himself of a wrong interpretation of the word 'natural:' it was not used in the sense in which he thought fit to understand that expression; it was used as moral, which no laws can supersede. All contracts, I do not venture to assert, are of a moral nature; but I know not any law to confirm an immoral contract, and execute it. The contract of marriage is a moral contract, established for moral purposes, enforcing moral obligations; the right of taking property by descent, the legitimacy of children; (who in France are considered legitimate, though born before the marriage, in England not): these, and many other consequences, flow from the marriage properly solemnized; are governed by the municipal laws of that particular state, under whose institutions the contracting and disposing parties live as subjects; and by whose established forms they submit the relation to be regulated, so far as its consequences, not concerning the moral obligation, are interested. In the case of Thorn and Watkins, in which your lordship was counsel, determined before lord Hardwicke—A man died in England, with effects in Scotland; having a brother of the whole, and a sister of the half blood: the latter, by the laws of Scotland, could not take. The brother applies for administration to take the whole estate, real and personal, into his own hands, for his own use; the sister files a bill in Chancery. The then Mr. Attorney-General puts in answer for the defendant; and affirms, the estate, as being in Scotland, and descending from a Scotchman, should be governed by that law. Lord Hardwicke overruled the objection against the sister's taking; declared there was no pretence for it; and spoke to this effect, and nearly in the following words—"Suppose a foreigner has effects in our stocks, and dies abroad; they must be distributed according to the laws, not of the place where his effects were, but of that to which as a subject he belonged at the time of his death." All relations governed by municipal laws, must be so far dependant on them, that if the parties change their country the municipal laws give way, if contradictory to the political regulations of that other country. [See the cases cited in Fabrigas *v.* Mostyn, *inf.*] In the case of master and slave, being no moral obligation, but founded on principles, and supported by practice, utterly foreign to the laws and customs of this country, the law cannot recognize such relation. The arguments founded on municipal regulations, considered in their proper nature, have been treated so fully, so learnedly, and ably, as scarce to leave any room for observations on that subject: any thing I could offer to enforce, would rather appear to weaken the proposition, compared with the strength and propriety with which that subject has already been explained and urged. I am not concerned to dispute, the negro may contract to serve; nor deny the relation between them, while he continues under his original proprietor's roof and protection. It is remarkable, in all Dyer, (for I have caused a search to be made as far as the 4th of Henry the 8th,) there is not one instance of a man's being held a villein who denied himself to be one; nor can I find a confession of villenage in those times. [Lord *Mansfield*;—The last confession of villenage extant, is in the 19th of Henry the 6th.] If the Court would acknowledge the relation of master and servant, it certainly would not allow the most exceptionable part of slavery; that of being obliged to remove, at the will of the master, from the protection of this land of liberty, to a country where there are no laws; or hard laws to insult him. It will not permit slavery suspended for a while, suspended during the pleasure of the master. The instance of master and servant commencing without contract; and that of apprentices against the will of the parties, (the latter found in its consequences exceedingly pernicious;) both these are provided by special statutes of our own municipal law. If made in France, or any where but here, they would not have been binding here. To punish not even a criminal for offences against the laws of another country; to set free a galley-slave, who is a slave by his crime; and make a slave of a negro, who is one, by his complexion; is a cruelty and absurdity that I trust will never take place here: such as, if promulged, would make England a disgrace to all the nations under heaven: for the reducing a man, guiltless of any offence against the laws, to the condition of slavery, the worst and most abject state. Mr. Dunning has mentioned, what he is pleased to term philosophical and moral grounds, I think, or something to that effect, of slavery; and would not by any means have us think disrespectfully of those nations, whom we mistakenly call barbarians, merely for carrying on that trade: for my part, we may be warranted, I believe, in affirming the morality or propriety of the practice does not

enter their heads; they make slaves of whom they think fit. For the air of England; I think, however, it has been gradually purifying ever since the reign of Elizabeth. Mr. Dunning seems to have discovered so much, as he finds it changes a slave into a servant; though unhappily he does not think it of efficacy enough to prevent that pestilent disease reviving, the instant the poor man is obliged to quit (voluntarily quits, and legally it seems we ought to say,) this happy country. However, it has been asserted, and is now repeated by me, this air is too pure for a slave to breathe in: I trust, I shall not quit this court without certain conviction of the truth of that assertion.

Lord *Mansfield*.—The question is, if the owner had a right to detain the slave, for the sending of him over to be sold in Jamaica. In five or six cases of this nature, I have known it to be accommodated by agreement between the parties: on its first coming before me, I strongly recommended it here. But if the parties will have it decided, we must give our opinion. Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law: in which the difficulty will be principally from the inconvenience on both sides. Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of enquiry; which makes a very material difference. The now question is, Whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws? The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate. On the other hand, should we think the coercive power cannot be exercised: it is now about 50 years since the opinion given by two of the greatest men of their own or any times, (since which no contract has been brought to trial, between the masters and slaves;) the service performed by the slaves without wages, is a clear indication they did not think themselves free by coming hither. The setting 14,000 or 15,000 men at once loose by a solemn opinion, is very disagreeable in the effects it threatens. There is a case in Hobart, (Caventry and Woodfall,) where a man had contracted to go as a mariner: but the now case will not come within that decision. Mr. Steuart advances no claims on contract; he rests his whole demand on a right to the negro as slave, and mentions the purpose of detainure to be the sending of him over to be sold in Jamaica. If the parties will have judgment, 'fiat justitia, ruat cœlum;' let justice be done whatever be the consequence. 50*l.* a-head may not be a high price; then a loss follows to the proprietors of above 700,000*l.* sterling. How would the law stand with respect to their settlement; their wages? How many actions for any slight coercion by the master? We cannot in any of these points direct the law; the law must rule us. In these particulars, it may be matter of weighty consideration, what provisions are made or set by law. Mr. Steuart may end the question, by discharging or giving freedom to the negro. I did think at first to put the matter to a more solemn way of argument: but if my brothers agree, there seems no occasion. I do not imagine, after the point has been discussed on both sides so extremely well, any new light could be thrown on the subject. If the parties chuse to refer it to the Common Pleas, they can give themselves that satisfaction whenever they think fit. An application to parliament, if the merchants think the question of great commercial concern, is the best, and perhaps the only method of settling the point for the future. The Court is greatly obliged to the gentlemen of the bar who have spoke on the subject; and by whose care and abilities so much has been effected, that the rule of decision will be reduced to a very easy compass. I cannot omit to express particular happiness in seeing young men, just called to the bar, have been able so much to profit by their reading. I think it right the matter should stand over; and if we are called on for a decision, proper notice shall be given.

Trinity Term, June 22, 1772.

Lord *Mansfield*.—On the part of Sommersett, the case which we gave notice should be decided this day, the Court now proceeds to give its opinion. I shall recite the return to the writ of Habeas Corpus, as the ground of our determination; omitting only words of form. The captain of the ship on board of which the negro was taken, makes his return to the writ in terms signifying that there have been, and still are, slaves to a great number in Africa; and that the trade in them is authorised by the laws and opinions of Virginia and Jamaica; that they are goods and chattels; and, as such, saleable and sold. That James Sommersett is a negro of Africa, and long before the return of the king's writ was brought to be sold, and was sold to Charles Steuart, esq. then in Jamaica, and has not been manumitted since; that Mr. Steuart, having occasion to transact business, came over hither, with an intention to return; and brought Sommersett to attend and abide with him, and to carry him back as soon as the business should be transacted. That such intention has been, and still continues; and that the negro did remain till the time of his departure in the service of his master Mr. Steuart, and quitted it without his consent; and thereupon, before the return of the king's writ, the said Charles Steuart did commit the slave on board the Anne and Mary, to safe custody, to be kept till he should set sail, and then to be taken with him to Jamaica, and there sold as a slave. And this is the cause why he, captain Knowles,

who was then and now is, commander of the above vessel, then and now lying in the river of Thames, did the said negro, committed to his custody, detain; and on which he now renders him to the orders of the Court. We pay all due attention to the opinion of sir Philip Yorke, and lord chancellor Talbot, whereby they pledged themselves to the British planters, for all the legal consequences of slaves coming over to this kingdom or being baptized, recognized by lord Hardwicke, sitting as chancellor on the 19th of October, 1749, that trover would lie: that a notion had prevailed, if a negro came over, or became a Christian, he was emancipated, but no ground in law: that he and lord Talbot, when attorney and solicitor-general, were of opinion, that no such claim for freedom was valid; that though the statute of tenures had abolished villeins regardant to a manor, yet he did not conceive but that a man might still become a villein in gross, by confessing himself such in open court. We are so well agreed, that we think there is no occasion of having it argued (as I intimated an intention at first,) before all the judges, as is usual, for obvious reasons, on a return to a Habeas Corpus. The only question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

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549. Proceedings in an Action by Mr. Anthony Fabrigas, against Lieutenant-General Mostyn, Governor of Minorca, for False Imprisonment and Banishment; first in the Common-Pleas, and afterwards in the King's-Bench: 14 George III. A. D 1773—1774.*

[The following Case is taken from the Trial, which was printed from the Notes in short-hand of Mr. Gurney, soon after the hearing. From the Address to the Bookseller, which preceded the Trial, it is plain, that Mr. Gurney was employed to take notes for the plaintiff, and that the Trial was published by the plaintiff or his friends:† *Former Edition.*]

In the Common Pleas, Guildhall.

Anthony Fabrigas, gent. Plaintiff. John Mostyn, esq. Defendant.

Counsel for the Plaintiff.—Mr. Serjeant Glynn, Mr. Lee, Mr. Grose, Mr. Peckham.

Counsel for the Defendant.—Mr. Serjeant Davy, Mr. Serjeant Burland, Mr. Serjeant Walker, Mr. Buller.

THE Court being sat, the jury were called over, and the following were sworn to try the issue joined between the parties.

Jury.

Thomas Zachary, esq.	Mr. Thomas Bowlby,
Thomas Ashley, esq.	Mr. John Newball,
David Powel, esq.	Mr. John King,
Walter Eaver, esq.	Mr. James Smith,
Mr. William Tomkyn,	William Hurley, esq.
Mr. Gilbert Howard,	Mr. James Selby.

Mr. *Peckham.* May it please your lordship, and you gentlemen of the jury, this is an action for an assault and false imprisonment, brought by Anthony Fabrigas against John Mostyn, esq. The plaintiff states in his declaration, that the defendant, on the 1st of September, 1771, with force and arms, made an assault upon him at Minorca and then and there imprisoned him, and caused him to be

* See 2 Blackstone, 929. Cowp. 161.

† The title of the proceedings first published, being only the trial of the cause at Nisi Prius before Mr. Just. Gould, who sat for the chief justice of the Common Pleas, was thus expressed:

"The Proceedings at large, in a Cause on an Action brought by Anthony Fabrigas, gent. against lieutenant-general John Mostyn, governor of the island of Minorca, colonel of the first regiment of dragoon guards, and one of the grooms of his majesty's bed-chamber; for False Imprisonment and Banishment from Minorca to Carthagena in Spain. Tried before Mr. Just. Gould, in the Court of Common-Pleas, in Guildhall, London, on the 13th of

carried from Minorca to Carthagena in Spain. There is a second count in the declaration, for an assault and false imprisonment, in which the banishment is omitted. These injuries he lays to his damage at 10,000*l*. To this declaration the defendant has pleaded, Not Guilty; and for further plea, has admitted the charges in the declaration mentioned, but justifies what he

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July, 1773. Containing the evidence *verbatim* as delivered by the witnesses; with all the speeches and arguments of the counsel and of the court."

Before the Trial there was the following Address to the Bookseller.

"I am very glad to find you are going to publish the trial between Fabrigas and Mostyn, as the knowledge of the particulars of this interesting cause must be worthy the attention of the public.

"As I have passed a great part of my life in Minorca, and have some knowledge of the parties, I was induced from curiosity with many others to attend this trial at Guildhall, where I was greatly surprised to hear the account given by governor Mostyn's witnesses, Mess. Wright and Mackellar, of the constitution and form of government of that island.

"I did indeed expect that Mr. Fabrigas's counsel would have called witnesses to contradict the very extraordinary account those gentlemen had given, which they might easily have done by any person who had the least knowledge of the matter. I suppose they did not, either from thinking the subject immaterial to their case, or perhaps to preserve to Mr. Serj. Glynn the closure of the trial by that most eloquent and masterly reply with which it was concluded.

"Whatever the motives of Mr. Fabrigas's counsel might be for leaving this account uncontradicted, I think it very material that the world should not now be misled, as they would be, should they read the evidence of these gentlemen, and not be informed of their mistakes; I call them mistakes, for however extraordinary some parts of their depositions may appear to an observant reader, I am unwilling to charge them with any other crime than ignorance.

"I am therefore induced to trouble you with this letter, that (if not too late) you may publish it with the trial; my sole object is, that the public may be apprized of the misinformation given by these gentlemen. I do not expect that the bare contradiction of an anonymous person should overset the declarations upon oath of two gentlemen given in open court. All I mean is, to apprize the public of the truth, and to leave them to make such farther inquiry as they shall think fit.

"The purport of that part of the evidence given by those gentlemen, which I mean to dispute, was, that a part of the island called the arraval of St. Phillip's is not under the jurisdiction of the magistrates, nor governed by the same laws which prevail in the rest of the island, but is under the sole authority of the governor, and has no law but his will and pleasure.

"It should seem that so very extraordinary a constitution as absolute despotism for a considerable number of inhabitants, in a country governed by law, and which is part of the dominions of the crown of Great Britain, should have had some very urgent and apparent cause to make necessary that slavery which Englishmen abhor, and if it exists, must have been established by some particular provision. If it had been said, that in the fort of St. Phillip's, in time of actual siege, an absolute military government must prevail, the objects and the reasons could easily be understood. But to say that in time of profound peace not only the inhabitants of fort St. Phillip's, but all those of the arraval, which contains a large district of country, with many hundred inhabitants, living out of all reach of the garrison, should be subject not to military government, for that has its written laws and forms of trial, but to the absolute will of the governor, without any law or trial, is in itself so absurd, and so contradictory to every idea of reason, justice, and the spirit with which this country governs its foreign dominions, that, I trust, my countrymen will not believe such a monster exists in any part of this empire, without better proof than the information of these gentlemen.

"I would not have the reader think that this strange idea originated in the brain of Mess. Wright and Mackellar, for I know it is a favourite point, which the governor of Minorca has endeavoured to establish; not so much, I believe, for the pleasure of exercising absolute authority, as on account of some good perquisites, which he enjoys, and which can be defended on no other ground.

"To establish this, it has been endeavoured to alter the ancient distribution of the districts or terminos of the island from four to five.

"The four terminos Cieutadella, Alayor, Marcadal, and Mahon, have their separate magistrates and jurisdictions, and comprehend the whole island. The arraval of St. Phillip's was always a part of the termino of Mahon; in order therefore to establish the governor's claim, it became necessary to set up the arraval of St. Phillip's as a separate and distinct termino. If this could be done, it ceased to be within the jurisdiction of the magistrates of the island, who have power only in their four terminos, and accordingly Mess. Wright and Mackellar advance, that there are five terminos instead of four; but those who are acquainted with the island well know, that this is a modern invention; that in the records of the country, there is not the least foundation for such an idea; on the contrary, that every proof of the reverse exists. The inhabitants of the arraval are subject to the particular jurats of Mahon, they differ in no respect from the other inhabitants of that termino, and the judges possess and exercise the same jurisdiction and authority in the arraval, as they do in the other parts

has done, by alledging that the plaintiff endeavoured to create a mutiny among the inhabitants of Minorca, whereupon the defendant, as governor, was obliged to seize the plaintiff, to confine him six days in prison, and then to banish him to Carthagena, as it was lawful for him to do. To this plea the plaintiff replies, and says, that the defendant did assault, imprison, and banish him of his own wrong, and without any such cause as he has above alledged, and thereupon issue is joined. This, gentlemen, is the nature of the pleadings. Mr. Serjeant Glynn will open to you the facts on which our declaration is founded, and if we support it by evidence, we shall be entitled to your verdict, with such damages as the injury requires.

Serj. *Glynn.* May it please your lordship, and you gentlemen of the jury, I am of counsel in this cause for the plaintiff. Gentlemen, this is an action that Mr. Fabrigas, a native and inhabitant of the island of Minorca, has brought against the defendant, Mr. Mostyn, his majesty's governor in that island, for assaulting, false imprisoning, and banishing him to a foreign country, the dominions of the king of Spain. Mr. Mostyn has, in the first place, pleaded that he is not guilty of those injuries; in the next, he has offered this justification for himself, that the plaintiff, Mr. Fabrigas, was guilty of practices tending to sedition, and that Mr. Mostyn, for such misbehaviour, by his sole authority as governor, thought proper to inflict upon him as a punishment, what Mr. Fabrigas, in his declaration, complains of as a grievance. This Mr. Mostyn takes upon him to insist, in an English court of justice, is the justifiable exercise of an authority derived from the crown of England. And the facts which he undertakes thus to justify, are, in the first place, a length of severe imprisonment upon a native of the island of Minorca, a subject of Great Britain, living under the protection of the English laws; and, secondly, by his sole authority, without the intervention of any judicature, the sending him into exile into the dominions of a foreign prince. Gentlemen, some observations must strike you upon the very state of this plea; they must alarm you, and you must be anxious to know the particulars of that case, to which, in the sense of any man who has received his education in this country, or ever conversed with Englishmen, it can be applied as justification; that case, therefore, I will shortly state to you:—Mr. Fabrigas is a gentleman of the island of Minorca, of as good a condition as any inhabitant of that island, of as fair and unblemished a character too as that island produces. It is however enough, for

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of the island, which could not be the case, if the claim set up by the governor really existed.

"No proof whatever has been or can be produced that this claim has any foundation; nor indeed did Mess. Wright and Mackellar attempt to give any but their own assertions. The only thing that had the least similitude to proof, was their saying, that in one instance the officer acting as coroner to examine a corpse that had met with a violent death in the arrayal, asked the governor's leave before he proceeded.

"This fact I do not pretend to dispute; it proves nothing; and was evidently only a mark of respect, which it is no wonder magistrates in that island pay to a governor who really has so much power. But to have made this amount to any thing like proof, it should have been shewn, that the like attention was not paid to the governor at Mahon, and in other parts of the island. The truth is, that the inhabitants are so dependant on the military, that I have known the same civility shewn in another part of the island to the officer who happened to command there, but certainly without any intention of surrendering to him their authority as magistrates.

"Mess. Wright and Mackellar also said, that the Minorquins claimed to be governed sometimes by the English, and sometimes by the Spanish laws, as suited best for the moment; but insinuated that the Spanish laws prevailed, and that by them the governor had a right by his sole authority to banish.

"The fact most undoubtedly is, that Minorca, a conquered country, preserves its ancient (the Spanish) laws, till the conqueror chuses to give them others; and therefore as England has not given them others, it is true the Spanish laws do prevail in Minorca, both in civil and criminal matters, among themselves: but it is equally true that they have the protection of the English laws against their governor, who cannot be amenable to their local laws, and that however despotically a Spanish governor may formerly have acted, it cannot be the law of Spain, or of any country (because it is contrary to natural justice) that a man should be condemned and punished without either trial or hearing.

"It would have been easy for governor Mostyn, if Mr. Fabrigas had committed a crime, to have followed the mode of proceeding established there in criminal cases, which is for the advocate fiscal to prosecute in the court of royal government, where the chief justice criminal is the judge.

"If I was not afraid of swelling this letter to too great a length, I should make more remarks on what passed at this trial, and point out many more instances of power unjustifiably assumed by the governors. But I hope that what appears from this publication will be sufficient to induce administration to consider the state of this island, and give the inhabitants some better security for the safety of their persons, and enjoyment of their property; for, exclusive of the meanness there is in ill using those who cannot resist, it is undoubtedly the best policy, for the honour and stability of our empire, to make all its dependencies happy." *Former Edition.*

this present purpose, to say that Mr. Fabrigas is a descendant of the antient inhabitants of Minorca: that he lived there under the capitulated rights: that, as such, the national faith was pledged for his enjoyment of those rights that his ancestors capitulated for; but what is of more consideration, being born in Minorca since its subjection to the crown of England, he was a free-born subject of England, and claimed, as his birth-right, the privileges due to that character, and the protection of the English laws. There was a particular stipulation upon the surrender of the island, that every occupier or possessor of land should be intitled, under certain regulations and restrictions, to the produce of his lands, and to such profit as by his industry he could make of them. Upon that ground a dispute arose, to which alone can be imputed the displeasure of Mr. Mostyn towards the plaintiff, and the treatment he received from him, in the progress of it. Mr. Mostyn, as governor, was appealed to, and his good-nature appeared to be so serviceable to the adversary of Mr. Fabrigas, that early in the morning Mr. Fabrigas was suddenly taken from his house by a file of soldiers, and by them conducted to a dungeon, unaccused, untried, unconvicted. Thus, without any form of judicial proceedings, this gentleman, who then lived in esteem in the island, finds himself all of a sudden committed to a dungeon, a dungeon that was made use of only for the most dangerous malefactors, and that only when they were ready to receive the last of punishments. In this gloomy, damp, dismal, and horrid dungeon, was this man detained without any previous accusation, without any call upon him to make his defence, or being informed there was any crime or offence that was alledged against him, and without any notice either to him or his family. When he found himself in prison, there was humanity enough in the breast of the keeper of that prison to accommodate him with a bed; but it seems that accommodation was by the power of that island thought too much for him, and the bed was taken from him; a check was given to the lenity of the keeper. No notice having been given to his family that they might visit or administer comfort to him; he did, by humble request, desire that his wife might be permitted to visit him: that consolation too was denied him. In this manner was Mr. Fabrigas deprived of his liberty for a considerable time. It is unnecessary for me to state particularly the precise time that this imprisonment continued; that you will hear from the witnesses. Nor does a case like this depend upon minutes, hours, or days, but this is the nature and kind of imprisonment that Mr. Fabrigas endured: so closely watched that no man could have access to him, deprived of the consolation of his family, severed from all communication with his friends, relations, or acquaintance, that could administer the least comfort to him. For several days did this man continue under this imprisonment, nor did his sufferings determine with it; his removal from the dungeon was only a substitute of one species of cruelty in the place of another: for the instant he was taken from prison, he was carried by the same arbitrary and despotic power on board a ship, without any previous notice, without any time allowed him to prepare for his departure, without the ordinary visit or comfort of friends and acquaintance, from whom he was probably to be separated for ever. Thus was this man taken from his native country, and the insupportable hardships of a dungeon were followed by an entire expulsion from his country, and every thing that was dear to him: he was sent instantly on board a ship by force, and carried to Carthagena, a foreign country, under the dominion of the crown of Spain. This is the nature of Mr. Fabrigas's case. Now, gentlemen, for a moment, let me remind you of the pretence under which this imprisonment is inflicted. It is said Mr. Fabrigas excited sedition, or attempted to excite sedition; that he acted or spoke in a turbulent and mutinous manner; and therefore that the governor, as his plea states he was well authorized to do, committed him to prison, and banished him out of the island; or rather committed him to prison for the purpose of banishing him out of the island, for I believe that is the true state of his plea. Gentlemen, you would justly accuse me of a great and wanton waste of your time, if I should say a great deal for the purpose of exculpating Mr. Fabrigas from the charge and imputation that is thrown upon him in this place, because I am persuaded that you, an English jury, if you were sitting in judicature upon the case of confessedly the vilest of offenders, you would not suffer the atrocity of the offence to mitigate that censure and animadversion which is due to a behaviour like this of the governor's. In private justice to the character of Mr. Fabrigas, and not as the least relating to any question here to be tried, gentlemen, I will state to you upon what grounds and pretence this mutiny is alleged against Mr. Fabrigas. Mr. Fabrigas, as I have told you, claimed, among all the other inhabitants and possessors of lands in the island, a right of selling the produce of his lands, under certain restrictions. The produce of the lands is chiefly wine: Mr. Fabrigas had a considerable quantity. His majesty, by his proclamation, had given free liberty to the inhabitants of that part of the island where Mr. Fabrigas lived, to sell their wines, the price being first settled by the authority of the governor:—that price is called the afforation price. Notwithstanding his majesty's proclamation, by an act and order, not of governor Mostyn, but of his lieutenant-governor, there was a prohibition that no wine should be sold without the immediate authority of the mustastaph. An application therefore, by Mr. Fabrigas, was made to this officer, either to permit him to sell his wines under the afforation price, which would be for the general relief and benefit of the islanders, and of the garrison, or that he him-

self would buy it at a fixed price. This officer refused to comply with either: Mr. Fabrigas therefore was reduced to the necessity of making an humble application to governor Mostyn, to permit him this alternative, either to sell his wine under a certain afforation and regulated price, or that the government would buy his wine of him for their use, or the use of the garrison. This petition was thought reasonable at first, and had a kind answer; it was received, and it appears to have been taken into consideration, but nothing was done in consequence of it. Mr. Fabrigas therefore repeats his application, and he receives encouragement to expect that the reasonableness of his petition would be taken into consideration, and that he should be at liberty to sell the produce of his land. But, gentlemen, at last this answer was given to Mr. Fabrigas: that if it appeared to be the sense of a considerable number of the inhabitants of the island, that it was for their benefit that such permission should be given, his application should be complied with. Mr. Fabrigas then prepares such a petition; he gets it signed, and he presents it to governor Mostyn. Now, gentlemen, here it is impossible to state what passed between the parties. If it can be pretended that there was any thing mutinous, menacing, or improper, in this last petition, I presume that petition will be produced to you, and it will speak for itself; but some indignation was conceived by governor Mostyn against the plaintiff, Mr. Fabrigas, which produced that strange, unaccountable, unwarrantable, and alarming conduct, which we now, by evidence, impute to Mr. Mostyn. For gentlemen, instantly upon this, Mr. Fabrigas is conducted in the manner before-mentioned to that horrible dungeon, where he continues for a considerable time under such orders as I have stated to you, till he was hurried on board a ship, and was conveyed to Carthagena in Spain. Here, for the first time, he receives intelligence of what was the provocation that he gave, what was the ground of such treatment of him, what charge was imputed to him, by what authority he was so detained and so treated: for here appears a letter under the hand of governor Mostyn, avowing this act, and telling him that he thought it necessary and expedient, for the punishment of his offence, to send him into exile, and to direct him to be conveyed to Carthagena in Spain. Here then you find the governor avowing the whole; and if he did not avow the whole, you could have no doubt under what authority these things were done; because you will hear from all, that they cannot be done but under the authority of the governor. Then, gentlemen, the imprisonment, and the sending this man into exile, are the acts of governor Mostyn. The imprisonment under such strange aggravating circumstances of horror and ignominy, and the sending him without notice, without time for preparation, without giving him the opportunity of paying the least attention to the concerns of his estate and family, into exile; these, gentlemen, we now presume to treat as the acts of governor Mostyn; and the governor says, he is justified in so doing, as governor of Minorca. I should be glad to know upon what idea of justice the governor grounds that pretence. I conceive, that in this case, there cannot be the least colour or pretence of any judicial examination, or the least form of judicial proceedings. Governor Mostyn, after having been guilty of this outrage to the plaintiff, would have acted much better, if he had not added this insult to the laws of his country, by assuming an authority incompatible with the least possible idea of justice that can be entertained in this or in any country whatsoever. Gentlemen, if governor Mostyn complains that justice is not done to his defence by his plea, that he is fettered and embarrassed by it, and could now justify his conduct upon better grounds, we will freely give him the opportunity of doing it; he shall do it in what character he thinks proper. If he has acted under the colour of any judicial proceedings in civil judicature, let those proceedings be produced, let him desert and abandon the shameful plea that he has presented; he has even our liberty to do it. If the governor means to be justified in his military character, I need not tell you, gentlemen, that it is necessary in that character, that there should be judicial proceedings likewise of a military court of justice. I will be told to say, that the idea governor Mostyn has adopted, that the lives, fortunes, and being of the inhabitants of the island of Minorca are at his mercy, and that by his sole authority he can inflict bonds and imprisonment on any inhabitant of that island, is the single idea of governor Mostyn; and I say the governor does not, in this case, talk like a military man, for his ideas are as foreign to the notions of a soldier, as of a lawyer. Gentlemen, this is the nature of the case that we shall offer to you, and which we shall produce in proof to you against governor Mostyn: an imprisonment, if it had been attended with all the circumstances of comfort that could have been administered to a person in that situation, unjustifiable, and without colour or pretence of legal authority, sufficient to entitle this gentleman to call for considerable damages from a verdict of a jury: a banishment into a foreign country of a subject of England, intitled to be protected, to whom the laws cannot be denied without breach of public faith, and a dangerous wound to the general system of our constitutional liberties. Thus, by the sole authority of governor Mostyn, without pretence of judicial examination, was Mr. Fabrigas sent into banishment. If all other circumstances were away, the being sent out of his native country by an arbitrary act of the governor of that island, is surely ground enough to call for the most considerable damages. But, gentlemen, you are to add to it every circumstance of discomfort. He was, during the whole time of his imprisonment, kept in a gloomy dungeon; no circumstance o ignominy that

could affect the mind of a man of feeling was omitted: he was put into a place set apart and designed only for the reception of the worst of malefactors, secluded from any conversation or communication with his friends or acquaintance, his nearest relations, his wife or his family, deprived of the comfort of a bed, and obliged, for a considerable number of days, to subsist upon bread and water. This is a case of the most unparalleled cruelty; the most ingenious circumstances of torture being added to the most unjustifiable and the most lawless exertion of authority, that I am persuaded has ever appeared before any court. If governor Mostyn can support the powers of this claim, and vindicate himself, as governor, by the plenitude of his powers, and that the sole judicature of the island resides in his person; if it was for a moment possible for you to entertain the idea of the legality of such a power being placed in any man, in consequence of an authority derived from the crown of England: I say, if it was possible for you to conceive that such a power could exist; try him even by that rule, try him by that rule, and he is without excuse; for the most despotic, the most arbitrary and uncontroulable power that is ever exercised, professeth at least to act by calling upon the party accused to make his defence, and I believe in no part of the globe is it looked upon as just to condemn a man unheard. Let general Mostyn travel into Asia, or visit his neighbours on the continent of Barbary, he will not find examples there to justify his conduct, in any of the powers assumed, or in the use he has made of them: for if their powers are not circumscribed or restrained by any laws; if they act, as the general professes he has a right to, by their sole will and pleasure; if that is the rule of their government, yet still there is an idea of a principle of natural justice that should govern their proceedings there; at least an appearance of it they are anxious to produce. I never heard in my life that it was the avowed privilege of any country, that a man should be charged with an offence, that he received the punishment for that offence, without the offence being explained and stated to him, and an opportunity given him of hearing the charge and the evidence by which it was produced; but this is the case of a transaction in the dark, a secret indignation conceived, that indignation immediately followed by the most horrid exertions of power upon the person of Mr. Fabrigas—committed to a dungeon, and unapprized of the charge against him till sent out of his native country, and upon the voyage to the destined place of his banishment. The offer made to general Mostyn not to tie him down merely to the justification specified in his plea, but to give him leave to offer any justification that may be consistent with the idea of civil or military justice, may be called insidious, because I must disbelieve every thing suggested on any trust, if I think the offer can be of no benefit to him if wanted; but it may be added to it, "Governor, take your ideas of law from Barbary or Turkey, produce your precedent, India or negro law, you are still unable to justify your conduct." Gentlemen, these are the circumstances we are to lay before you in evidence. The governor may, if he pleases, endeavour to charge this gentleman with mutiny. If he does, I presume he will adduce his proof of it. But if it was possible to decide that Mr. Fabrigas was a mutinous man, though the reverse of that character is but justice to him; nay, if you could decide that he was the worst and most dangerous of offenders, governor Mostyn's conduct is still destitute of any colour of justice or law. His conduct is totally unwarrantable, and the pretence he has here set up, that he is a prince with a power unbounded and unlimited by any rule or law whatsoever, that he is authorized to act by his own will and pleasure, must represent this case in so alarming a light to you, that I am persuaded that you, who have taken your ideas of law and justice from conversation with Englishmen, and observation on the English constitution, will give all attention to the particular sufferings of the man, as well as to what you owe to yourselves, your country and posterity; and we trust, even in the very best construction that is possible to put on governor Mostyn's conduct, that you will think the damages laid in the declaration are not extravagant.

Basil Cunningham sworn.

Examined by Mr. *Lee*.

Mr. *Lee*. You are in some military capacity?—*Cunningham*. Yes.

Were you in the year 1771 in the island of Minorca?—Yes.

In what character?—Acting serjeant major for the royal artillery.

Do you remember Mr. Aathouia Fabrigas being at Minorca?—Yes.

Were you serjeant major at the time he was seized and taken into custody?—I was, when I saw him brought into prison.

Do you recollect any orders at that time coming in any body's name touching his confinement?—There was a general order given us, that three more men should be added to the artillery guard.

Court. Have you that order?—*A*. No.

Q. Was it not your office as serjeant major to transcribe that order into your book?—*A*. I gave that order out in the company's order book.

To whom does the custody of that order book belong?—When the books are written out, they give them to the captain to whom they belong.

They put three additional men sentry upon that occasion?—Yes.

Court. Why?—*A*. To do duty upon the prisoner Mr. Fabrigas.

How long had Mr. Fabrigas been in custody at that time when this order was given out? Was it immediately upon his coming into custody, or after he had been put there?—

To the best of my recollection, I believe about twenty-four hours after he had been in custody, or the evening of the same day; I cannot be certain as to that.

You can tell us what prison it was that Mr. Fabrigas was committed to?—*A.* He was put into prison No. 1.

What is the general use of that prison? to what is it applied?—All the prisoners that are guilty of capital offences, or for desertion, we commonly put in there.

Do you recollect any circumstances attending Mr. Fabrigas's imprisonment? mention any that occur to you. Do you recollect the manner in which he was brought or confined?—To the best of my recollection he was brought by a party of soldiers, whether of the 25th regiment or the 6th, I can't say; he was brought in handcuffed, I think, but am not certain.

How long was he confined there?—As near as I can recollect, about five or six days.

In that prison?—Yes.

During his confinement there, can you tell the court or jury whether he was permitted to be visited by his wife or family?—No: the centries had orders that he should have no conversation with any body but the prevost marshal.

Do you know of any orders that he should not be seen but by the prevost marshal?—The centry informed me that was his orders; besides, it was put into the general orders too.

Serj. *Davy.* If you mean to affect the defendant with that, you should produce the order.

Mr. *Lee.* Well then, we shall produce it.

Q. In fact, do you know whether any body was permitted to visit him but this prevost marshal?—*A.* I don't know of any; if they did, it was contrary to orders.

Do you know if any body applied to see him?—His wife applied to see him, but was refused, as I was informed.

What is this prevost marshal?—One that has the charge of all prisoners that are confined for capital crimes; he has the keys of the prison.

Is this an executioner too, as well as a gaoler?—No.

Can you tell us the cause for which this gentleman was committed—the occasion of it?—I cannot.

Do you know what Mr. Fabrigas is?—He is an inhabitant of the island of Minorca.

A native?—Yes: a Minorquin.

Do you know whether Mr. Fabrigas is a man of any property, or was a grower of any wines upon that island? Do you know in what manner he lived?—He lived like a gentleman there.

Were you acquainted with any disputes touching his liberty to sell his wine?—I know nothing at all of it.

Do you know any thing of what happened to him after his confinement in this prison? what became of him after?—He was sent out of the island.

Do you know of your own knowledge?—I did not see him taken away.

Do you know of any orders touching his being sent?—I did not see any orders.

You being at St. Phillip's at this time, when he was in prison, you can tell us whether he was tried for any offence previous to his commitment there, or after?—No: he was not tried.

Cross-examination by Serj. *Davy.*

How long had you known this Fabrigas before the time of his being brought to this prison?—I had seen him different times, being in the island for between eight and nine years.

I wish to know in the first place whether he was a quiet subject, or otherwise?—I never heard any thing to the contrary.

What? but that he was a quiet, inoffensive subject?—I never heard to the contrary.

He was looked upon as a very good friend to the garrison, I believe?—I really can't tell what he was; he was an inhabitant of the island. I don't know that ever I spoke to him in my life.

What part of the island did he live in?—At St. Phillip's.

There it was he was imprisoned, I presume?—Yes: he was brought a prisoner to St. Phillip's castle.

I think you say you have been in the island five years?—Almost nine years.

Then you were there before Mr. Mostyn was appointed governor?—Yes.

You were there in governor Johnston's time?—Yes.

Were you there in governor Blakeney's time?—No.

James Tweedie sworn.

Examined by Mr. *Grose.*

What were you in the year 1771?—A corporal in the royal artillery in the island of Minorca.

Did you see the plaintiff brought to the castle?—No: I did not see him brought; I was a serjeant of the guards when he was delivered up to me, from the 61st regiment.

Court. Can you recollect the time?—*A.* No: it was some time about the middle of September, to the best of my knowledge, in the year 1771.

In what way was he delivered?—He was delivered to me in the prison N° 1.

What were the particulars of that delivery to you? in what way was he delivered?—He was in but a very mean habit; for, by what I could learn, his clothes and every thing that he brought in with him had been taken from him.

Counsel for the Defendant. That will not do. What condition was he in?—*A.* He was in the prison; he had been in the prison almost twenty-four hours, before he was delivered to the artillery.

What orders did you receive concerning him?—That I was to suffer no person to approach the grate.

What grate?—The prison door.

From whom did you receive these orders?—From the adjutant lieutenant Frost; he was our acting adjutant; he read the orders.

Not to let any one come to that grate?—Or converse, or have any communication with him, upon any account.

Whose orders does the adjutant lieutenant give out?—I imagined it was a general order.

What do you mean by a general order?—Coming from the commander in chief.

Do you mean from governor Mostyn?—Yes: he was commander in chief then of the island.

What order?

Serj. *Davy.* I will give you no trouble about these things. With regard to orders, you have given us notice to produce the orders. The fact is as you contend. We mean to conceal no circumstances.

Court. I think the right way will be, as it is now admitted, that this was done by the defendant's order, to proceed with your parole evidence, and read that at the conclusion.

Counsel for the Plaintiff. If your lordship pleases, we will read the order of imprisonment, and the sentence of banishment.

The *Associate.* The title is,

"Orders given out to the troops in Minorca by lieutenant general Mostyn, governor of the island, who arrived the 21st of January, 1771. September 15: In order to relieve the main guard at St. Phillip's, which now wants a sentry extraordinary upon Antonio Fabrigas, confined in prison N° 1, general Mostyn orders, that three men be added to the artillery guard in the castle square, as they are most contiguous; and that duty taken by them, the sentry must be posted night and day, and is to suffer no person whatever to approach the grate in the door of the said prison, either to look in, or have any communication with the prisoner, the prevost marshal excepted, who is constantly to keep the key in his possession."

"To Anthony Fabrigas de Roche.

"You Anthony Fabrigas, inhabitant of the arraval of St. Phillip's, are by me, chief governor of Minorca, banished this island for twelve months from the date hereof, not to return hither until that time is expired at your peril, for your seditious, mutinous, and insolent behaviour to me the governor, and for having dared most dangerously and seditiously to raise doubts and suspicions amongst the inhabitants of the arraval of St. Phillip's, and to excite them to dispute my authority, and disobey my orders; and for having further presumed most dangerously to insinuate, that his majesty's troops under my command, without any authority from them for such false and scandalous insinuations, were imposed upon.

"J. Mostyn, Governor."

"*Mahon, 17th day of September*, 1771."

Q. You say you received this order to permit no person to approach the grate of the prison, or have any communication with the plaintiff: did you obey this order?—*A.* Yes.

Did you obey it strictly?—Yes, as strict as it was in my power.

Did any person apply to see the plaintiff?—Yes, his wife and two children.

Were they permitted to see him?—No.

How near were they permitted to come to the prison?—As nigh as I can guess, about thirty yards.

They were not permitted to come nearer?—They were not permitted to come nearer.

Do you know in what way the plaintiff laid?—He lay upon the boards.

Were there no beds?—No beds.

Was any bedding sent to him?—I saw his wife with bedding, which was not permitted to be brought to him.

In short, tell the jury whether the guard would suffer any thing whatsoever to pass them?—If they did, they were sure to come to trouble, to punishment, by it; and I am certain they never did.

Tell us what his subsistence was?—Bread and water.

What sort of subsistence has a deserter if he is confined in this place?—It is a general rule in Minorca, that deserters and prisoners, even for capital crimes, should have provisions sent them.

What provisions?—Such as the island affords, bread and beef.

Court. Do you know whether any provisions were brought him?—*A.* I never saw any; there was such a strict order, that nobody ever attempted it.

I believe there was an air-hole at the top of the prison?—Yes.

Was any body placed over the air-hole?—No; but there was a sentry upon a bastion near to it, who had orders given him, that nobody should approach this air-hole.

Upon what account?—For fear any thing should be dropped down to him.

Court. Was that particularly upon this occasion, or generally when deserters were there?—No; I never heard a circumstance of the kind, but during the time Mr. Fabrigas was in prison.

Did you know the plaintiff?—Yes, I have been at his house several times; I was at the island almost nine years.

What family had he?—A wife, when he was in prison, and five children, to the best of my knowledge.

Now, during the time you have known him, have you never heard him say any thing disrespectful of the governor?—No; he only complained of his hardships, of his own bodily sufferings.

William Johns sworn.

Examined by Mr. *Peckham.*

Q. Was you at Minorca in 1771?—*A.* Yes.

In what situation and capacity?—I was garrison gunner.

How long were you in the island?—Almost nine years.

Did you know Mr. Fabrigas?—Yes.

Did you know Mr. Fabrigas's situation in the island?—He lived very genteel in St. Phillip's.

Did he live in the same state as the principal inhabitants of St. Phillip's?—Yes, as much so as any man in St. Phillip's.

Do you remember any thing of his being imprisoned?—I saw him brought to the prison.

In what manner was he brought?—By a file of men.

Were his hands bound?—I cannot say.

Serj. *Davy*. I admit that he was with his hands bound, as the first witness said, and that he was kept in prison by order of the governor.

Mr. *Peckham*. Do you admit that he was hand-cuffed?

Serj. *Davy*. Yes, that he was hand-cuffed, and kept in the way described by the former witness.

Q. Was he kept hand-cuffed in prison?—*A.* I believe not.

What sort of a place is this prison?—It is set apart for capital punishments, for prisoners that are under sentence of death.

Is it a prison dug out of a rock?—It is a subterraneous place in the body of the castle.

Is it under ground?—No, under the top of the castle.

Is it a ground floor?—A ground floor, I believe.

This being the prison, and you standing there to guard him, do you remember any of his children coming to see him?—I saw his son the first day he was confined there, a boy about 15, come to see him.

What did he come for?—He had some provisions in a basket.

Did he apply to you, that those provisions might be given to his father?—He applied to the regiment then upon duty to give them to his father, but was denied.

Serj. *Davy*. I admit he was sent hand-cuffed to the prison, as described by the former witness: I meant to include the matters of belief as well as matters of knowledge.

Court. For my part, I like to hear the evidence in any case, to know the truth, and then we have no squabbles afterwards.

John Craig sworn.

Examined by Mr. Serjeant *Glynn*.

What are you?—A matross.

Was you in the island of Minorca in 1771?—Yes.

Do you know Mr. Fabrigas?—Yes.

How long have you been in Minorca?—Pretty nigh nine years.

What condition was Mr. Fabrigas in?—In very good circumstances there; he is reckoned one of the best in circumstances in the island.

Do you remember the time when he was in the dungeon there?—Very well.

You did not do any duty upon him, I suppose?—Yes, I did.

Do you remember whether people were admitted to see him?—I am sure there were none admitted to see him.

Do you know whether any person came to see him that was refused?—I know his wife and children came, and they were refused.

Do you know of his being taken out of the prison?—I saw him put on board a ship in the harbour.

How many days after his first imprisonment?—I am not certain of the days.

About what number of days was he in confinement?—Five or six days, to the best of my knowledge.

In what manner was he taken out of prison, and put on board a ship?—I happened to be down at the quay, and saw him put on board a boat, to be taken to the vessel.

What time was this?—Early in the morning, I am not sure to the time, but to the best of my knowledge I think between three and four in the morning.

Had he any time allowed him on shore?—No, he was hurried on board; his wife and family were coming down to speak to him, and the soldiers kept them off, and would not let them. I wanted to speak to him myself, and the soldiers would not let me.

You saw his wife and children come to him, do you remember whether they brought any thing for him?—I think they had some bedding, to see if they could get it on board the ship he was going to, and it was turned back again, they would not allow any thing to come to him; he was put on board a boat and taken into a ship which was laying in the harbour there, the ship was under sail.

Serj. *Davy*. I admit he was banished to Carthagena.

Coun. for the Plaintiff. You admit he was banished by governor Mostyn for a year?

Serj. *Davy*. Yes, I do.

Colonel *John Biddulph* sworn.

Examined by Mr. *Lee*.

Q. You are an officer in the regiment that was at Minorca?—*A.* I was not in Minorca at the time this matter passed.

But you have been at Minorca?—Yes.

Did you know Mr. Fabrigas?—Yes; I knew him from the time I arrived in the island until I left it.

When did you arrive there?—I think in the year 1763, about May or June, and stayed about eight years.

When you knew Mr. Fabrigas, in what condition and circumstances was he?—He seemed to me to be of the second sort of people in the island; he had some vineyards and some houses, and some property, and was received not as of the first quality, but as a gentleman; he was esteemed a man of property: I should call him a gentleman farmer.

While you knew him what character did he bear? or how did he behave himself, as far as you had an opportunity of observing?—As far

as I could observe, he behaved very well, and had a very good character. I used to employ him in getting wine for me, and other things the island produced, because I had a family; and often he was very useful to me in procuring things at a reasonable price. When I was at Citadella, at the other end of the island, he came there, and was with some of the better kind of people; he was always with a don Vigo, or a don Sanchio, who were reckoned the principal people of the place; they are nobles in that island.

While you knew him, I ask you what was his behaviour? Did he behave like a peaceable subject, or like an unruly and factious one?—He always behaved with very great decency and decorum.

Cross-examined by Serj. *Burland.*

Q. Do you know whether he was a man of property in the island?—*A.* As far as I understand he was, but it is impossible for me to say positively; he was reported such.

He had a father living?—I believe he had, an old man.

You do not know whether it was his own property or not?—It seemed to be his.

He conversed with the two noblemen you mentioned?—Yes; he was at their houses as a gentleman.

Did you use to visit at his house?—I have been there.

Did you ever dine or sup with him?—I think I dined with him once.

Court. The gentlemen suggest, but you don't mean to make a distinction between the classes there?—*A.* I do make a great distinction.

Q. What promotion has general Mostyn in the army at this time?—*A.* He is a lieutenant general, and commander in chief of the island of Minorca.

Has he any military promotion at home? has he any regiment?—Yes.

What regiment is it?—I don't recollect the number; it is a regiment of dragoons.

Do you know of any office that the general has about his majesty's person, any place at court?—I don't recollect it; I believe he has.

Serj. *Glynn.* My lord, we have done for the plaintiff.

Serj. *Davy* for the defendant. May it please your lordship, and you, gentlemen of the jury, I am of counsel in this cause for the defendant, general Mostyn, who is charged with a misbehaviour towards the plaintiff, in the defendant's capacity, as governor of this island; the plaintiff, Fabrigas, being a subject of the crown of England, a native of that island, a Minorquin by birth, and living in the town of St. Phillip's, (there is a reason why his residence in the town of St. Phillip's is, in my apprehension, material, for some matters which I shall trouble you with before I sit down.) The defendant was appointed governor of the island of Minorca on the 2nd of March, 1768. His predecessor was governor Johnston, whose predecessor was general Blakeney. So far I am able to trace back the governors of this island, whom the questions before you have any sort of relation to; and any further is unnecessary. I don't know whether it may be new to any of you, gentlemen, to inform you, most probably not, the history of your country will tell you, that this island of Minorca, whose situation is in the Mediterranean, and which is of extreme use in the protection of the Mediterranean trade, was taken in queen Anne's wars from the crown of Spain, and was ceded by that crown to Great Britain, by the treaty of Utrécht in 1713: that upon the ceding of that island, the condition annexed was a requisition on the part of Spain, which was acceded to on the part of Great Britain, that the inhabitants of this island of Minorca should continue in the free exercise of the Roman Catholic religion, which could be no farther than was consonant to the laws of Great Britain. For whereas the laws of Great Britain will not allow the pope's bulls, excommunication from the court of Rome, the inquisition, and some other matters of that sort; therefore a free exercise of the Roman Catholic religion was not with the exercise of any powers in the bishop of Rome, but what were acknowledged by the laws of Great Britain. They had only the free exercise of their religion, as Roman Catholics. All other rights which they had, and all laws by which they were to be governed, were to be given to them by the king of England. He was to establish what code of laws he thought proper in that country. They were to be subject either to civil jurisdiction of particular sorts, or military, or whatever sort the king of England pleased. They were a conquered people, a conquered island, and no terms were annexed to that treaty of Utrecht, but only the exercise of the Roman Roman Catholic religion. The king was to appoint his governor of the island, to govern them by such laws as he thought proper to direct; an arbitrary despotic government, or a qualified government, or whatever government, under whatever sort of magistrates, or whatever order the crown of England should think proper. There is a manifest and very wide distinction, to be sure, between a Minorquin by birth (I don't speak of an Englishman that goes over there), and the case of an Englishman: I just mention these things, which will be very proper for your consideration throughout the progress of the several facts I shall mention in this cause. They are, in my humble apprehension, essentially necessary to your consideration. Some time after these people (I don't know exactly the date of it) had become subject to the crown of England; after 1713 they petitioned for a confirmation of the usages and customs of Spain, and to be governed by the laws of Spain, as they had been used to be before: and that was granted, so far as the wisdom of the crown thought proper to grant; and there were certain regulations, which I will take notice of by-and-by. Many regulations were made from time to time occa-

sionally, by the crown of Great Britain, for the internal police of the island. Gentlemen, I should inform you too, that the island of Minorca consists of five separate divisions or districts. In four of these they have magistrates annually elected. In the fifth, which is called the arraval of St. Phillip's, which is the fort of the island and its security, there the particular district which is just the suburbs, which takes in the town of St. Phillip's adjoining close to the foot of the citadel, that district is under the immediate government of the governor of the island appointed by the crown. There are no jurats, which the common name of the magistrates in the other divisions, who are elected by the people; but the proper officer for the police of the arraval is appointed by the governor himself, and I think his title is mustastaph: he is the officer appointed by the governor of the island. There is an extreme necessity, that more particular care should be taken in the regulation of the police of that part of the island which is immediately contiguous to the fort of St. Phillip's, and where there is a perpetual garrison, for the sake of preserving military discipline. A law of this island, amongst others which is necessary to mention to you, because the history of the transaction has immediate respect to it, is, that the jurats in the several parts of the island in the four other districts of the island, and the mustastaph in the arraval of St. Phillip's, which is the fifth dependent district under the immediate dependence and government of the governor himself, set a price, and value, and measure, upon the several commodities. I don't know whether it includes all commodities, but wine, and corn, and other things, which they call the afforation, that is the assize, or price to be paid, upon commodities to be sold. Gentlemen, in the year 1752, (the date here is material,) there was a regulation appointed by the crown, made by the king in council. I extract that part of it that regards the present question; that is, that the jurats of all the universities (now universities are the districts, and you see there are no jurats of any universities, but these four: districts and universities are synonymous terms) 'that the 'jurats of all the universities be left at full 'liberty, without the intervention of the com-'mandant, or any other of the royal officers, 'to make the afforations, and settle the assize 'and prices of all manner of corn, and all man-'ner of provisions, the produce of the island; 'and also the prices of corn imported into the 'island, and bought by the universities for the 'good of the public; and that the natives and 'the inhabitants be at all times permitted to sell 'the same at or under the afforation, without 'any intervention of the governor or secre-'taries, or any other person or persons acting 'under his authority.' You see, gentlemen, that this order of council imports, that these people are under the absolute despotism, if I may so say, of the crown of Great Britain, because this is in a language that we in this country are not acquainted with. Whether to sell or buy our goods, or not, does not suit an English genius, the genius of the English law. This is an order made by the king in council, in the year 1752. That order of council, and some other provisions that were made by that order, occasioned some uneasiness and misapprehension; therefore another order of council was made the following year, the 10th of August, 1753, which you will in the course of the evidence have read to you. There are some matters in it I will trouble you with. It was made upon the consideration of several papers transmitted from Minorca by general Blakeney, who was governor at that time. Several things were advised by the privy council. Among the rest, I shall just extract a few things. With respect of the first article in the civil branch, relating to the making the afforations, about which great complaints have been exhibited, that the governor be instructed to require the jurats of the several terminos in the island, at all proper times and seasons, to make the same afforations: and in case the said jurats should refuse or neglect to comply with his command therein, that then the said governor be authorised to make the said afforations himself: but due care is to be taken, that the said afforations be made equal and general, as to all the things and persons subject to the said afforations, as well as at all proper seasons. This word 'seasons' will have some meaning by-and-by. Then they go on with a great many regulations. Amongst the rest is, advising the king for the future, by his letters patent under the seal of Great Britain, to authorise the governor, or in his absence the lieutenant-governor, or commander in chief for the time being, to exercise the power of civil government, as well as those of the military, taking care to preserve the one separate and distinct from the other: and that they should receive all this power, but that they should be subject nevertheless to such instructions as should be given by his majesty. He is to govern according to these directions contained in the letters patent, as also to such instructions as shall be given to him by the king. Then, among other things, here is a direction, and this is very material: you see, it mentions some confusions that have arisen in respect to the regulations made before in 1752: that it may be proper for the governor to endeavour to make the inhabitants sensible of the great happiness they enjoy under the king's protection and government, and to shew them that they have not only at all times been treated with justice and equity, but with lenity: that the increase of riches amongst them is owing, amongst other things, to the great sums of money constantly circulated from the pay of the king's forces, and from the number of foreigners now settled among them on account of their trade: and also the extension of their trade, they being permitted to carry on commerce in like manner with the rest of his majesty's British subjects: and that it is therefore expected, that they should, in return for so many great and

real benefits, most heartily and effectually concur with his majesty's governor in any thing he shall propose for his majesty's service, and the good of the island, and demean themselves as become good subjects, &c. and it may not be improper for the said governor therefore to inform them of all their privileges. Gentlemen, observe these are founded upon the 11th article of the treaty concluded at Utrecht, on the 13th of July 1713; and that they cannot be entitled to any other privileges than those signified therein. And for the better information thereof, that they do lay the said articles before them, a copy whereof was annexed thereunto; by which it appears, that they are allowed to enjoy their honours and estates, and have the free use of the Roman catholic religion, and that means shall be used to secure it to them so far as is agreeable to the laws of Great Britain, which they still continue to enjoy without the least interruption, and without any fear or dread of the court of inquisition; and that at the same time may inform them, that, by the ancient laws of this country, the pope's bulls, &c. are not permitted to be executed in his majesty's dominions, nor any penalty levied or punishment inflicted under such decrees, without permission of the crown of Great Britain: and then it goes on and gives farther directions with regard to the governor's authority, and the necessity of these persons demeaning themselves cheerfully to the order of the governor; which is the government and constitution of that country. Now, gentlemen, you see that in 1753 some considerable regulations were made, to explain, and in some respects to alter, the regulations which had been made in the year 1752. And another thing is clearly observed; that the tenor of all the instruments I have read some parts of to you, these regulations neither in 1752, much less by the explanation of them in the subsequent year, 1753, with regard to the afforation, could not possibly extend to the arraval of St. Phillip's, for the jurats were the persons who were to make the afforation in their several universities, or districts, or terminos, as they are called. Now, in the arraval of St. Phillip's, there were no jurats at all; consequently, that was to be made by the proper officer appointed by the governor himself, namely, the mustastaph. In case of the failure of the jurats making the afforation, the governor was to make it himself: but in this district there are no jurats. There is another thing to be noticed; and that is, that if particular care was not taken as to the afforation and manner of selling wine in the arraval of St. Phillip's, that is, where the garrison is; if great care was not taken of that, it might tend to the intoxication of the soldiers of the garrison, and might be attended with most pernicious consequences. For this reason general Blakeney, when he was governor of the island, soon after an explanation of the former regulation now made in 1753, that was continued afterwards by his successor governor Johnston, made a very proper regulation with regard to wine, particularly in this arraval of St. Phillip's. That was soon after the order of council in 1753; I believe it was in 1753 or most likely was the beginning of the year 1754, that general Blakeney made the regulation I am now going to mention to you. The mustastaph was an officer there that did the office of jurat in the other districts: he was appointed immediately by the governor. The jurats in the other districts were chosen annually by the people, in order to avoid any partiality, and to take care that the mustastaph shall do his duty regularly, that the inhabitants that have wine to sell shall sell their wine by turns; that all the people within the arraval of St. Phillip's shall sell their wines by turns; for if they were at liberty all to sell their wine as fast as they could sell it, that would, as I mentioned just now, tend to the intoxication of the soldiers, and to the ruin of the island. And the way that was appointed by general Blakeney in the year 1754 was, that they should ballot, or cast lots, for turns; and then the several people that had the lots to sell, should sell at an afforation settled by the mustastaph, at such a given time. Then the others shall come to their turn, as ballotted for; so that every one, in the course of his turn, taking the chance of the ballot, will sell his wine at or under, if he pleased, the afforation price, during the time specified. This was a regulation governor Blakeney made upon the order of council. The people of that district were all very well pleased, and things went on in very good order. The people were glad to be so regulated. This being approved of, and consequently being found by experience to be a very good regulation, and to answer all the good ends of government, it was continued during all the remainder of the time that general Blakeney was governor of the island of Minorca. When governor Johnston succeeded to the government of the island, he found this regulation, and the island in very good order and tranquillity. He found the regulation had answered all the good ends proposed by it, and he continued the regulation during all the time that he was governor of the island. In this situation the island was found by general Mostyn, the present defendant, when he succeeded Mr. Johnston to the government, on the 2nd of March, 1768, now five years ago. The present governor found it just as governor Johnston had found it before, and which certainly bore testimony to the wisdom of general Blakeney, as well as of the government from whom he received his orders. It had been approved of in England, and was approved of by the inhabitants there, the Minorquins. It answered all the good ends proposed by it. It produced peace, tranquillity, and harmony in the island, which had been torn by seditions and disputes before, as the order in 1753 recites. General Mostyn continued it. And, gentlemen, the continuance and observance of that order is the very cause of the complaint now before you:

and this made my friend so particular. There is nothing more nor less, as you will see by-and-by, than his continuation of the order of government, which had been prescribed, you see, in 1754, and continued all the time down, till the revolting spirit of the plaintiff thought proper to break through all order. Gentlemen, it will be time now for me to take notice, as I have so far gone into the general history, of another circumstance, which is notorious to all the gentlemen who have been settled in that island, as well governors as the other military gentlemen that have been there, that the native inhabitants of Minorca are but ill affected to the English, and to the English government. It is not much to be wondered at. They are the descendants of Spaniards. They consider Spain as the country to which they ought naturally to belong; and it is not at all to be wondered at that these people are not well disposed to the English, who they consider as their conquerors. A strong instance of that happened at the time of the invasion of Minorca by the French, when the French took it, which I believe was in the year 1756, the beginning of last war: and it is very singular that hardly a Minorquin took arms in defence of the island against the French; the strongest proof in the world that they were very well pleased at the country being wrested from the hands of the English. The French did take it, as we all very well know; but, thank God, we have it again. Of all the Minorquins in that island, perhaps the plaintiff stands singularly and most eminently the most seditious, turbulent, and dissatisfied subject to the crown of Great Britain, that is to be found in the island of Minorca. Gentlemen, he is, or chuses to be, called for this purpose the patriot of Minorca. Now patriotism is a very pretty thing among ourselves, and we owe much to it; we owe our liberties to it: but we should have but little to value, and perhaps we should have but little of the liberty we now enjoy, were it not for our trade. And for the sake of our trade it is not fit we should encourage patriotism in Minorca; for it is there destructive of our trade, and there is an end to our trade in the Mediterranean if it goes there. But here it is very well; for the body of the people of this country they will have it: they have demanded it, and in consequence of their demands they have enjoyed liberty, which they will continue to posterity; and it is not in the power of this government to deprive them of it. But they will take care of all our conquests abroad. If that spirit prevailed in Minorca, the consequence of it would be the loss of that country, and of course our Mediterranean trade. We should be sorry to set all our slaves free in our plantations. Gentlemen, having now troubled you so far in general concerning the law, the situation, and government, of this island, and given you a hint too of the spirit of the plaintiff, which I don't wish to make the least impression upon you, unless the evidence of facts, which we shall produce, makes impression upon you; give me leave to descend to the particular circumstances which gave rise to the matter now complained of. The plaintiff, Fabrigas, was a native of the town of St. Phillip's, and within the arraval of St. Phillip's, and consequently under the immediate eye of the governor himself, as he was within that district which is regulated by the mustastaph. In July 1771 he thought proper to present a petition to governor Mostyn, the defendant, in this form: "Sheweth, that your petitioner has now by him twelve casks of wine of the produce of his own vineyards, without having purchased so much as a grape of any other person, of which he has not sold a drop, when several other inhabitants of the town have sold all theirs, as well from the produce of their own vineyards, as what they bought to make a profit by; and this with Mr. Allimundo the mustastaph's permit. That the petitioner, on the 28th instant (July) applied to Mr. Allimundo for measures to sell wine by, of the rate of two doublers per quarter less than the afforation price, which would have raised a profit to the troops and the poor inhabitants of St. Phillip's: but notwithstanding his demand was very reasonable, and conformable to the express disposition (direction I suppose he meant) of the first article of his majesty's regulations of 1752, regulating this island, where it is expressly mentioned that the inhabitants shall always be permitted to sell at the price of the afforation, or under it; Mr. Allimundo refused his petition, telling him that he would not buy his wine: and that this is not only against the reason and justice of the public, and the garrison of St. Phillip's, but also contrary to his majesty's orders in the said regulation:" and he mentions that the mustastaph had made fifty casks of wine, and sold them. Now, gentlemen, two or three observations occur, before we go any further. In the first place, this gentleman, if I may call him so, this Fabrigas, goes upon the idea of the regulation of 1752 being disannulled. In the second place, he goes upon the idea, that the order that was made of 1752, was universal over all the island, without distinction of this district in the arraval of St. Phillip's, in both which you see he was mistaken. Another thing, which don't strike so immediately from what I have read, and yet here give me leave to take notice of it—it is artfully thrown into this petition, as if the good of the garrison was very much concerned in his having his petition granted. And, gentlemen, I do assert, and shall be justified in the assertion, I dare say, by your opinion, before I have done, or at least before the evidence is gone through, that his design, from the beginning to the end of it, was to stir up sedition and mutiny; and amongst the rest, particularly to point to the passions and inclinations of the soldiers of the garrison to take his part against the governor. This petition being presented to the governor, the governor called upon Mr. Allimundo to give an answer to this man: for you see he complained, that he, Fabrigas, had not the permission to sell his

own wine, Allimundo having refused him the measure by which he should sell it; and in the next place, that Allimundo himself had sold his wine. Allimundo did give an answer to this; for the governor, willing to serve every body, and to act with the most impartial justice, and being uneasy himself, that any Minorquin should be uneasy; for the uneasiness of a Minorquin perhaps diffuses itself further than a particular man, and is a fit matter to be attended to by government; he called upon Allimundo to explain this matter. Allimundo gave a full and clear answer to the matter; and stated in that answer, that Fabrigas's complaint was, because his turn for selling wine had not come, according to the lots I mentioned just now, and that was the only reason why he had not yet sold a drop; for no man could sell a drop, till by balloting his time was come: so that Fabrigas had nothing to complain of. But he insists, that no man ought to be bound by the lots, but that every man had a right, by the regulation of 1752, not taking notice of the regulation since that, but that any man might sell under the afforation price: therefore he, offering to sell under the afforation price, ought to be permitted to sell his wine without waiting for ballotting. He was mistaken here: first, because that order of 1752, had been rescinded, and was not the binding order: second, that he lived in a district, where it was not to be regulated by jurats, but by order of the governor: thirdly, that the regulation which had been obtained in the former governor's time had been the way I have represented to you: in all which particular heads he was grosly mistaken; and therefore he had no cause of complaint that he had not sold any of his wine, his time for sale being not yet arrived, according to the regulation of the lots. With regard to the other part of the complaint, that Allimundo sold his wine; Allimundo freely insisted, that he had a right to do so. He claimed a right which had been enjoyed by all his predecessors, and which he could not, without an order from the governor, depart from, not only for his own sake, but for the sake of his successors; that he had a right to sell his own wine without resorting to the lots, and that he had not bought any wine, but sold his own wine. This answer being given by Allimundo to the governor, the governor upon that sent word to the plaintiff, that he had enquired (for he had not taken Allimundo's word for it, but had enquired) into the matter, and found what Allimundo had done was right, and afforded no cause of complaint. This was some time in July. Upon the 11th of August, this Fabrigas thought proper to prefer another petition in these words, "I had the honour to present a memorial to your excellency, shewing, the transgressing and not observing in the said town two regulations given upon the 28th of May 1752, by his Britannic majesty [still adhering to the order of 1752, as if there had been no subsequent order] that the inhabitant should be permitted to sell his fruit at the fixed price, the afforation, or under; secondly, that no commander, judge, or officer, be allowed to have any traffic, bargain, or so forth: [It cites a great deal of this order, and then he takes notice] that Allimundo, who does the functions of mustastaph, bought grapes and made wine. And then he offers to sell to the inhabitants in the garrison of St. Phillip's, twelve casks of wine that he has got by him of his own vineyard's produce, at two doublers less than the ordinary afforation and fixed price. The petitioner has applied several times to your secretary's office for your excellency's decree [that is, for his answer]. Your secretary told your petitioner verbally, that your excellency was satisfied with the answer given by Allimundo; at which he is surprised, as he is ready to prove, in a judicial way, the truth thereof." [Then he prays the governor to give his decree at the foot of the memorial, and to have the satisfaction to justify himself, and to prove his charges against Allimundo.]

Gentlemen, this second petition being presented to the governor upon the 16th of August, which was five days after the date of it, governor Mostyn took the only possible step for a man in his situation to take, consistent with wisdom and justice; and that is, to refer both the petitions, or memorials, as well the former as the second, to the proper officers of justice, for their determination. Accordingly he did refer not only the two petitions, but also the answer or justification of Allimundo. He referred all these papers to the only proper officer there to refer this matter to, namely, the solicitor general of the island, and Dr. Markadal, the first law officer, in order that they might enquire into the matter of complaint, and impart their opinions. They made their report upon the 21st of August to the governor. Now you will see what were the opinions of the lawyers of the island at that very time, that the orders of his majesty in council, of the year 1752, relative to the sale of wine, had never been executed in the suburbs of the castle of St. Phillip's. You see it is just what I told you at first; that is, the arraval of St. Phillip's, that order of 1752, was never understood to extend to that particular district, which is under the immediate government of the governor himself, that is the place where this man dwelt. Then they say, secondly, that the custom observed in the suburbs, upon the sale of the wines of the inhabitants, has been, that the mustastaph had the direction of distributing the measures among those inhabitants, which was continued till some years past; when lieutenant general James Johnston, lieutenant governor of the island, in order to avoid complaints, formed a regulation, dividing the said suburbs into four quarters, and ordered that the wine should be sold by such of the inhabitants unto whom it should fall (I see I am mistaken; it was introduced, I see, by governor Johnston), which regulation at this time exists. The third is, that Antonio Allimundo was elected mustastaph. Fourthly, that Alli-

mundo, Joseph Neto, Ralph Preter, and Joseph Leslie, who are the persons that have executed the office of mustastaph of the said suburbs for several years past, have been accustomed to purchase grapes for making wines:—this is the defence of Allimundo. Then, fifthly, that the bailiffs, jurats, mustastaphs, and other public officers, make, and have been accustomed to make wine from grapes bought by themselves. And then lastly, that the making of wine from grapes bought had not been reckoned an illicit traffic, nor incompatible with the office of bailiff, jurat, mustastaph, and so forth. Now see what method these officers took to be informed of this matter, in order to give the answer to the governor. "This, sir, is what in obedience to your excellency's order, we can inform you of, according to what appears to result from the declarations which we have received upon oath from the properest persons, whose original depositions remain among the archives of the royal government." These two observations naturally occur. In the first place, that the governor took the only method he could, upon the complaint of this man, to refer it to the only proper officer of the island, upon whose report he might depend, with the power of examination by this officer, of all proper persons upon oath, for their information. That upon the result of the report of this officer, it appears that the complaint of Fabrigas was groundless. It was groundless both with respect to his claim of right to sell out of the order, by casting of lots: it was groundless, likewise, with regard to his complaint against Allimundo, for having sold wine himself. For they say that the regulation made in 1752, had never applied to the district of St. Phillip's, that is, the arraval of St. Phillip's. They say, secondly, that within that district they had always sold their wine by lots. And they say, thirdly, that the mustastaph, and the other officers that do fix the afforation, have always sold wine the way that Allimundo has. This was the answer that was given, and this the report that was made to the governor, in consequence of his having referred to them the two petitions of Fabrigas, as well as the answer of Allimundo to the petition. Gentlemen, they afterwards made another report; for this, I told you, was on the 31st of August. They made another report four days after upon the 4th of September: they gave an account, for the governor was very desirous to know in what manner these gentlemen had proceeded. (You see there is a general allusion at the foot of the report, to their having examined proper persons upon oath.) The governor was exceedingly desirous to know in what order these gentlemen had proceeded, to see whether all possible care had been taken to avoid complaint, and from an earnest desire he had, that all causes of complaint might subside, that there might be one universal rule of good government preserved among the Minorquins: and to be sure, he must be answerable to the crown of Great Britain for any improper conduct. "We, upon the same day, the 16th, that is the day of reference, we wrote to the said Allimundo and Fabrigas, citing them by our commission, and ordering them to appear upon the 20th; and in obedience to which they having appeared, we again ordered them to appear on the 23d following with their proofs and documents. At their appearing on the 23d, we demanded of them their proofs and justification; when Fabrigas answered, he did not intend to enter into the same, till he had obtained the decree of the 3d memorial, that is, the answer of the governor in writing. On the 26th, Fabrigas was convened in your excellency's office, where it was asked, what action it was he intended by these memorials against Allimundo, whether civil or criminal? And having time given him to answer, he replied, a civil one: all which appears by the acts to which we refer. As the said Fabrigas hath not this day represented before us any proof by way of justification of his said two memorials, we therefore, for this reason, have the honour to submit the same to the consideration of your excellency's wisdom, that you may not impute to us the least omission of the lively desire we have to execute the orders of your excellency." This is dated the 4th of September. Upon this order, this report that was then made upon the 4th of September, which gave a clear satisfaction that every thing had been done with proper care and caution to prevent any complaint, this Fabrigas presented a third petition or memorial. I call them petitions, remonstrances—I don't know what name to call them by, but still they have the title of a petition—he called it the humble petition—and in this third, as in the second, he had complained of Allimundo. Now here is a remonstrance against the judges:

That "whereas the judges delegated by your excellency"——

Court. Of what date is this?

Serj. *Davy.* I have no precise date to it. "The judges have denied him a communication of the answer given by Allimundo, who does the functions of mustastaph of St. Phillip's: prays you will be pleased to order the judges to receive the witnesses which are produced to justify the articles." And then follows upon this, no less than twelve articles of impeachment, as it were; articles upon which the witnesses were produced to prove some facts committed by Allimundo against his majesty's orders, and to prove some injustice done by Allimundo against the Minorquins inhabiting the town of St. Phillip's, and against his majesty's troops of that garrison. Then follows a string of twelve articles, which I don't mean to read to you now: you will have them by-and-by in due order. Then he speaks of the prices of meat, fish and several other things, all which he complained are not well done; and there is a general complaint throughout the government of all the officers, that all the Minorquins are ill-used by the misconduct, misrule and

his government there: least of all could he ever wish to oppress or injure this man, too inconsiderable in his own particular private station of life, too remote from a connexion or acquaintance with the governor, for him to have made him the object of vindictive—I won't call it justice, but of any vengeance or resentment upon any occasion whatsoever. When the man made a complaint, he wished to enquire into the grounds of it; and when he found it was groundless, and the man reiterated the complaint, however he might be teazed by this reiterated complaint, (for it is grievous and troublesome to a man to be teazed with new remonstrances and petitions, when he sees the impropriety and impossibility of granting what is requested) still takes all possible occasion to enquire into the grounds of the complaint, to answer the complaint. But when, after every means had been tried, the man threatens the dissolution and destruction of government in the island, it became his duty then to treat this with some seriousness: and yet for the general good of the island he did it, never complaining of these two hundred men that were to be armed, only laying hold of the man himself, and, as soon as a ship could be got, to send him out of the island. And now governor Mostyn is called upon in an action. The laws of a foreign country, gentlemen, are matters of fact here; and it is very well worthy consideration—it is very well worthy of consideration indeed (I do not mean to trouble you with a discussion of that question; but since his lordship has hinted about it, it is very well worthy of consideration) whether such conduct, upon such occasions, in such a place, can be the subject of litigation in a court of justice in England; it is very well deserving of consideration. I know very well, upon a former occasion, when an action was brought against the governor of the island of Barbadoes, by a man who succeeded in his absence to the government, without any particular appointment so to do, and having been guilty, in the governor's absence, of some malpractice, (he was appointed by him, but had not took the oath) there was an action in that case brought against the governor for some proceedings against his deputy, as was the subject of an action, and there was judgment in that case given for the plaintiff; but a writ of error being brought, and that being removed afterwards to the House of Lords, that judgment was reversed. As well as I recollect it, one of the chief grounds insisted upon on the part of the defendant was, that being a matter abroad,—(for that it was upon demurrer to a plea)—that being upon a matter abroad, it was not cognizable by the courts of justice in England. In answer to that, it was insisted—

Court. Was it not the main question in that trial, whether the council of state, or the governor of Barbadoes, had a power to commit?

Serj. *Davy.* That was a question. I have sir Bartholomew Shower's parliamentary cases upon the table.

Court. I think the courts held they had no power to commit: the House of Lords held they had a power.

Serj. *Davy.* Your lordship will find the particular reason of the reversion of the judgment is not stated, but only that the judgment was reversed. But one of the particular reasons was that the island might be governed by particular laws, and that he was not responsible here for what he did there. To this it was answered and insisted upon by the other side, that they were governed by English laws; that they were not a conquered country; that they were inhabited by the subjects of the crown of Great Britain, who came of English or Britannic subjects, going from Great Britain to that country to reside and settle there, and were not like the case of a conquered country. The reason of it does not appear. Upon that report, the House of Lords thought proper to reverse the judgment. In the present case, see how strong it is! for every objection made upon that case applies with double force here. Suppose it comes to that question of law, will not that question be of too great magnitude for me to say a single syllable about it? This that I have now mentioned, and your lordship has gone before me in what I was going to say, is a very important question of law indeed; a very great question; a question of the first magnitude, and which will therefore deserve to be discussed and determined by the highest court of justice this kingdom is acquainted with. It is a question of infinite difficulty and great importance, with regard to the responsibility of the governor in a conquered island, with respect to their being amenable to foreign subjects, with regard to being amenable for their conduct.

Serj. *Glynn.* They are the descendants of foreigners, all of them.

Serj. *Davy.* I mean those that are born in Minorca, that descend from the ancient inhabitants of the island. They are subject to be governed by whatever laws the king of Great Britain shall think proper to impose upon them. The king of Great Britain may, if he pleases, alter his government of that island, and give what laws he pleases under a general ratification; and they are all bound by it. I say, a discussion of that question, as a question of law, is of great magnitude. I do not mean to trouble you with it. To be sure, it is too much for my grasp; it is too much perhaps for the grasp of any one man sitting in judgment, much more for me standing here as a counsel, who have no judgment at all, only a duty I owe my client; and perhaps, and most probably, it will be a question to be referred to the determination of the court above. And you, at the same time, will certainly, if you think proper to find a special verdict in this cause, which I suppose you will, you will do well to consider the subject with regard to the damages, which we call contingent damages; it was therefore exceeding fit to mention all those circumstances to you, not only with regard to the matter of fact, but also for your consideration with regard to the

damages. For suppose (it is upon that ground I now address you) suppose the governor mistook the law upon this occasion; suppose he was wrong, and ought not to have proceeded *in this way*; suppose that notwithstanding all the opinions he had took, as well from the civil officers in their different departments, the law officers, and the assessour judges, and so forth, confirmed by all the military officers, whom he assembled together upon the threat of the insurrection; suppose, notwithstanding all these opinions, he ought, instead of doing what he did, rather to have kept this man a prisoner, and brought him before some tribunal to be tried: suppose that ought to be his conduct; that therefore he did wrong, instead of it, to imprison the man immediately, and banish him, upon his own authority; now to be sure the assessment of damages by you must go upon that supposition. I think I speak fairly upon the occasion: I mean in this and all other occasions to act with character: I suppose that to be so: what mighty damages ought, on that occasion, to be given against the governor? He in that instance mistook the line of his duty; he acted as he thought for the best, for the safety of the island; but he acted precipitately. Why, let Mr. Fabrigas or his friends (for I do not know whether he is in England himself or no), let them put one question to themselves to decide it. If general Mostyn had done the thing, the not doing of which they now complain of; if general Mostyn had brought this man to a trial, what might have been his fate? The least surely could have been that which he now complains of, banishment for a single year; for with regard to the imprisonment, it is not an unusual thing in any country. Upon great and emergent occasions, it is not an unusual thing to confine a man for a few days, and debar him the access of his friends: that is not an extraordinary thing. But suppose in that he did wrong: I will suppose the whole to be wrong. Wherein is it wrong? It is wrong from a misapprehension of judgment, from a mistake: it is wrong merely in respect to mistake. It is not wrong from malice, from wilful wickedness towards this man, from a tyrannical disposition, from a desire to oppress or hurt him. If this had been the case; if the governor, respectable as his character is, could for a moment be suspected to be capable of acting in this manner, from tyrannical, cruel, or wicked motives, he would have done ill to call upon me to be his advocate; for though even in that case I would discharge my duty towards him, I could not have spoke with cheerfulness for him. But here I consider him, and the whole tenor of his conduct bids me so to do, as a gentleman willing to discharge his duty to the crown; to preserve this island, as it was his duty, to the commonwealth of England; willing to do all that was good, right, and just, without any vindictive motive to this man, to whom he is a stranger. But upon this occasion the governor will pardon me, if I take notice upon this occasion, of what is too well known ever to be questioned, his general good character. And yet I have less need to ask his particular pardon upon this occasion, because that gentleman from whom I received my instructions, the attorney in the cause, has filled my brief with, I think, not less than thirty of the first names in this kingdom, who, I am told, are all attending here, or within a moment's call from this hall, some of the most respectable characters in this kingdom, some of the highest rank, and gentlemen of the first character in this kingdom, to tell you that they have at different times served under general Mostyn, and that they do not know in all their acquaintance, a man of a more cool, dispassionate temper, a man of greater character, humanity, and justice, then general Mostyn; as celebrated for it as any man of any rank or of any degree of honour in the world; and yet general Mostyn must be supposed, in order to justify vindictive or exemplary damages upon this occasion, must be supposed to be actuated by motives which his heart abhors, and which motives never actuated his heart a moment in his life. I leave it upon this idea, that if he has acted improperly in every step, yet, upon the idea of its being a mistake in general Mostyn, I apprehend the plaintiff has no right to expect exemplary damages.

Serj. *Burland.* I suppose it is a fact admitted between us, that this is a conquered island, ceded by the treaty of Utrecht?

Mr. *Lee.* Minorca was ceded to this crown by the 11th article of the treaty of Utrecht.

James Wright, esq. sworn.

Examined by Serjeant *Burland.*

Q. You resided some years in Minorca?—*A.* From about January 1771, to the middle of 1772.

In what character?—As secretary to the governor.

To Mr. Mostyn?—Yes.

You know the division of the island, do you?—Yes.

What are the districts they are divided into?—I believe originally five; but two are blended together, that there now are but four.

Do you mean to include in one of these districts the suburbs of the fort of St. Phillip's?—They never do, when speaking of them; that is, extrajudicial of the common officer of the island.

Under whose particular jurisdiction is that?—I always understood it to be under the direction of the governor.

What do you call that district?—The arraval of St. Phillip's.

Are you sure you understood it to be distinct and separate from all the other districts?—Yes; insomuch that I was always led to believe, and told, that no magistrate of Mahon, which is the district next adjoining to it, ever did go there, or could go there, to exercise any sort of function, without leave had of the go-

vernor; and whenever there was occasion to send any of them down there, the fort-major received orders for their admission.

Are these laws varied at any time, and by what authority?—The island is governed by Spanish laws,* subject to be varied by the governor, with regard to all interior matters. A proclamation of the governor is as binding there to try a man upon a trespass, as any laws whatsoever, subject to be varied by the order of the governor; not in respect to property, not with regard to *meum* and *tuum*, but with regard to the internal police.

What do you mean by proclamation?—That if the governor issues a proclamation, and inflicts a penalty for the breach of it all over the island, and if any person is guilty of the breach of that proclamation, he is subject to the penalty of it, and for want of payment is imprisoned.

I suppose you mean they enforce an obedience to that proclamation by imprisonment?—There is there the chief justice criminal, and the chief justice civil: both have their separate courts. If the governor's proclamation is broke with any penalty annexed to it of imprisonment or fine, the man is seized and brought into that court: the proclamation is exhibited against him, and by that he is condemned to either fine or imprisonment, though that proclamation was made perhaps but the day before.

According as that proclamation affects, whether a civil or criminal matter?—I do not recollect any of a civil matter.

Court. What are the nature of the proclamations you are speaking of?—*A.* In all the memorials presented to the governor, he issued an order, that no memorials or petitions, except for mercy, should be presented to him without being signed by an advocate admitted in the courts.

Q. You mean governor Mostyn issued this?—*A.* Yes.

Whether, though the Minorquins by the treaty of Utrecht are governed by the Spanish laws, yet whether our government here do in fact, or not, from time to time make alterations and regulations in those laws?—The king in council, upon all occasions of application to them, issues out such orders as the case requires, and they are recorded in the royal court there, and are as binding as any laws whatsoever.

They are registered there, are they not?—Yes.

What do you call the royal court?—The court of royal government is the criminal and the civil court.

You know Mr. Fabrigas?—Perfectly well.

What is he in the island?—I was directed by governor Mostyn, who was very much teazed by his repeated applications, to enquire what sort of a man he was.

First, as to his quality in the island; what station is he?—His father holds some vineyards, very small. He himself I believe actually, for his bread, labours and digs and prunes the vineyards, and talks and chatters about politics perhaps five days out of six. It has been repeatedly said, Mr. Fabrigas is a man of property. I believe he had at that time no property upon the earth. General Mostyn ordered me to make enquiry, and that was the result of it.

We know what the station of general Mostyn is; that he was then and is now lieutenant-governor of Minorca; that he is commander of a regiment, and a man of family: what is his character as a man and as an officer? Is he a man of humanity?—I believe as much so as it is possible for a man to have; that is, in my opinion. I have seen much of him. I do not believe there exists in the world a man of tenderer feelings, for any ill effects that may be produced from him.

Is that his general character?—I believe him to be much more so than common. I think that is his conduct that will be found upon every enquiry that can be made of him.

And it has been so under your own knowledge?—I am sure of it: I have had many opportunities of seeing the working of it in a very surprising manner.

Will you let us know as much as you do know of this transaction between Mr. Fabrigas and the governor?—May I refer to some minutes I have here?

Counsel. Yes.

Serj. *Glynn.* Did you take them at the time?—*A.* No; but all within three days. I hope I shall be excused if I should make any mistakes in respect to date. Mr. Fabrigas presented a memorial, I believe to myself, to be delivered to governor Mostyn—that was the 31st of July 1771—complaining that Mr. Allimundo, the mustastaph, the only officer in the arraval—I think that was the first petition, complaining of some abuses in buying wine. The governor said, What does the fellow want? He bid me order Allimundo to answer it, for he knew nothing about it. I sent for Allimundo up to the head-quarters. The mustastaph is the only civil officer of St. Phillip's, that is, in the arraval: he is put in by the governor, and turned out by him at pleasure.

Did you order Allimundo to give in an answer to it?—I sent for him, and desired him to come up to me. I gave him the memorial, and told him it was the governor's order that he answered it. Upon Allimundo's answer coming up, it was read to the governor.

Counsel. That answer is dated the 8th of August 1771?—*A.* I read it to the governor. The governor ordered me to tell Mr. Fabrigas and Allimundo, by an interpreter, that he was very well satisfied with the defence Allimundo had made to Fabrigas's charge. I told them both so. Fabrigas came again, and desired to see the defence that Allimundo had made. I told him I was not authorised to shew it him,

* As to the laws which should prevail in a conquered country, see the Case of the island of Grenada, A. D. 1774.

nor did I think it was a matter for him to demand. He came again the next day, or the day after, giving in another memorial, desiring that that might be shewn to the governor.

Counsel. That was delivered the 13th of August?—*A.* Yes: in short, desiring to see the justification of Allimundo, and shifting the ground of his complaint, and, I think, adding another article.

You shewed these two memorials to the governor?—I did. Governor Mostyn ordered that Dr. Markadal, who then acted as chief justice civil, should receive and hear any complaints that Fabrigas had to make against Allimundo; and he added to him the advocate fiscal, the second officer in the island that acts under the king's commission: the chief justice civil is the first, the chief justice criminal is the second, the advocate fiscal is the third, next after the governor: he gave them authority to send for papers and persons, and whatsoever might be useful in the enquiry in his name. By my memorandum, I think it was the 20th of August, that these two law gentlemen, as commissioners, met, and ordered Fabrigas and Allimundo, who were then present, to attend them the 23d following. It may be necessary to observe, that though these two gentlemen were then sitting in their own civil courts, they acted as commissioners of enquiry, because the man was one of the arraval of St. Philip's. I won't charge my memory by oath, but I am very sure they had a separate commission on purpose under the governor's own seal.

Was the inquiry made?—On the 23d, Fabrigas declared he would proceed no further till he was allowed to see the defence that Allimundo had made, and given in to the governor.

Where was that declaration made?—In the court before the commissioners. Mr. Fabrigas presented a third memorial to governor Mostyn, saying nothing more than what he had said before the commissioners, that he could not proceed till he had seen Allimundo's answer to his petition.

Before the third memorial that was presented, had the commissioners made any report?—None.

Do you recollect whether the third memorial was after or before the report?—I am pretty sure before.

Serj. *Burland.* That is the third memorial, containing the 12 articles he exhibits against Allimundo: there is no date to it.

Q. Can you fix the date to that?—*A.* I think it must be between the 23d and 26th of August. General Mostyn referred him to the commissioners.

What was done afterwards?—The commissioners reported to the governor, that Mr. Fabrigas, by the manner of his carrying on this accusation against Allimundo———

When was their report?—The 24th of August, I imagine: here is their report.

Court. I dare say this report he is speaking of now, don't contain the commissioners answer about the 12 articles?—*A.* There are two reports.

Serj. *Davy.* I took a great deal of pains to collect dates, and I did it from the contents: I believe they were right, as I opened it.

Wright. There were two reports, one the 31st of August, the other the 4th of September, that Fabrigas, by the manner of carrying on this charge, intended to sow dissention.

Serj. *Davy.* Mr. Wright, I find, confounds two reports together: it is the third report where they report that it is to breed sedition.

Q. Then he presented this third memorial containing the 12 articles?

Mr, Just. *Gould.* My brother Davy stated, that it was the 10th of September that they took notice of the articles.

Q. Was there another report about the 10th of September?—*A.* Yes, there is. On the 26th of August the governor ordered me to desire the criminal chief justice, and the civil chief justice, the advocate fiscal, and the secretary to the court of the royal government, to come to me next morning, that being the 26th. Fabrigas came there. I asked him in the governor's name, by an interpreter, what he meant; whether a civil prosecution to recover damages against Allimundo, which he had sustained? or whether he meant to make an example of him for any abuse he had committed in his office? These gentlemen were present.

What answer did he make?—None; I could get no answer from him.

Serj. *Davy.* That is, upon the articles.

Court. Is that subsequent to the delivery of the articles?

Serj. *Davy.* Yes.

Q. This question arose upon his presenting the 12 articles to the governor?—*A.* Upon the whole of his conduct.

But that was after he presented the articles?—Yes.

What did he say to that?—He said nothing. I desired him to make some kind of answer, that I might tell the governor. His answer at last by extortion was, that if I would give him a quarter of an hour, he would go and come back with an answer.

Being confounded at the question at first, and giving no answer for some time, at length he said that?—He did not know which he wanted nor what he wanted. He gave no answer at last, but only asked that he might have a quarter of an hour. I told him that he was not confined to a quarter of an hour; but it being then between 10 and 11 o'clock, I believed that they would be so attentive to him, that he might call again at 12 o'clock if he pleased. He came back again within the time, and gave notice that he meant a civil action.

Serj. *Glynn.* I would not interrupt this evidence, as it does not appear to be of great consequence to us; but I submit to your lordship, whether this is properly evidence, the answer being conveyed through an interpreter? and

whether the interpreter should not be produced, who knows what answers were given?

Mr. *Lee.* We are now to take the answer from a man that does not know what the questions were, in a language the witness does not understand, and consequently cannot report if there were any, or what answers given; whereas there is a man living in the world who could report the answers that were given. I should not object to it, if that gentleman could himself understand the answers that were given.

Mr. Just. *Gould.* I think it is very clearly sufficient evidence.

Mr. *Peckham.* The interpreter was appointed by the governor, or by his order, therefore we cannot tell whether that interpreter gave the fair and true constructions of the conversation which passed between Mr. Fabrigas and Mr. Wright; but from the person appointing him, we have reason to apprehend the contrary.

Court. First, it is very clear, from what Mr. Wright says, and I suppose nobody will doubt from the subsequent action, but that this interpreter very fairly and rightly interpreted, that this man desired to have a quarter of an hour to consider of it: that is clear. He has two hours given him. He comes back again, and then the same interpreter officiates. The act proves that he had explained the first very clearly, because he went away in consequence of it.

Wright. The assesseur criminal talks as good English as any gentleman in court, and he, whenever there was the least mistake or confusion of sound or words, set it right instantly. He returned again and said he meant a civil action.

How long time do you think he was absent?—Within two hours, probably an hour, the assesseurs both of them walked out and came in again. The commissioners not finding Mr. Fabrigas would attend them, were desired by the general to send him an answer in writing to six questions.

When was this?—Subsequent to his saying he would proceed by civil action.

I suppose then that meeting broke up?—Yes. The governor consented that he might have a civil action against him. I reported it to the governor.

Did you tell him of that?—I never saw him afterwards, but the judges present heard him say he meant a civil action. They told him they would admit it.

Mr. *Peckham.* Did you hear that?—*A.* Yes, I did. I was to signify to him that the governor assented to his having a civil action, if he chose it.

And was it signified to him?—Yes, it was.

You say he did not proceed by a civil action, and therefore six questions were proposed to him?—The assesseur civil came to the governor, and informed him this man did not proceed in a civil action: then the governor sent six questions to him.

How long after was it that they were sent him?—I cannot recollect.

Was it the same day?—No; it might be three or four days. The general sent for his own information six questions, relative to the conduct complained of, of the mustastaph, for the opinion of the chief justice civil, whether the mustastaph had or not exceeded his commission. The questions are in court, and the answers.

Is there any date to these six questions?—The mustastaph of St. Phillip's hearing this great confusion, in which he was the great person complained of, spontaneously sent up an attestation, or rather a desire, of many of the inhabitants of the arraval of St. Phillip's, to request the continuance of the old regulations, and that the alterations proposed by Mr. Fabrigas might not be made. That was signed by a great number of them, and was as much the object of conversation there, as any thing ever was.

Was any order made upon that, or what was done?—On Sunday the 8th of September, the governor having first asked Dr. Oliver's leave, a very considerable merchant in the town, a doctor of laws, and the chief justice civil, he gave them a commission to go the next morning, the Sunday, to the arraval of St. Phillip's, to a country-house the governor has there, that is called Stanhope's Tower, telling them he would give directions to all the people that dealt in wine, that they should come before them separately to be examined, and give their opinions, and whether they chose the new resolutions, or to adhere to the old rule.

What do you mean by asking Dr. Oliver's permission?—He was no officer. For them to say whether they chose the new institution of general Johnston, or whether they chose the general sale of wine as every body pleased. A great many of them did appear the next morning; I suppose all: I understood at least all that chose to come.

What was done?—They reported to the governor, that 93 were for the then practice, (that is, general Johnston's institutions) 41 were for the old regulations, and 6 appeared to be indifferent, and 4 wanted some alterations of their own.

Which were the old ones?—They never were in practice in the arraval of St. Phillip's; but, upon all the enquiry, they could find that the king's regulation subsisted about six months, and made great confusion, but that the regulation of 1752 never obtained at all in the arraval of St. Phillip's.

When was this reported, and dated?—The 8th of September; that was on a Sunday.

What followed? Was this reported to the governor?—Yes; but the governor was well informed of what had passed, on the Sunday. Mr. Fabrigas came on the Monday morning with a new memorial, complaining that it was Sunday; and he protested against what was done, and that Dr. Oliver, and the chief justice civil, had used threats and menaces to the people.

Then the next memorial I have in my hand is Dr. Markadal, and Dr. Oliver's?—The go-

vernor was so exceedingly cautious in every thing, whether of consequence or not, upon this nonsensical memorial, that he submitted every transaction to the people of the island. He sent this report to Dr. Markadal and to Dr. Oliver, for them to answer. They answered it on the 10th.

What followed the next day after that?—I think it was the same day Fabrigas came for an answer, the 10th, which was Tuesday. He came to me to desire an answer to his memorial about the Sunday affair. I was not at home. He enquired then for the governor's aid-de-camp, and gave him the memorial.

Here is another of the 10th of September, of Dr. Francisco Segui, and Dr. Markadal's.—Francisco Segui is the advocate.

That was an opinion of their's, as the lawyers of the island?—I fancy that accompanied the answer to the articles; I cannot be positive to dates. Returning home, I met Mr. Antonio Fabrigas immediately after he had been with the governor's aid-de-camp; I think the 10th. I rather avoided having any thing to say to him: I had had so much, I was quite satisfied. He came to me. I called Segui, a priest, and got John Vedall, who served for an interpreter, and who happened to be in the street, almost under the governor's wall. I desired Mr. Fabrigas in the most civil manner I could, having done so fifty times before, to say what he wished or wanted. If he would only point out what he wished, it should be done: I would undertake to answer, the governor meant to do any thing that he wanted; but that he had acted in such a manner hitherto, that nobody knew how to please him. Mr. Vedall, who knew this matter, as every body in the island did, joined with me in desiring him to go home and mind his family affairs. All his answer to me was, complaining of the enquiry being on a Sunday. I told him that it could not be altered. John Vedall joined with me in desiring him to go home, and not bring mischief upon himself. John Vedall told me, he said he would come again the next day with one hundred and fifty people. I think it was under his interpretation, though I had the priest there some part of the time.

Q. from the Jury. Was it armed men?—*A.* No, no.

What did he say?—He would come with one hundred and fifty men to back the petition, or whatever the word was, with a petition and one hundred and fifty men, or with a petition backed by one hundred and fifty men.

Q. from the Jury. What do you apprehend he meant by that expression?—*A.* Upon my word I catched at the expression, and desired John Vedall to desire him to desist from such an idea; which John Vedall did, and treated it as laughing: but if I understood any thing by it, it was not to come with guns, for they had no such thing, but to come as a mob.

Q. from the Jury. Did he speak Spanish or English at the time?—*A.* Minorquin.

What was the other interpreter's name?—Segui, a priest, one of the Spanish priests: he was there the first part of the time, and John Vedall the latter part.

Court. And then in consequence of that, you thought he meant a mob?—*A.* Yes; or I should not have got John Vedall to enter into a long conversation to desire him to desist.

Q. What did he say upon that?—*A.* He went on, I believe, repeating the same again. I believe the conversation was closed upon that.

Q. from the Jury. Has Allimundo, by virtue of his office of mustastaph, any particular limited quantity of wine to sell?

Serjeant *Davy.* When the papers are read, that will be particularly spoken to.

Q. You informed the governor of what was said about 150 men?—*A.* Yes.

What passed after that?—I think on Wednesday, the governor sent his compliments to most of the officers of the corps, desiring they would come to him the next morning, to see the honour that was to be done to him.

Did they meet there?—There were most of them there. Every one, I believe, expected a full meeting of the inhabitants of St. Phillip's.

What meeting was that that was expected?—Those people Fabrigas had spoke of. They waited some time, and at last four people came, (I think all four were shoe-makers) and they brought a memorial. I believe a gentleman is in court that received it from their hands. He took the memorial of them, read it, and I think colonel Mackellar, after reading it, told them that they were to go about their business, to go home peaceably, and behave themselves as good subjects to his majesty ought to do. I think there was a conversation preceding, to shew they did not know the contents of that memorial they were delivering, which I believe will, by-and-by, come out. The general asked the opinion of the general officers, as well as I recollect, whether they all knew that this was founded by Fabrigas's proceeding? and the next day he asked them what they understood by it? They said they understood that the man was to be banished the island.

You were not there when they gave their opinions, I believe?—I cannot tell.

And so, in consequence of it, he was banished the island?—The general ordered him, in consequence of that, to be taken up that night. He could not be found. The general sent to the chief justice-civil, and the chief justice criminal, and the advocate fiscal, to know what he should do in that case; that he thought him not safe to be left at large in the island. They told him—

Q. from Mr. Serjeant *Glynn.* Were you present, or do you speak from information?—*A.* I am speaking of what they told me: I was sent by the governor to ask their opinion. This is their answer.

Q. What were you to ask of them?—*A.* The governor's power upon this occasion. They said, the governor's power extended over the man, and he might do with him what he

pleased; and if he chose to banish him, they would answer for it with their ears.

These gentlemen are themselves Minorquins?—Yes; and both talk very good English.

Court. This answer you carried back to the general?—*A.* Yes; and they told it him *viva voce.* The chief justice civil, upon my having many doubts about it myself, and saying that it was not quite the idea of Englishmen, and that we had not any such law in England, said it over and over again. He gave me a piece of paper with his own hand, which he called a quotation from the law of that land, a royal order in the year 1500 and something else; a positive order from the then king of Spain, wherein the king says, that the opinion of the assesseur criminal is consultative only; that the governor may be guided or not by it, as he pleased; but not so in civil cases. Although the governor is absolute in regard to the politics and œconomical government of the island, it is not improper, but very prudent to take the advice of the assesseur criminal, as has been recommended by the king of Spain to the governor; although it must be observed, that in these cases the assesseur only gives his advice, and consequently it is in the governor whether he will follow it or not, and is not decisive, as in civil cases. This man being a Minorquin, the governor wanted to know how he should apprehend him, no officer of his knowing him. The assesseur criminal said, that the officer that attended him as tipstaff was an old fellow. Says the other, "You shall have mine, who is a young able man:" and he was apprehended by the tipstaff who walks before the assesseur civil every day of his life when he goes in or out of court.

How long was he kept in prison?—I do not know; the books will shew it.

Was he put in the common and usual prison?—There is no other prison in the arraval of St. Phillip's, but where he was put, I believe.

Why do they call it N° 1?—I do not know.

Court. It has been particularly described to me and to the jury as the prison where capital offenders are confined, and is called N° 1: why is it called N° 1, if there is not some other prison?—*A.* There are gentlemen better informed of the castle of St. Phillip's than I am. I believe there is no other prison. That may be N° 1 room in the prison.

Cross-examined by Serj. *Glynn.*

I think you told us your residence in Minorca was about a year and a half: who was governor during the time of your residence?—Upon our arrival there, the lieutenant-governor commanded; and upon our arrival the command devolved upon general Mostyn.

Then the command immediately devolved upon him?—Within two days, or so.

And the other two days Mr. Johnston, as his lieutenant, commanded?—I believe the general came there on Monday, and took the command on Thursday. Reports under general Johnston's signature that the governor was arrived made it necessary.

Then your experience of the laws of Minorca has been collected in that residence?—That is all I know of them in the world.

Which has been during the government of governor Mostyn or his lieutenant. Now you told us, that the proclamation of the governor, with regard to the criminal court, was the same as a law; and you distinguish the court of property, which regards *meum* and *tuum*, from it?—Quite.

Do you mean that, without any limitation whatsoever? Suppose the governor intended to inflict a capital punishment upon any offender, must that law be obeyed by the judges?—I should imagine it would. It is only my imagination, observe.

I think you were so kind before as to tell us, that though that proclamation came out but the morning before, it would be equally obligatory upon the courts of justice?—I understand so.

Now this mustastaph, Allimundo, sells wine, does he not?—He makes wine of his own vineyards, and buys grapes of other people to make wine, and sells it in the arraval. He does not sell it retail.

That was a regulation of governor Johnston's?—I believe so.

I would ask you, whether Allimundo had not a lot himself to sell his wine, and exclude every other person?—I think, as the papers are upon the table, they will speak for themselves. I think Allimundo for his own vindication urges——

But I ask you, of your own knowledge, whether the lot did not fall upon him?—I believe he did not draw any lot at all; it is not the custom for the mustastaph to draw lots.

You think he did not draw lots?—No.

You did not understand the Minorquin language?—No.

It is a mixture of Italian and Spanish?—Yes, I believe so, and a kind of bad Spanish.

You have told us of the two interpreters: I think you don't recollect exactly the words the last interpreter said? You think father Segui was gone before Fabrigas said, "I will come with a petition with 150 men, or backed by 150 men?"—I cannot be sure; I think it was Vedall; and the more so, from his joining with me in endeavouring to persuade him from his intention.

I think you communicated this matter to the governor?—Yes.

Did you carry Vedall with you?—No.

Did you make any enquiry after the 150 people?—No.

You yourself were the person that reported the conversation to the governor?—Yes.

What time did you write this paper?—I fancy the memorandums of that paper were wrote, I should think, I could not swear to it so particularly, I should think, within an hour of every one of these transactions happening.

Then I take it for granted, that this is a faithful copy of a faithful collection, according

to your memory, within an hour and half after such transaction?—It was not put down for the public eye, but to refresh my own mind.

Then you did not put down any thing which you did not believe to be true?—No, I should not dream of such a thing.

How long after did you communicate to the governor what Fabrigas had said?—I never was longer between communicating to Fabrigas what the governor said, and to the governor what Fabrigas said, than going from this wall to that; unless the governor was not arrived in the morning, and I waited his return.

Then you could make no mistake of what Fabrigas had said. You communicated to the governor what you put down: you are sure you are under no mistake on that head?—I know I might mistake.

But I do not ask you about any mis-spelling or misdates, but the effect of the conversation?—Upon my soul, I believe so.

Serj. *Glynn.* Then, Sir, I will read it.—"The same day Mr. Fabrigas came for an answer to his petition, and told the governor's secretary he should come the next day with a petition of people concerned in grapes and vines, which they will sign and come with themselves, to the number of 150."

Serj. *Glynn.* I desire it may be read; but I won't ask Mr. Wright any more questions.—(It is read by the Associate.)

Mr. *Peckham.* Pray read the next paragraph.

Associate. "On Wednesday the 11th the governor, having the field officers in and near Mahon with him, received a memorial from four men, signed by persons of St. Phillip's, desiring the old practice might be pursued: to which he answered, that the four men should return home, and behave themselves as good and peaceable subjects to his majesty ought to do."

Mr. *Lee.* Your lordship will give me leave to ask upon this paragraph a question of Mr. Wright. You say there were four men came with a memorial signed by persons of St. Phillip's, desiring the old practice might be pursued: did you see that memorial?—*A.* I did.

Can you take upon you to affirm by what number it was signed?—I shall speak merely from memory, for they were all scratches: I do not believe there were ten names legible to it.

What number of signatures were there upon this paper?—I have already said I really and upon my word do not know.

Were there nearer 150 or 100?—It is merely a matter of memory; there were from 41 to 47, I believe.

Now can you take upon you to affirm, that there were not more people signed this memorial than had signed the memorial for the new institution?

Court. I understand it is in the report. There is a report of the assessour civil and Dr. Oliver, that 93 were for governor Johnston's institution, and 41 for the old regulation; 6 appeared to be indifferent, and 4 wanted some alterations of their own.

Q. There were 90 odd for the new institution?—*A.* My memorandum says so.

Can you tell me whether there were or were not upon this memorial which was brought by the four men, the signatures or requests of more or less than that number for the old institution?—I have already said ten times, that I cannot take upon me to ascertain the number of signatures upon this last memorial; but I do know Allimundo proved many of them to be false.

You know that is not an answer to my question. I did not ask you what were the number of men that signed this memorial: I don't mean you should answer with that precision, whether 46, 50, or 150: but my question is, whether you can take upon you to affirm at this distance of time, that the memorial which was brought by four men was signed by more or less than 90?—I can say no more: if I knew, I would tell you. I looked at the memorial, it was full of crosses; and what makes me think it was between forty and fifty was, because I counted it.

Then you did count it?—I did begin to count it.

Did you proceed to count them through?—What signifies answering that?

Because I expect an answer. What signifies counting numbers, and not going through it?—I wish your head was capable of retaining every little circumstance of no consequence.

Court. The gentleman means, whether you have now such a certain recollection of the number of signatures upon that paper as to say, whether there were more or less than 90?—*A.* I don't recollect any thing but one; that is, that I began counting; any other circumstances that shall lead me to the number, whether I left off at 40 or what.

We understand that a considerable majority signed this very memorial—we want to know that fact?—Every attention was employed, every argument used, and every possible means was taken, for finding out the true sense of the inhabitants; and amidst the various methods taken, there did not appear, when enquired into fairly and honestly, to be one in ten of all the names that were presented to the general in support of Fabrigas's complaint. Mr. Allimundo was supposed to be a man that would produce the truth. The fort-major was sent to examine with him.

Mr. *Lee.* The serjeant will tell you, that is no evidence at all. Let me ask you, when this particular paper was copied that I have in my hand?—*A.* As soon as I was at leisure to do it myself.

When was this particular paper copied?—I have said half-a-dozen times, as soon as I had time to put all the bits of paper together; instantly.

Was this paper copied from a memorial in which this number is stated blank as it is here, or have you that original memorial by you?

In whose possession was that memorial?—Not in mine.

To whom was it given?—I think to colonel Mackellar.

He was an officer of the governor's?—Commander in chief of the corps of engineers.

So he had the possession of that memorial, the contents of which you have stated by blank persons?—All I can recollect of that particular memorial that you speak to is this, that four people brought it; it is a hard thing to be pinned down to such a thing as that. The mustastaph himself was present. I think col. Mackellar was talking of this memorial: I think I had it out of his hand, and was going to read it, and count it. I believe he or Allimundo took it; and I believe Allimundo took it home to confute many of the names, which he did afterwards.

And that you conceive to be the reason why you did not get through them, why you did not proceed to tell the number?—I should believe so, upon my word and honour.

You do still take upon you to affirm that there was nothing like the number in this, that there were for the other regulation?—I did not attempt to say such a thing.

Upon the inspection you then had, you cannot take upon you to affirm that?—I have told you all I know of it: I fancy there was much less.

Serj. *Burland*. You were asked about the lieut. governor being general Mostyn's lieut. governor; I believe the governor does not appoint his own lieut. governor?—*A*. No.

I believe those regulations made by general Johnston were some years before general Mostyn was governor?—The date will shew it.

I suppose about 1752?—O no; since that.

I meant 1762?—I believe prior to the execution of the office of mustastaph by Mr. Allimundo.

Prior to the time Mr. Mostyn was made governor?—Yes.

You were asked a good deal about that memorial that had these crosses upon it: you said Allimundo took it away with him in order to confute———I know he had it; I don't know whether he took it away.

Had the governor any reason to apprehend that those names at the bottom of that memorial were not put there by the persons?—Yes, he had reason to believe it.

Did he enquire into it?—Yes.

What was the result of his enquiry?—The report made to him was, that a certain number of their names were absolutely forged; that the hands of others were obtained under a supposition that the memorial related to oil.

Court. You said just now, that upon a strict enquiry there did not appear above one in ten; did you yourself make enquiry of what was the general sense of the inhabitants?—*A*. To every body, and with every body that could possibly give me information; and from the general conversation I had, it did not appear to me that there was, I might say one in twenty that ever wished it; and it would be worth your lordship's attention to see what these regulations are.

Court. Then by the general's direction you made the strictest enquiry you possibly could, to see what the sense of the people might be, and did not find above one in ten that wished for this alteration that Fabrigas desired?—*A*. I, according to my own opinion, give a great allowance when I say that.

Did you inform the governor of this?—When I use the word report, I don't mean an idle story picked up from one or other, but a military term, an answer to the enquiries made by the governor.

Then the intelligence you conveyed to the general was, that the opinion of by far the greater majority was against this Fabrigas's desire?—All almost: I save my oath by saying almost, but there was almost all.

John Pleydel sworn.

Examined by Serj. *Walker*.

Q. You were aid-de-camp to general Mostyn, I believe?—*A*. Yes.

Upon the 9th of September 1771, give an account of what you know of this affair when Fabrigas came to the governor's?—He asked me to see the governor in the morning. I told him he could not then see the governor, but I was aid-de-camp to the governor, and any favour or any thing he had for the governor I was ready to receive. After a little hesitation he gave me a paper, a memorial: he desired at the same time I would inform the governor that he should come the next day for an answer; he said he should come accompanied by 200 or 250 of the inhabitants of St. Phillip's.

Two hundred or 250?—I don't exactly remember the words.

Was that all the conversation you had with him?—Yes. I immediately acquainted the governor with this message: I read the memorial to the governor immediately, and informed the governor of what he had said to me. I think it was that day the governor sent to the field-officers of the garrison and to the commanding officers of the corps, to meet at his house the next day, in order that they might be witnesses of the manner in which he should receive this Fabrigas and the people he mentioned to come along with him. Only four men came the next day, and brought a memorial.

Were any of the commanding officers there?—Yes; I think all the commanding officers were there when these men came.

What were the sense of the commanding officers?—I think the sense of the commanding officers was, that, in short, this man should be taken up.

Why would they take him up?—As a troublesome, seditious, and dangerous person in the island. The governor mentioned to me, that he had consulted the chief Minorquin judges of

the island. I know he had consulted them, which corroborated the opinion of the field-officers that were there attending.

Who is this Mr. Fabrigas?—An inhabitant of the arraval of St. Phillip's.

Of that district that does not belong to the four where there are jurats?—Yes, and is close by the glacis of the fort.

What, has he there any property?—His father is alive; he takes care of his father's vineyards, I believe. That is all the property he has.

That is, the liberty of working in his father's vineyard?—I believe so.

What sort of a character does he bear there?—He is generally supposed to be a seditious, turbulent man; that is the general character of the man. General Mostyn is very far from being a tyrannical, overbearing man. I had more opportunity of knowing him; I served immediately under him the greatest part of the last war.

A man of temper and humanity?—Yes, very much so.

Cross-examined by Mr. *Lee.*

Q. You were aid-de-camp to general Mostyn?—*A.* Yes.

Do you remember Fabrigas declaring that next day he would come accompanied with 250 men?—Yes.

Do you know whether there had not been a dispute amongst the inhabitants, and upon which side there was a majority, whether for the new or old regulations?—I cannot tell.

What were these 250 men to come for?—I imagined it was to give weight to the petition.

Do you conceive that the object of Mr. Fabrigas was to bring 200 or 250 men that were of his opinion to give weight to his request?—Yes.

My learned friend thought he meant to attack the garrison of St. Phillip's. You did not apprehend he meant to take the garrison of St. Phillip's, that stood out against the whole force of France for a considerable time, and, by the bye, might have stood out a great while longer? You did not understand that he was to come at the head of these armed peasants?—Not of armed peasants.

Court. You apprehend he was to bring these people to shew there were so many people to back his petition?—*A.* No; I apprehend he meant a mob that would breed confusion in the garrison.

Whether you understood that he meant to bring these 200 people to occasion and raise a tumult, or whether he meant to bring so many people to shew they favoured his petition?—So many people together in a garrison would breed confusion.

Court. What did you understand?—*A.* I really thought he meant to give weight to his petition.

Had you heard at the time that Fabrigas spoke of bringing 200 or 250 of his friends—had you heard of any dispute, whether there were more of one opinion, or more of the other; or had it been asserted that the people in general of the arraval of St. Phillip's were consenting to the new regulations?—I think the people in general wished to have the old regulation continued; I took it in that light.

What do you mean by the old custom? the custom Fabrigas contended for, under the order of council in 1752?—Yes.

I dare say the serjeant will not acknowledge that you mean that

Serj. *Davy.* No more he does.

Court. Do you mean by the old custom, that which was settled by governor Johnston?—*A.* I do; it was some years before general Mostyn came to the island.

Court. Or do you mean a custom that was before the order of 1752?—*A.* I do not.

Mr. *Lee.* Then am I to understand you, that you think the majority of people were against the opinion of Mr. Fabrigas?—*A.* That is my opinion.

Do you recollect that having been alledged to governor Mostyn as the general opinion?—Yes.

Do you recollect that having been alledged to Fabrigas, that the popular opinion was against him?—I don't exactly recollect.

Don't you recollect that the very end he had in view, and professed to have in view, in bringing a number of his friends and a number of people concerned in vineyards to present this memorial, was for the purpose of convincing the general that a majority of people were with him, and not against him?—I suppose he must mean so.

Did not you understand him so at that time, when he talked of bringing a memorial, and coming accompanied by 200 or 250 men? Did not you understand him to mean that such a number of people that were concerned in the wine trade and in the produce of vineyards would come and signify that to be their intention?—Certainly he meant so.

Were you present when the four men, not the 200 or 250, came with the memorial signed by others?—I was.

Was that memorial ever in your hands?—I don't remember ever having it in my hands. I saw it in colonel Mackellar's hand, the chief engineer, when he questioned them about it; and these very people seemed shocked when he explained to them the tenor of the memorial. It was wrote in English, and they seemed not to understand the import of it.

They were Minorquins?—Yes.

Can you tell me what number of signatures were in that memorial?—I cannot guess at it: I should think much about 50 or 60, but cannot guess.

You did not count them at all?—No.

Robert Hudson sworn.

Examined by Mr. *Buller.*

You were, I believe, fort-adjutant at this time?—Yes.

Was any application made to you by the civil magistrates?—Yes; the mustastaph of St. Phillip's came to me on the 10th or 11th of September, and told me, upon reading some orders of general Mostyn, that Fabrigas said he would come with a mob, and said they were null and void, and they would see better days to-morrow.

Mr. *Peckham*. You need not mention what the mustastaph told you; that is not regular.

Counsel for Defendant. That is the regular method there.

Mr. *Peckham*. It may be regular there, but it is very irregular here, and cannot be admitted as evidence.

Mr. Just. *Gould*. I should be glad to know how the governor can be apprized of any danger, unless it is by one or other of his officers informing him there is likely to be such and such a thing happen? I suppose he gives the governor an account of what he has heard, then the governor makes an enquiry into the matter.

Mr. *Peckham*. Hearsay is no evidence. Besides, the mustastaph is an interested and a prejudiced person; at least he appears so throughout the different parts of this cause. Now can what he has said in Minorca to this witness be admitted as evidence here? The mustastaph is living; why don't they produce him? If they had brought him here, we should have his evidence on oath, and could cross-examine him to the facts.

Court. We do not take it for granted that it is really so; only that this gentleman, hearing of this, tells the governor.

Mr. *Lee*. It is no evidence of the fact: if you mean it only as a report, we do not object to it.—*A*. The mustastaph told me, that upon giving out some orders to the inhabitants of St. Phillip's, some orders relative to the selling wine in St. Phillip's, he came with a mob, and said, "It is null and void, and we will see better things to-morrow." He further said, that if there were not some immediate measures taken with this Fabrigas, he was afraid of the consequence, the rising of the people.

This was enough, I should think, to give an alarm. Did you acquaint the governor of it?—Yes, I did.

What was done after that? Did the governor call you together?—I was not privy to what the governor did in consequence of this; my post was two miles off.

Court. Gentlemen of the jury, then all this comes to nothing; he proves no fact—

Serj. *Davy*. No: this is to introduce the next evidence, of the governor summoning the officers together.

You knew this Fabrigas; what was his behaviour in the island?—Extremely troublesome, as was represented to me: there never was any objection to governor Johnston's regulation till by this man. Governor Johnston did this, because the wine used to turn sour, by every body being allowed to sell wine at a time: they distressed one another by opening too many casks at a time. The general made this regulation, in order that no more might be opened at a time than could be sold before it was sour.

Court. I chose to hear the reason and foundation of the regulation.

Q. What is the consequence of that among the soldiers?—*A*. Disorders of different kinds, fluxes and the like.

Court. There being no cellars, I suppose they could only buy from hand to mouth.—*A*. In general they are open sheds; they are hardly better than sheds.

Q. Did that produce any disagreements among the sellers themselves, that they undersold each other?—*A*. Some poor people, that had but little wine, were almost starved: the several years after governor Johnston made this regulation, there never was known to be a cask sour.

Court. I was rather apprehensive that this might enhance the price.—*A*. The price was never raised upon that account.

Mr. *Buller*. There was an afforation price.

Mr. *Lee*. Yes; but this was a liberty of selling below it.—*A*. The town of St. Phillip's was divided into four divisions, and four people used to sell at a time.

Colonel *Patrick Mackellar* sworn.

Examined by Serjeant *Davy*.

Were you at the garrison in Minorca in 1771?—Yes.

Did you know Mr. Fabrigas before the time of his being apprehended?—I have known him by character a great while; they called him Red Toney.

You happened to say you knew him by character; what was the character he bore?—A very bad one ever since I have been in the island, and for some time before.

Of what sort?—He was seditious, troublesome; a drinking, gambling fellow; sat up of nights with low-life people; and he kept women.

In short, he is a man of an ordinary character?—Yes.

But the character that I wanted chiefly to be informed about was, concerning his obedience to government, whether he is a turbulent man?—I have had many complaints of him from two mustastaphs, when I have been commanding officer of the garrison.

How long have you been there?—I was one of the first that went there when the island was restored after the last war, and had been there a good many years before. I went first in 1736, and left it in 1750. I went in May 1763, and remained there till May last.

Then you must be pretty well acquainted with the laws, and government, and constitution of this country?—I have a good deal of knowledge of it, as much as a military man can have: we cannot study these things as lawyers do.

Pray is there not a district they call by the name of the arraval of St. Phillip's?—Yes.

How far is that?—It is enclosed by a line

wall on one side, and surrounded by water on the other.

Pretty near to the fort?—Within a musket-shot.

This district within this line is called the arraval of St. Phillip's?—Yes.

What do you mean by the word royalty?—It is where the governor has a greater power than any where else; where the judges of the island cannot interpose their authority or power, but by his permission; and people of the arraval have particular privileges on that account. The judges cannot convene any person to appear before them, but by the governor's approbation, within the arraval.

It is not so in the other parts of the island?—No.

You have, I believe, in the other parts of the island, officers called jurats?—Yes.

Is there any such in the arraval?—No; the mustastaph is the only magistrate there.

Then there is an officer within this royalty, within this arraval, called a mustastaph, who is the only magistrate there?—Yes.

In other parts of the island there are other magistrates of different names, jurats and so forth?—Yes.

Whom is the mustastaph of the arraval of St. Phillip's appointed by?—The governor; or commander in chief, when there is no governor.

Does he displace him at his pleasure?—Yes.

What is the office of mustastaph?—He takes care of the weights and measures of markets; takes an account of all the wine that is made, and of the expenditure of the wine; and settles any little disputes among the inhabitants, in what they call the first instance.

What, is that with regard to the afforation, or settling of the price of the wine?—That is done by the magistrates at Mahon. The magistrates of Mahon, as they do every where else, set a price upon the wine, which they call an afforation or market price, and the arraval of St. Phillip's is always ruled by the afforation at Mahon; the magistrates at Mahon do not put the price upon it, but it is always adopted.

Who is the officer that in point of form settles the afforation price?—There are different prices in different terminos, but that is governed by the price that is fixed at Mahon. Mahon is the nearest district to St. Phillip's.

Who is the person that in point of form does so adopt it?—The mustastaph is the officer that does, and he only signifies what the price is.

He is the trumpet, the mouth by which they understand what is the afforation price, he being regulated and governed by the afforation at Mahon?—Yes; the price that is paid at Mahon is always paid at St. Phillip's.

What is the general law? Are the Minorquins governed by the English or Spanish law, or what sort?—They always plead the Spanish laws, as it was settled by the treaty of Utrecht; but when the English laws are convenient for them, they plead them.

So that which is convenient they will plead, those that are most suitable?—Yes.

But which is the law that most prevails?—The Spanish law. When the island was given up, I believe nothing at all was settled with relation to them, and therefore we were supposed to receive them upon the same footing that the French had them; but since that time they made interest at home to restore to them the same laws and privileges that took place before the island was taken, that is, the Spanish laws.

Were you there when the place was taken by the French?—No; I was in America.

Pray what is the temper of the Minorquins in general? Are they well affected to the English government?—Some are very well, I believe; others are not so.

Pray do you remember the occasion? were you one of those that were invited to meet governor Mostyn, with the other gentlemen, upon the occasion of being consulted about Mr. Fabrigas?—I was, once or twice.

Had you been acquainted that it was a matter of public notoriety of what had happened with regard to Fabrigas?—I have been at the presenting several memorials to the governor.

Did you hear of the report of what had prevailed, the general talk of the place?—Yes.

What was the universal opinion, if there was but one? or if there were various opinions, what was the opinion of you and the rest of the gentlemen that were called in?—The opinion of the other gentlemen as well as my own was, that he was a very dangerous and troublesome man. By his former history, and from some anecdotes of those times, it was thought a very unsafe thing to let him be at liberty; that it would be a right thing to take him up, and bring him to punishment, lest he, who was a man very likely to be practised upon, would take other measures productive of mischief.

What was agreed upon?—It was in loose conversation thought best that he should be banished.

According to the practice of former times, do you remember a practice of that kind having been done?—I have heard of several; when the English were in possession of the island, as well as when the Spaniards were.

Mr. *Lee*. This is proving a prescription.—*A*. I tell you what I have heard.

Serj. *Glynn*. It is impossible that it can be admitted: if he had known an instance, he might have mentioned it.

Court. It is one question, whether, according to the exigence of the case, the general might inflict this banishment? and another thing, whether it is the ordained law established in such a case to be applied to such behaviour? Now, if you go into a usage of that kind, you must prove particular facts, not produce this gentleman to say he has heard such things: it does not follow from hence that this might be the proper punishment.

Serj. *Davy*. You have known general Mostyn, I believe, a great while?—*A*. Only since he became governor of the island.

I wish to know of you, what is his character and behaviour?—I always heard a character of him as a good officer, a polite, well-bred man, that carried his command in the genteelest manner.

Is he a man of humanity, or rather ferocity?—I always understood him to be a man of great humanity.

Cross-examined by Mr. *Lee*.

Q. You say the general opinion of the field-officers was asked, of which you are one?—*A.* I do not believe the general opinion was asked; I believe it was private conversation.

Did general Mostyn then call for your opinion, or the opinion of any other general officer, touching what he should do to Fabrigas?—Afterwards we thought upon the subject.

After the man was gone to Carthagena?—The same day, perhaps an hour.

The same day you were assembled there?—Yes.

The day that Fabrigas had spoken of assembling a number of his friends together, the general sent to convene a body of you?—Yes.

Court. You were a field-officer?—*A.* Yes.

Did you and the other field-officers meet together at the governor's?—We came there by his order, by his desire.

Q. He proposed to you then for your opinion, what should be done with this man; and you, partly from the former history, and partly from modern anecdotes, thought he should be banished?—*A.* Yes, I did so.

That was the ground of the accusation; former history, and late anecdotes?—Yes.

Court. I shall certainly hear his evidence, if you ask him the motives and grounds.

Mr. *Lee.* I only ask whether I had taken it right.

Court. Did not you object to enquiring into former instances of banishment?

Mr. *Lee.* No; he has spoken of former instances of bad conduct in Fabrigas.

Q. Did any of you propose to the general, or did he propose himself, to have any trial of this gentleman before his banishment?—*A.* I believe he never did propose that; for the judges there gave it as their opinion, that that was lodged entirely in the governor's own breast; two of them particularly, that it was entirely in his own breast.

And needs no trial at all?—I do not know that there was any form of trial there.

You heard of no trial?—I heard no trial mentioned.

You tell me the opinion of the field-officers was this?—Yes.

As I don't know exactly who all the field-officers were, and as I wish to deliver as many of them as I could from the imputation of that opinion, pray did major Norton concur in that opinion?—I do not remember particularly whether he did or not.

Serj. *Davy.* That is, whether he was there or not?—*A.* He was there, but I do not remember what his opinion was upon the occasion.

Then you cannot take upon you to say whether it was a majority of opinion, or unanimity of opinion?—A majority of opinion. I believe there might be a difference of opinion.

Do you know a colonel or a major Rigby; I do not know what rank?—Major.

Was he there?—Yes.

Did he concur in that advice to the governor?—Both the gentlemen are here, and can tell. We were talking among one another; our opinion was in general.

Those that chose to give an opinion in favour of banishment gave it, and those of another opinion either might give it or were silent?—It was not talking of giving an opinion, but talking of the man's case, and what ought to be done.

Then you cannot tell what number dissented?—No.

Court. Were there any of the field-officers present that did dissent to it?—*A.* I do not remember that any did indeed.

Edward Blakeney sworn.

Examined by Serj. *Burland*.

Q. I believe you officiated as secretary to general Blakeney?—*A.* Yes; I was there about seven years.

What sort of power does the governor exercise in the arraval of St. Phillip's?—There is no writ; nothing can be executed there without his commission.

What authority does he execute there?—An absolute authority; it is a royalty.

Have you known any instance of people being sent out of the arraval?—A few months after general Blakeney's arrival, he banished two Franciscan friars immediately by his own authority.

Where did he send them to?—To the continent.

Court. Into Spain?—*A.* I cannot tell whether to Spain or Italy.

Q. from Jury. Was it in peace or war this happened?—*A.* In peace time. They found the way to Rome, and complained to the general of the Franciscan order, who corresponded with the general upon the subject. Several letters passed; and general Blakeney wrote in one of his letters, if they did not behave better for the future, he said he would banish all the Franciscans out of the island, and make barracks of their convent. Intercession was made for them: they asked pardon for the offence they had committed, and upon a promise of behaving well they were allowed to come back.

Did you ever hear that the power of the governor upon that or a like occasion was ever called in question in the island?—No; I took it for granted it was handed down by the Spanish governor, and they were governed by Spanish laws.

Are they governed by Spanish laws?—Yes.

We are told the arraval is a distinct jurisdiction from the rest of the island, and there is

more authority exercised by the governor?—Yes; it is within gun-shot of the fort. The judges have applied to me to obtain leave for them to execute writs in the arraval.

I don't know whether you remember any other instances of banishment but these two you have mentioned?—I remember an instance of a priest. I will tell you shortly: the case was this. Four regiments were sent out by the late king, to relieve four regiments that had been a long time then in the garrison. The governor received orders to send home every creature belonging to the four regiments then there: they had been many years in the island. A report had been made to him, that a daughter of one of the military people was missing. An enquiry was made: she was proved to be last in the possession of a priest. The priest was called upon; he denied knowing any thing about her, or of her. He was brought before the governor; he gave bail of two people; (this was a military affair entirely) and next day he was desired to produce her. He did not. The governor embarked him directly, and sent him on board, I believe, in the very transport, that was to carry this young woman away. The fleet sailed to Gibraltar; and application was made immediately to the governor by the magistrates of Mahon, and by the religious order, begging the governor to forgive him, and stay the ship, and, if the governor would give leave, to put the girl on board, and bring back the prisoner. They begged, and petitioned, and prayed the governor. Upon that the girl was delivered up, brought from the vicar-general, who lived at a remote end of the island. She was brought to me. The story she told me was, that the vicar-general had, out of charity and compassion, taken care of her. She was a very pretty girl. She was put on board the transport, and sent after the fleet, and the priest was brought back, and there were great rejoicings upon his arrival.

Mr. *Lee.* You know how little material that is.

Q. In what office were you in this place?—*A.* Secretary to the governor and commander in chief by the king's commission.

When did you go first?—In the year 1748.

You were in Minorca, I fancy, when a positive order came from England, that if any friar of the Franciscan order, not a native of the island, should come into that island, he should not be suffered to remain upon it? Do you know of any such order in the first place?—Be so good as to repeat the order.

"That in case any friar of the Franciscan order, not being a native of Minorca, but an itinerant friar, shall come into the island, he shall not be permitted to take his residence there, &c." You don't recollect any thing of this, or that it was in obedience to the order of council that this Franciscan was sent away? So you forget this, though it happens unfortunately when the governor obeys the order of his superior, that is now to be quoted, as a president of his own regal authority?

What was the priest?—A native of Minorca.

And the friar?—I understood them to be Minorquins.

Can you be positive about that?—I do believe that as a certainty and a fact: I am morally certain of it; I was not present at their birth or registry.

It seems that you have forgot even that such an order existed, till I reminded you?—I am not clear that I remembered such an order existed; I have been over a great deal of ground since.

Was it the nature of your office to acquaint you with all the orders of the council of England?—It came through my hands, yet very likely and probably I forgot it.

But you might not have forgot it at the time the friars were ordered away?

Mr. *Lee.* This was in 1753.—*A.* That is long subsequent: the affair of the friar was in 1748 or 1749.

Serj. *Burland.* Then you admit that the king has a right to make such orders?

Serj. *Glynn.* No; the council may make such orders, but we do not admit them to be legal.

Court. The case of the priest was some years after the case of the two friars?—*A.* Not a great while; about a year I believe, some such time: it is a great many years ago; I cannot be positive to a few months.

Captain *James Solaire* sworn.

Examined by Mr. Serjeant *Walker.*

Q. I think you are a native of Minorca?—*A.* I am.

You know Mr. Fabrigas?—Not very particularly.

I thought you had known him at fort St. Phillip's?—I know he is an inhabitant of that place.

You have seen him there?—Several times.

What sort of a temper and disposition has he?—I cannot answer very particularly.

Do you know any thing of his general character?—No; I do not.

Serjeant *Burland.* I have a very long and respectable list of persons here to speak to the character of general Mostyn, and his general behaviour: I suppose the gentlemen on the other side don't dispute the general character which has been given of him.

Serjeant *Glynn.* I shall not make the least attempt to asperse general Mostyn's character; I shall found myself upon the facts.

Raphael Prato sworn.

Examined by Mr. *Buller.*

(He not speaking English, an interpreter was sworn.)

Q. Do you know Mr. Fabrigas the plaintiff?—*A.* Yes.

What character has he borne for some years past in the island of Minorca? Is he a peaceable man, or what?—A troublesome man, that meddles too much with affairs.

What affairs do you mean?—With the government.

Court. The question is, whether upon the facts and circumstances of the transaction itself, the general was justified in what he did; otherwise they may empty the island.

Mr. *Lee.* Yes, this island of all the people.

Q. to Mr. *Wright.* You delivered in these different memorials and papers: all that you delivered in, are they genuine papers or copies of papers that were presented in Minorca?—*A.* All, except the last, which was delivered to the general's aid-de-camp, were delivered to me; that is endorsed on the back——

Reads:

"To his excellency general Mostyn, governor and commander in chief of the island of Minorca, &c. The humble Petition of Antonio Fabrigas, a native and inhabitant of St. Phillip's in the said island, sheweth, that your petitioner has now by him twelve casks of wine, the produce of his own vineyard, without having purchased so much as a grape of any other person, of which he has not sold a drop, when several other inhabitants of the said town have sold all theirs, as well of the produce of their own vineyards, as that proceeding from what they bought to make a profit by; and this with the permit of Mr. Allimundo, who does the function of mustastaph. That the petitioner, on the 25th of July, applied to the said Allimundo for measures to sell wine by the rate of two doublers less than the current price, which would have raised a benefit to the troops and poor inhabitants of St. Phillip's; but notwithstanding this demand was very reasonable, and conformable to the express condition of the first of his majesty's regulation of the 17th of May 1752, regarding this island, where it is expressly mentioned that the inhabitants of this island shall always be permitted to sell at the price of the afforation or under it, Mr. Allimundo refused your petitioner, telling him he should not sell his said wine. And as this is not only against the reason and justice of the public, and the garrison of St. Phillip, but also contrary to his majesty's order in the said regulation, where it is mentioned that the inhabitants may sell their wines whenever they please without any permit, under the afforation-price in the island; therefore he prays your excellency will be pleased to order Mr. Allimundo to be more regular in this (for he has made above 50 casks of wine himself, of grapes he bought to make a profit by, of which he sold more than the half, in prejudice of those persons who have old and new wine by them), and to give your petitioner the correct and just measures at the aforesaid rate of two doublers."

Court. There is no date to this petition, I observe?—*A.* No.

Mr. *Lloyd.* It is marked on the back, "delivered the 31st July, 1771."

The next is inclosed in the answer of the mustastaph's reply to Fabrigas the 7th of August, 1771. "To his excellency lieutenant-general Mostyn, governor and commander in chief of the island of Minorca, The humble Petition of the under-written inhabitants of the suburbs of St. Phillip's, shews, That during the government of his excellency lieutenant-governor Johnston, on account of some complaints that were made concerning the direction, and selling wine, a regulation was made in the following manner: that the suburbs of St. Phillip's shall be divided into four wards; that the people shall draw lots; that they who shall come out shall have the liberty to sell their own wine, the accidents of the casks, and the preference of the poor helpless people being entirely under the direction of the mustastaph. That regulation was accepted by the inhabitants of the suburbs, and they are glad of its continuance as it is observed to this day. They have heard that some of the inhabitants are intending to destroy the aforesaid regulation, in order that every one might sell their wine at the place they please, without dividing the wards. This will be not only the total ruin of the inhabitants, but it will also make them careless in the culture of their lands, and less careful in making their wines, and consequently there will be very little wine of a good quality; therefore your petitioners humbly crave your excellency to be so good as to cast an eye of pity upon them, in not permitting that such a good regulation should be ever altered: and as in duty bound shall ever pray." Signed by 58.

Serj. *Glynn.* Are they marks or names?—*A.* Most of them marks.

Directed to lieutenant-general Mostyn.

"The humble petition of Antonio Allimundo, mustastaph of St. Phillip's, sheweth, that your excellency desiring to be informed about a petition made by Anthony Fabrigas of St. Phillip's, relating to the selling of wine, says, that formerly the selling of the wine of the inhabitants of St. Phillip's was under the direction of the mustastaph of that suburb; but as several disputes and difficulties arose from this, his excellency lieutenant-governor Johnston found it proper to make a regulation for the selling of the wine, which was accepted with an entire satisfaction by all the inhabitants of St. Phillip's, and by them practised to this day. At the time I had the honour to be made mustastaph of that suburb, the aforesaid regulation was in its full force and execution, and the said lieutenant-governor charged me particularly to have it carefully observed. In consequence of this, the said Anthony Fabrigas having applied to me a few days ago for the measures to sell his own wine two doublers cheaper than the common price, I thought it was impossible to grant it to him without forfeiting the duty of my employ, because his demand was contrary to the said regulation, by which the inhabitants of that suburb are permitted to sell their wine only by turns, after they have

drawn lots; for which reason your petitioner told the said Fabrigas, that he could not sell his wine; intending to say, by this, that he could not sell it in the manner he had proposed, that is to say, without drawing lots, it being inconsistent with the said regulation; thinking it was his duty to have it observed till such time as your excellency ordered him to the contrary. In the former petition he had the honour to present your excellency, he thinks to have the same privileges with other inhabitants of St. Phillip's, that is, to buy grapes, to make wine, and sell it; and besides, seeing that his predecessors sold this wine when they pleased, notwithstanding the said regulations, he thought that the mustastaph of St. Phillip's was not included in it; in which case your petitioner did not think it was proper to prejudice his rights, or those of his successors, unless your excellency ordered him to the contrary; but to comply with the inhabitants of that suburb, that they might be satisfied, your petitioner always imposed a rule upon himself to sell his wine at different times, and sometimes by the gross, insomuch that most of the inhabitants of that suburb have sold the half of their wine, whilst your petitioner has not yet sold a third part of his. If Anthony Fabrigas, or his father, says, that he will not sell his wine under the common price, and that he has sold none of it as yet, the former having none to sell, the reason is only because his turn did not come at the time when the lots were drawn, to which all the rest of the inhabitants of St. Phillip's are agreed; but his wine will be sold when his time shall come."

The PETITION of ANTHONY FABRIGAS, Aug. 13th, 1771, directed as before.

"The humble petition of Anthony Fabrigas. On the 31st of July 1771, the petitioner had the honour to present a memorial to your excellency, shewing the transgression and non-observance in the said town of two regulations given on the 8th of May 1752, by his Britannic majesty, &c. &c. viz. that any native or inhabitant of this island shall be permitted to sell his fruits at the fixed price of the afforation, without any person's authority: secondly, that no commander, judge, nor officer, directly or indirectly, for himself nor through any other persons, shall be allowed to have any concern in any traffic, bargain, or commerce whatsoever: your petitioner having likewise represented to your excellency that Antonio Allimundo, who does the function of mustastaph in St. Phillip's, has bought grapes to make, as he really made afterwards, 50 casks of wine, of which he sold more than one half, in prejudice of the inhabitants of St. Phillip's, who have the old wine by them; and that your petitioner wanted to enjoy the liberties granted to him in the said regulations, offering to sell to the inhabitants and garrison of St. Phillip's, 12 casks of wine he has by him of his own produce, at two doublers less than the ordinary afforation or fixed price, &c. yesterday, the 12th of August, your excellency's secretary told your petitioner verbally, &c. at which your petitioner was greatly surprised; as he is ready to prove judicially, before any one of his majesty's judges of this island that your excellency may think proper to appoint, all that he has said in his last and this present proposal; in which case, &c. being sure from the justice he has in his favour, and from your excellency's good administration to administer it, prays your excellency will be pleased to give his decree at the foot of this memorial to your petitioner. He hopes thereby to be at liberty to sell his wines at two doublers less than the afforation set by the mustastaph of St. Phillip's, &c. and that the mustastaph has acted unbecoming the office he exercises of mustastaph of St. Phillip's; which being evidently proved, will undoubtedly oblige your excellency to give the necessary orders for the relief and better advantage of the inhabitants and garrison of St. Phillip's."

Serj. *Glynn.* May it please your lordship, and you gentlemen of the jury, to favour me in this cause by way of reply. Considering the length of time that has been spent already in this cause, I should ask your pardon and indulgence for adding more than I could wish to the time that you have already spent, in answer to those arguments that have been used in behalf of the defendant, and in submitting to you such observations as occur to me. For, gentlemen, the cause, as I conceive, having already wandered very far from its true merits, and being perplexed with matters very foreign to the question, it is incumbent upon me to make such an attempt as my powers will enable me to do, to recal your attention to the real and true question in this cause.

The question, gentlemen, is shortly stated; the discussion of it, however, requires some time.---The question is merely what satisfaction and reparation Mr. Fabrigas, a subject of Great Britain, as much as any man even born in the city of London, has a right to demand for the treatment he has received. He is a native of the island of Minorca, born in the Britannic dominions; and his lordship will tell you that every person that is so born is a free-born citizen of Great Britain, intitled to all its liberties and privileges.

The question therefore is, how a man thus circumstanced is intitled to have his case considered by an English jury, and what satisfaction you shall think due to him for such kind of treatment as he has undergone; such tortures of the most studied, and the most perplexing and excruciating kind, (if you take into consideration the feelings of a man's mind, as well as his corporal sufferings) as have by the wantonness of power been inflicted upon him.

Gentlemen, in the discussion of this question, I shall now barely mention to you one topic upon which a great deal of your time has been taken, and which I mention merely for the purpose of clearing the cause of it, and dis-

missing it totally from your consideration; and that is, what respects the character of Mr. Mostyn the defendant. You are told of the high and respectable names of great men that have given their attendance here to countenance that character which you are told Mr. Mostyn indisputably possesses. My answer to it is, that if he had brought the privy-council, if he had come with testimonials in his hands from the two houses of parliament, it would not have varied the consideration of this cause. The question here is wide of all consideration of character: you must decide it upon the facts which appear before you in evidence, and from them you must judge of the merits of this cause. The motives of Mr. Mostyn's conduct, and every circumstance that is material or relative to that question, you are to decide upon; and beyond that, gentlemen, it is neither my desire nor my duty, it is far from my province, and far from my inclination, to attempt throwing any kind of calumny or aspersion. Let Mr. Mostyn, with all my heart, if he can, reconcile that conduct that has appeared before you to such a character, to that verdict which I am confident you must pronounce upon this cause. Let Mr. Mostyn enjoy the esteem of his great and noble friends; I have no desire to deprive him of it: I have however a zeal for the justice of this country, that goes something beyond the mere line and duty of an advocate, —I owe it to humanity,—I think it is a question of humanity, not depending upon the particular laws of any country: but it is a question highly affecting the honour of the British nation, and a question that will throw disgrace upon our laws, our constitution, and the humanity of our judicature, if this man should be sent back into the island of Minorca with his wrongs unredressed, and an accumulation of expences upon him.

I own therefore, gentlemen, upon these grounds and these considerations I feel a warmth and a zeal in this cause, which I hope will justify me for the pains that I mean to take, if my strength will support me in it, in laying before you what I conceive necessary for your consideration. I have said, that I mean to deprive general Mostyn of nothing that is not necessary to the reparation of the wrongs of this much-injured plaintiff; that he shall enjoy his good name and his character as far as my duty will permit him to enjoy them; I shall make no observations upon him but what arise from the cause now before you. I have some reason to wish, and to complain that the like conduct has not been observed on the other side. General Mostyn is to be graced with the countenance of great men; and a plain English jury is to hear the titular testimonies of the character of a man invested with a high office, in high power, and possessed of great riches; yet the character of a poor, unhappy, helpless individual, an inhabitant of an island, part of the territories belonging to the crown of Great Britain (confident too that he lived under the protection of the constitution of Great Britain,) is to be treated as a subject of ridicule, because he is not a man of high rank, though you are told he is a man of character and of fortune, such as has intitled and recommended him to the company of men of rank in that island. Have we not some reason to complain, that such matters are now introduced to rebutt his just and well-founded expectations to receive satisfaction from an English jury for the wrongs he has already sustained?—Is it not enough that this man has endured an imprisonment of six days, under the most unparalleled hardships of rigour and cruelty that can be inflicted upon a human being? is it not enough that he has endured a banishment from his native country? but, to heap calumny and obloquy upon the head of a man that he has injured, shall he with impunity be permitted to digress wide from the facts in this cause, to tell you that he is a profligate idle man; that with a family he neglects all the duties of a husband and the master of a family; that he is devoid of moral character? Is a poor helpless stranger in this kingdom thus to be represented, after having been driven out of his own by cruelty unparalleled in the British history? Nor can any history be produced, even of any other country, that did not receive a most signal discountenance from the power of that country. A man thus driven out, seeking refuge from the English laws, friendless in this country, ignorant of its language, is treated in this manner! A gentleman comes forth, and entertains you with the connexions, character, and acquaintance of the powerful defendant: he then enters into the private concerns and private character of the plaintiff, and dwells upon the ignominy of it, and endeavours to impress you with a prepossession that it will not be in his power to remove it. I trust this conduct has not escaped you. Not a word has fallen from us of the character of general Mostyn; I mean on that head to be silent for ever; and if I had it in my power to asperse his character, unless it was something relative to the cause, that made it my duty to produce it before you, I should be very silent about it.

Having dismissed, I hope, from the cause these considerations, let us now recur to the defence that is set up by general Mostyn. And, gentlemen, the defence set up by the general is, that Mr. Fabrigas is a man dangerous, seditious, and turbulent; that he was in the act of perpetrating sedition in the garrison of Minorca; that there was danger even of the loss of Minorca itself; that it affected the commercial interests of this country; and, as well-wishers to this country and the commerce of it, you are called upon to give a verdict for the defendant, or to reduce the consideration of damages so as to pronounce something worse for the plaintiff, if possible, than even a verdict for the defendant.—Gentlemen, their state of it is, that this man, Mr. Fabrigas, being a factious, turbulent, and unquiet man, was pursuing general Mostyn with an improper importunity; that he was endeavouring to spread

sedition, to raise discontents in the garrison itself that affected the very safety of the government, and the island was in danger; that he uttered a threat that would have made general Mostyn responsible with his head, if he had not prevented such a scheme from being carried into execution; that he said, if his petition was again rejected, that he would come at the head of 150 men, a menace represented as if it imported a threat that he would come at the head of an armed force: such was the construction his counsel put upon it, that he would appear in such a way, as to make it necessary for the general to comply with his demands; that there was an end of all government and all order in the island of Minorca, and a valuable part of the British dominions lay then at the mercy of our enemies. Gentlemen, this is a well-drawn picture, and was very powerfully urged to you. It was something over-painted, as I conceive you will judge. And the necessity of doing it is an observation that will not escape you; for less than *this*, I do conceive (I rest myself satisfied in the general humanity that prevails in the breasts of Englishmen, and inhabitants of the city of London) less than this could never have served as any colourable justification for such conduct as has been proved upon general Mostyn: this therefore was necessary to be stated to you, that it was extorted, (contrary to the feelings of humanity which are said to sway and influence that gentleman in all his conduct) that this was extorted from necessity; that there was no time for consideration; that it was an emergency he was required to decide on; it superseded therefore all forms; it was absolutely necessary, for his government would not have existed if he had been at all induced to postpone it; and that possession of which he was the guardian, and for which he is said to be responsible with his head, was in danger of being for ever lost to Great Britain. I can conceive a case like that, adding more circumstances than even the ingenuity of the counsel furnished, which would not justify, though it might extenuate indeed, the conduct of the commander. But was there any thing like it in this case? This, I submit to you, gentlemen, is a case that the counsel thought necessary to open; and less than this furnishes no pretence or colour of justification for general Mostyn. Gentlemen, when this cause was opened to you, and when the general's defence was stated to you, that the general was obliged to act in an emergency; bound by the most religious of all duties, to look with circumspection to the care of the garrison in instant danger, it was necessary to act as he did; it was an act therefore not of inclination nor of deliberation, it was an act of absolute cogent irresistible necessity, and which he had been unjustifiable if he had either omitted or deferred for a day. That is the nature, and that is the colour of the general's justification: but did the general know how different the case that would appear upon evidence would be from that which he had instructed his counsel to represent to you? It was necessary that the defence should be guarded; and then there is a prefatory defence made, which in my opinion very much deserves your consideration. General Mostyn, with the prudence that from this hour I shall think makes part of his character, chose to decline the jurisdiction of an English jury. I don't wonder that he did; and I am not amazed that you are told that this is a matter extraneous to the jurisdiction of the courts of judicature in this country; that you, as a jury, are incompetent for its decision: it is of all cases in the world that case which, as a defendant, general Mostyn must be inclined to wish might never appear before an English jury. It is a tribunal that he must dread; it is a tribunal that he must shrink from; and he acts upon the soundest motives of policy and prudence when he endeavours to evade it.—If that should prove insufficient to him, the next resort is in the general law and doctrine respecting the power of the governor in the island of Minorca; and you are repeatedly cautioned not to consider yourselves as administering justice by the laws of England. You are told, that you are deciding a question of the laws of another country, far different indeed and materially opposite to those of the laws of England: you are called upon therefore to judge this cause by another rule, and by another standard, than that which you are in the habit of. Considering and trying causes by something more than this must be desired of you, before the ends of the defendant can be completely answered. You are desired to divest yourselves too of the feelings of humanity; and they are endeavoured to be suppressed by representing to you circumstances of horror and danger to the general trade of this country, in case you should suffer even principles of law, of justice and humanity, to prevail in this cause. Gentlemen, it was stated to you, that in this island of Minorca there is no law whatsoever; that the form of government is despotism; that what may be called the law, is the will and pleasure of the person that governs; that the king is absolutely despotic; that he may change and alter the laws of this island as he pleases; and not only he himself can do it, but that he has delegated that power to his substitute; that he is sent over to govern, not by any fixed invariable plan of laws, but such as he thinks proper to make, such as he thinks proper to prescribe to the inhabitants, at any time that in his wisdom it shall appear just and expedient that it should be so. This is the state of an English government, and this is the construction put upon an English patent that passes the great seal of Great Britain. I will be bold to say, that if that construction is ever attempted to be put, it must be put repugnant to the words of that patent. I will be bold to say, that if a patent passes the great seal containing such words, there is not so feeble a judicature in this kingdom that would not dare to pronounce it void,

and every act done under it illegal. And I will venture to say too, it is impossible that the great man that should dare to put the great seal, and prostitute public authority to a patent of that kind, but he must answer to public justice with his head.—And yet this has been contended to be the true genuine construction of an English patent, the authority under which this same general Mostyn, this governor of the island of Minorca, has presumed to act. Gentlemen, having stated how repugnant it is to every idea and principle of law and justice, it gives me concern to hear in what habits, possessed with what ideas, men return from the island of Minorca. It has been contended to be right, because it has been done before. If it has been done before, I say it is alarming, and it is time to put an end to it. You have had gentlemen with military commissions appearing here in red coats, to give you legislative constructions; to tell you, as lawyers, what is the law of the island of Minorca. You have had a gentleman who served as a secretary to governor Mostyn, who comes home and tells you, that the governor with respect to the administration of laws that regard only questions of civil property, is limited by the laws of the country; but with regard to criminal jurisdiction, his power is uncircumscribed, and totally unlimited; that by his proclamation he can change laws whenever he pleases, and the law of to-night is not the law of to-morrow, if that man thinks proper to issue his proclamation to repeal it; that the courts of justice are under a tye to respect these proclamations as laws; that the individuals of the island are all to be bound by it, and if these laws are issued but an hour before, they are as binding as if of long standing in the island.

These are the ideas of law that these gentlemen bring from the island of Minorca, under the government either of this general Mostyn, or his lieutenant-general; and upon the authority of these gentlemen that have furnished themselves with such ideas of law and justice, you are at once to be prevailed upon to determine that the laws, liberties, and privileges of this kingdom in no respect extend there. It is something shocking to English ears; a despotic, an arbitrary, an unlimited power! (for even the words have not been spared) and you are here, as an English jury, to pronounce that the king of Great Britain, and persons acting under him, are to exercise this unlimited power within a part under the jurisdiction of the judges of England. If this is offered in extenuation of the conduct of general Mostyn, added to the strong irresistible calls of justice and humanity that must press your minds more than words can, there must be added to it the most powerful political considerations; for you have been told in the course of this argument, that the island of Minorca is an insecure possession to the crown of Great Britain; that its inhabitants are in a great measure disaffected. If they are, has not the cause of the disaffection been very explicitly set forth to you? Is not the cure as evident? Correct these gentlemen, who think that their hands are not bound by law and justice, that go over to exercise power over these helpless men. Teach the poor Minorquins that the English law will protect them; that their governors are bound by law and justice to teach them the blessings of an English government; you'll remove disaffection; you'll get a stronger guard than all the caution and wisdom of governor Mostyn, his secretary and friends, powerful and titled as they are, and this fatal system of military despotism; you will have the island to serve you, you will have the affections of the inhabitants to assist you, you may command them whenever you will. Yet, gentlemen, it has been dwelt upon as a topic, that this island is disaffected; that their inclinations are against the English government. And who can wonder at it, if what Mr. Blakeney says he is clear in his recollection of? I hope he is not; I don't mean to derogate from his veracity;—that a power like this has been used of arbitrarily sending a man, a native, an inhabitant, from the island, his friends living there, his possession there, for no offence committed, but at the absolute will and pleasure of the governor. You have heard a great deal of Turkey, you have heard something of the laws of Japan, you have heard of other despotic powers, whose names I trust are sufficiently odious in the ears of all English hearers; and yet you are told that the governor of this island is equally despotic with any of these powers; that he has no limits but his will, no bounds but his pleasure, no law but his inclinations; that the lives and persons, if not the properties, of all the inhabitants of this island lie prostrate before him, and they must depend upon his natural good inclination and humanity in what degree they are permitted to enjoy them.

This is the state of this island; and I will be bold to say, it would be speaking injuriously of the government of Japan,—it would be speaking injuriously of the government of Turkey,—it would be speaking injuriously of the emperor of Morocco's government, to describe that as the general state of these subjects; it never was in the idea of even despotism itself till this very hour: it is violence and outrage, it is the law of robbery; it never obtained in any place where the idea and form of a civil government ever was allowed; because, if the legislative power and the executive meet in one person, that distinguishes a despotic government from the happy state that we enjoy in this kingdom. Our king can't prescribe us laws, but he must administer us justice by those laws that our representatives make for us. That is the state of this country, happily distinguished from the state of despotic countries. But in no despotic country whatever did this idea ever obtain, that the prince, the despotic sovereign, call him by what name you will, was to administer justice by his incident pleasure, will and power. If he made laws, he made them, proclaimed and divulged them, and the subjects were governed

by them; and their kings were ruled by those laws. But here this gentleman, Mr. Blakeney, goes wide beyond his counsel, (his counsel would not state any thing like this) but according to this gentleman, the inhabitants of this island, without the least imputation of delinquency, without any mode or form of trial, were sentenced, instantly transported, and removed from their friends and relations for ever, unless it is the good will and pleasure of the governor ever to permit them to return. I say, it is the most shameful anecdote that ever was found of any government whatever; and a bashaw of Egypt would merit the bow-string for behaving in so illegal and so indecent a manner. The form, the appearance, the semblance of justice, are all of importance to be observed, and which the policy even of the lawless prescribe; yet have our ears been tortured, and our patience and time been spent with doctrines of this sort, by gentlemen who have enjoyed trusts in that island, and which have constantly been exercised by them. This is what general Mostyn has set up in his defence.

His majesty, it is said, makes laws whenever he pleases; it is in his sole will and power to impose what laws he pleases upon a conquered country. It is more than ever I heard. The prerogative goes further than any book, that ever I read, can justify me in allowing; because, as I have understood it, if true, the strongest authorities support these prerogatives. One Christian prince conquers a Christian kingdom, that is governed by its own laws, unless it is the will of the conqueror to abrogate those laws. The conquest of the island of Minorca was not made by queen Anne personally, but it was made by the subjects of Great Britain, and belongs to the supreme state of Great Britain. But if you give the power to the sovereign to make those laws, allow them to be rightly exercised. Can you suppose that it belongs to the governor appointed, and that they are sent out of this island not to be governed by any laws, any instructions that they shall receive, but to govern and administer justice arbitrarily and incontrolably, according to their own will and pleasure? For in order to furnish the defendant with any colourable defence whatever, he is to be justified by precedents, which you must condemn as precedents of robbery and burglary, equal in point of violence to either of those terms; or you must allow of such a power which has hitherto been held not only incompatible with the law, the spirit, the genius, and the constitution of Great Britain, but with the idea of any law whatever that ever obtained in any state or climate: both these you must subscribe to before you can comply with the request that is made you, and pronounce a verdict for gen. Mostyn.—The gentlemen then having taken this broad and extensive line of defence, which they thought would contain and embrace any defence that they thought proper to offer to you, they next proceed with their defence. And, gentlemen, you are told, that as it was the authority, so it was the duty of the general to proceed as he did; that he could have no personal malevolence to a man so remote from his situation, so unlikely to fall in with his connections; that the man was mutinous in the whole of his conduct; and that at last he committed that dangerous act of mutiny that made it an indispensible act of justice in the governor to commit him, and to send him out of the island; that if he had not done it, and a consequence had happened fatal to the island, the governor would have been responsible for it. Why, gentlemen, the state of it so much exceeded the facts, it certainly was expected by the learned counsel who offered it to you that he should prove something less, and therefore something that required bold and strong positions to support it; because, if he could have proved this, though I should conceive it would by no means have intitled the general to a verdict, yet such considerations,—an act of absolute necessity, the alternative of seeing such a trust as the island of Minorca lost through his remissness, or the removing of this man out of the island—I should have conceived might very well have furnished an excuse for him in his conduct: I am sure it would have taken off from any edge, any warmth, or keenness in which an action would have been supported that would have been brought against him. But, large as the ground was laid, it was to take in certainly another case than this. Nothing, as I conceive, and as I submit to you, of this kind has been proved. Petitions, letters, messages have been given in evidence before you, and comments are made upon the very petitions themselves, as carrying with them strong proofs of a mutinous inclination; and at last there is a broad fact asserted, that there was a downright threat of appearing in arms at the head of 150 men.

Now, gentlemen, give your attention to these letters, to these petitions that have been read. They are expressed, as I conceive, in decent and in respectful terms; and if it is an act of mutiny, I do conceive that it is impossible for any one man to complain that he has received wrong from another, either by word or letter, but he must be condemned as a mutineer in the island of Minorca; and the public faith, the national faith that is pledged for the protection and enjoyment of their property, is reduced to that state—'You shall enjoy it, but if another presumes to wrong you, you must not dare, upon the pain of transportation and long imprisonment, to utter a word of complaint; for it is judged dangerous, it is not consistent with the wisdom of government to permit it, and we are called upon to punish you most severely.'—Gentlemen, the transaction appears to be this: that an officer in the island of Minorca, called a mustastaph, was the man from whom the islanders were to receive what they call the afforation or the assize price: this was the conception of Mr. Fabrigas the petitioner. Another notion prevailed, that the order of

council received from the crown, which is consistent with their capitulation and the rights stipulated to them, ought to be observed; by which order they were at liberty to sell their wines after a certain price had by a public officer been once assized, which is called the *allotation*. But the mustastaph of the island thought proper to say that the order of council was superseded by another order, which coming from the active person in the government, though not the principal at the time, must necessarily supersede that order of council; and it was insisted upon that governor Johnston's order, judging of the inexpedience and impropriety of the former, must take place; and that Mr. Fabrigas was wrong in his conception of what should be understood to be the law of Minorca. Upon his presenting his complaint to Mr. Mostyn, he received for answer, that Mr. Mostyn would immediately call upon the mustastaph for his answer. The answer is given; and in consequence of it Mr. Fabrigas is told that his petition was groundless, for that the mustastaph had most perfectly satisfied the governor. Mr. Fabrigas then desires to see, for confident as he was that he was well grounded in his complaint, yet he desires to see the reasons that the mustastaph has assigned. The sight of these reasons is denied him. In consequence of that, he presents another petition; which is, I think, referred to some of the law officers of the island for their consideration. They run it over, and they report themselves satisfied; and they insert the answer of the mustastaph, which answer the plaintiff Mr. Fabrigas is very desirous of seeing and answering. The business then proceeds, as it is said, in repeated petitions; Mr. Fabrigas conceiving that the governor is misled, not that he wilfully denies him justice, but is misled through the influence and misrepresentation of this mustastaph; and that produces at last a convention of some of the island, in order to take their sense of the matter. Here it is not clear what was the sense of the majority; but here the mustastaph had weight and interest enough to get that represented by the majority, which he wished to have received. This being on a Sunday, when many of the inhabitants were in the country following their diversions, and Mr. Fabrigas thinking that the sense of the people had not been properly taken, comes again to the governor with another petition, not censuring the governor, not upbraiding the governor, not intimating the least disapprobation of the governor's conduct, or jealousy of his inclination, couched in terms of the utmost decency. The consequence of it was an answer, which produced from Mr. Fabrigas that very answer upon which the defence of Mr. Mostyn has been in so great a measure built; to which the gentlemen have applied that evidence which was produced by Mr. Wright, Mr. Mostyn's secretary. Mr. Wright says, that first of all the conversation was interpreted by a priest, and then by another interpreter; but he does not know who interpreted those expressions which fell from Mr. Fabrigas, which he apprehended to be of a dangerous kind, and therefore discouraged, and advised him never to repeat again. He does not know, he says, whether the expression was to this purpose, that he would come again if permitted, and that there should be another petition backed with 150 men, or that he would come with 150 men to back his petition. I am sorry for it. But here I can't forbear a comment; it would be betraying my cause and my own judgment if I did. This gentleman is very sure that one or the other of these were the expressions. He professed to refresh his memory by a paper he had written down within an hour and a half of the transaction; and he thought proper to add, that it gave him an alarm, as if something dangerous might follow.

Now, gentlemen, what are the words which he has written, from which he said he made his communication to the governor, and which certainly contains the truth, as he recently wrote it down? Why, that Mr. Fabrigas said he would come next day with a petition of the people concerned in grapes and wines, which they would sign and come with to the number of 150! These are the words wrote down by Mr. Wright himself. Why, gentlemen, I submit it to you, whether in common sense and plain honest interpretation there can be any mistake about these words.

You hear, gentlemen, this was a contest between the mustastaph and Mr. Fabrigas. The governor is appealed to as a judge expected to be, and who ought to be, impartial between them: he was appealed to with decency on one side, but leaned rather with friendship on the other; for the interest of the governor is not unconnected with the emoluments of the mustastaph. On one side it is insisted that this was not the sense of the majority of the inhabitants; on the other side, notwithstanding what had appeared from the advantage taken upon a Sunday, when many could not appear, yet still that the real sense of the majority of the inhabitants was on the side of Fabrigas. Gentlemen, is not that the most natural key? does not that furnish the most obvious interpretation to this? He would come with 150, in answer to what he had been told; for his petition had been rejected upon the ground that it was not consonant to the wishes of the inhabitants, for they had been summoned, had declared and signed against it. He answers, that I will come the next day with a petition signed by 150 men. And who are these men to be? Why, he says, persons concerned in grapes and wine. Can you conceive then that he threatened to bring an armed force, that he threatened danger to the garrison? Was it not a natural answer in that dispute that then subsisted between him and the mustastaph? Is it not clearly explained by the words, "the persons concerned in grapes and wines," that he meant the mistake should be rectified the next day, and that it might appear from the number attending that petition, upon which side the

majority of the islanders were? There was no man, that did not desire to mistake it, that could have mistaken it: that is impossible. This I will be bold to say, that no man that wrote this paper would have given the evidence that Mr. Wright has given, and say he was in doubt only in the recollection of the particular words that were used, whether he would come with a petition backed with 150 men, or that he would come with 150 men to back his petition. I am persuaded that no man who had wrote this, and which he tells you is the truth, could ever entertain that kind of doubt that Mr. Wright suggested to you. I am as confident that no man could have mistaken this, that had not some purposes to answer by affecting to mistake it. But what was Mr. Wright's, what was the governor's conduct upon this occasion? Did either of them enquire after these 150 men? If this was a matter that would give such an alarm to a governor of a garrison, was it proper to acquiesce in the removal of one only? Was there any enquiry made after the others? If it struck Mr. Wright as dangerous, would it not have occurred to him, to stop Mr. Fabrigas upon the instant? Would he not have demanded the names of these 150 men? But Mr. Mostyn at once abandons all his character, for the purpose of the cause; he is now no longer that faithful officer, that good and trusty soldier, that diligent and circumspect governor, that you were before told he was. Is it not impossible but it should have occurred to both, that the proper conduct was, if this was a just interpretation of the words that were uttered, to take that man up? not to stop there, but to have interrogated him, to discover his abettors and accomplices, to pursue the enquiry, and preserve the safety of the garrison, which they conceived to be so much in danger? It is most clear from all the circumstances, that neither of them apprehended any danger whatsoever to the garrison; they slept in quiet as before. There must be some other reason for their proceeding in the manner they have done against Mr. Fabrigas, besides that which arises from the necessity and emergency which was represented to you, of the interposition that the governor was called upon by indispensible duty to make, for the sake of preserving the garrison from being thrown into confusion, from falling into the enemy's hands. There must be, I say, some other reason for acting in this manner against Mr. Fabrigas. Mr. Fabrigas is suspected, as they would have it, of a dangerous design; that a dangerous design was a foot; yet he is the only man that for six days remains in the island in close imprisonment, and there is not any inquiry made after the persons presumed to be concerned with him in the business. If the governor had conceived that impression, and wished to be set right in his opinion, the appearance of the petition the next day would have answered it. When four poor Minorquins, (which for some purpose or other are described to be of the worst class of men, and which you will therefore presume to be the most inoffensive) when these four men alone came with the petition, did governor Mostyn then continue in the opinion that this man was the framer and contriver of dangerous designs, to be backed and supported by multitudes? Must not he change his opinion then? Did the imprisonment end then? Were the sufferings of this man then put an end to?—No, gentlemen; the man continues in prison for six days, and is afterwards by an order extra-judicial, by an order of this governor Mostyn, sent into exile; which if it is law, any thing he thinks proper to do will be law; and I must then agree with Mr. Wright's juridical opinion, that the power of the governor can have no bounds in criminal matters. If he can justify this, he might as well justify capital punishments; and if he had thought proper to have ordered him to immediate execution, he would have done an act full as justifiable, in my opinion something more agreeable to humanity; for he sends this man to rot in a dungeon, the place ordained for the vilest and most desperate malefactors, for capital offenders only, whether under ground or not is immaterial, but it was gloomy, damp, and uncomfortable; it has all the horrors of a dungeon belonging to it; and there this man is kept under a special extraordinary order, which our witnesses, who were soldiers of the garrison, who were attendants at the place, tell you, were unprecedented; no food suffered to be administered to him, his friends debarred from seeing him, his wife and children denied access as often as they approached, and this in consequence of orders which their humanity shuddered at, but which they dared not presume to contradict. Singular and unexampled as was this cruelty even in the government of Minorca, which has the peculiar character of having a despotism belonging to it unknown in any other place upon the face of this globe; yet even there, though they may quote instances to justify some part of their behaviour, they never can pretend that a man ever was treated with the studied circumstances of rigour and cruelty contained in these orders: I mean, that no such orders were ever issued out before. This, gentlemen, is the treatment Mr. Fabrigas has undergone, and this Mr. Mostyn must justify. He must not only justify the removing this gentleman out of the way of doing mischief, but he must say, that without hearing, without any proceeding, without the form of sentence, without even so much as an intimation of the offence with which he is charged, he has a right to inflict the greatest of all punishments upon him. This Mr. Mostyn must say: and you are to conclude, from the exceeding good character of Mr. Mostyn, that all this proceeded from the pure benevolence of his heart, from the most upright and commendable of all motives. You are in your judgment to pass an approbation of denying a man, untried and unconvicted, all food for six days but bread and water, of stripping him of all comfort, and of

denying him even the accommodation of a bed. You must pronounce that there was nothing improper, nothing unlawful, nothing inhuman in separating a man from his wife during this imprisonment, stripping him of the comfort of his infant children, and then transporting him into a foreign country, without giving him the opportunity of providing for his voyage, or receiving that small assistance which you have been told his wife and son were ready on the spot to deliver to him. This you must pronounce to be legal and justifiable, and to be agreeable to humanity, to be necessarily incident to the office and duty of a governor of a garrison. You are desired, admitting for a moment that you can't justify the general in this conduct; admitting that some form of trial, that calling a man to answer and signifying what he was charged with were necessary forms to precede the infliction of any punishment whatever; (which admission will be an affront to the judgment of the worthy gentleman his secretary, who insists upon the general's will being the law) but laying that aside for a moment, it is said the governor's conduct stands so circumstanced, that it is so mitigated, that you can never find it consistent with your duty to give any considerable damages against him, at the complaint of this man. And to brand him with the most dangerous of all names, you are told that he is a patriot: that patriotism, however it may be introduced here, and may be serviceable in a commercial country, is of no use and benefit, but of the highest danger, in the island of Minorca; and the love of a man's country, which is called the first of virtues in other countries, becomes a mark, a dangerous offence in that country. At the instance therefore of such a man as that, and against such a man as Mr. Mostyn, you are told, you can give no damages, for the great and the long imprisonment, for the cruel and afflicting injury done him, in sending him into a foreign country from his wife and family. You cannot do it, because it is said Mr. Mostyn has been in an error, and that the utmost extent of Mr. Mostyn's crimes amounts only to that of error. To support this, the opinion of the military was asked, and the opinion of those wretched men called lawyers, who have studied law in a country where law is not permitted to reside, and where the will of the governor is the only law. Upon such authorities it is said Mr. Mostyn could not hesitate. Clear as his judgment is, he is mistaken; he is misled by the first of authorities: he certainly meant well. Gentlemen, if Mr. Mostyn had offended against any particular positive law of this country or even Minorca, though clear to common understandings, yet that defence might be open to him; but it is not open to him in this case: for he has offended against the law of humanity, impressed upon every good mind (no man that feels it can ever be mistaken), and he has offended against the first principles of justice. But it is said, he only erred in sending a man to a dungeon, that probably might kill him; out of error too, he issues out orders to restrict him to bread and water for his sustenance; out of error too, he prohibited the access of his wife and children; out of error, he banished him into a foreign country, stript of his property, and all the comfort he could be supposed to have in his banishment, not suffered to take that small provision which his family had made for him; all these errors are incident —To whom? To the governor of Minorca. I trust by your verdict that you will never suffer a man who has acted this part, to call it humanity, and go back to Minorca justified by your verdict, in saying, 'I committed these mistakes, but they were all mistakes of the heart.' I am sure you will not give him the sanction and authority of your verdict. But if these arguments prevail, you must do it; you must give the plaintiff small damages, merely because the defendant is mistaken. Governor Mostyn, bred too in England, lately gone over to that country, does not recollect that it is necessary that a man, before he is punished, must be tried: you are to call that an error too. I do conceive, the lowest wretch that walks the streets of London, is incapable of falling into that error: it must be an error produced by the place; it must be that very intoxication and drunkenness of power which you ought, by your verdict, to correct. It is impossible that any Englishman, or any man bred in a civilized country, could fall into such an error. And give me leave here to remark on one part of the case. Gentlemen are brought to tell you of reports conveyed to the governor. If Mr. Wright reported faithfully what he was authorized to report, the governor had little to build upon. Another gentleman adds, that there was a report of somebody; and it is said it may justify the governor as a report. Now did they consider how the governor is to be justified by a report? Does a report justify a man in proceeding to the very extremity of punishment instantly, without trial or examination? Does not every observation that can possibly be made turn against general Mostyn? If you pronounce a verdict for him, must not you give a sanction to that horrible and dangerous doctrine here advanced in his support? Are not you called upon then by every consideration that is dear to you, to give great and exemplary damages in this cause? If ever example required it, it does in this. If ever the suffering of a man required it, it does in this; for never was any man more clearly and unjustifiably wronged and injured. If you send Mr. Fabrigas, if he has courage to return to the island, with a verdict of a few hundred pounds, to give triumph to a man whose revenue is seven or eight thousand pounds a-year, who does not regard what such a man as this recovers; then the despicable doctrine of arbitrary power that the governor was so fond of, and thought so well established in this island, will never again be disturbed. Is it not essential to the very safety of the island, that

the inhabitants may be assured that they are protected from such a power, that they shall never be told that in a court of justice such a power was ever insisted upon, and that the jury gave only a few hundred pounds damages, as a mark that they did not bear in their minds any great disapprobation of it?

On the other hand, it is of no great consequence whether Mr. Mostyn ever returns to that country again. It is my, and I am sure it is your wish, that he may never be permitted to return. I wish he may never see the face of Mr. Fabrigas again. I wish he may never see the face of Mr. Fabrigas again in that island. But it is of the greatest concern to the peace and happiness of that island, that they are safely protected from such outrages, from such rampant violence and capricious exercise of tyranny and despotism; that they shall never be disturbed again by such exertion of authority, much less that it shall ever be acknowledged as the claim of the governor of the island; but that they may quietly enjoy those rights that as natural-born subjects of Great Britain they are entitled to, and which the national faith is pledged to make good to them. This will be the advantage that will follow the giving ample, considerable, and exemplary damages to the plaintiff; damages that I must say in this cause are called for from the very nature of the cause itself: for if there was not any weightier consideration in it than for the sufferings of the man, the damages must swell high indeed; but, added to that, you will produce this happy effect, that Minorca, which is said to be a precarious possession, will for ever be a permanent and secure possession to the crown of Great Britain. I much fear, if this conduct receives countenance, it will be insecure indeed; and much as I love the trade and commerce of this kingdom, I protest as a man of feeling, great and valuable as they are, I would not consent that they should be purchased, I cannot consent that they should be preserved, at the expence of the most solemn rights of society.

Mr. Just. *Gould.* Gentlemen of the jury, Anthony Fabrigas is plaintiff, and John Mostyn, esq. is the defendant. This, gentlemen, is an action of trespass and false imprisonment, on which the plaintiff declares in two counts.

The first is, that the defendant upon such a day made an assault upon and imprisoned the plaintiff, without any reasonable or probable cause, against the laws of this kingdom, and compelled him to depart from Minorca, where he was then dwelling and resident; and carried or caused him to be carried from thence to Carthagena, in the dominions of the king of Spain, against the plaintiff's will, whereby he was put to great expence and trouble, his goods were wasted and lost, his family brought to great want and distress, and he was deprived of their comfort. That is the first count. The second is, the general charge of false imprisonment, without alledging these circumstances. To this the defendant has pleaded two pleas.

In the first place, the general issue, that he is not guilty.

In the second place, he says, he is governor of the island of Minorca, and that he was intrusted with all the powers, privileges, and authorities, civil and military, belonging and relating to the government of the said island in parts beyond the seas. Then he states, that the plaintiff was guilty of a riot and disturbance of the peace, order, and government of the island, and was endeavouring to create and raise a mutiny and sedition amongst the inhabitants of the said island, in breach of the peace, in violation of the laws, and in subversion of all order and government; whereupon the defendant, in order to preserve the peace and government of the island, was obliged, and did then and there order the plaintiff to be banished the said island, and to leave and quit the island. And in order to carry this into execution, and to send him from and out of the island, he did (then come the words of form) gently lay hands upon him for that purpose; and accordingly did cause him to be kept in prison for a reasonable space of time, until he could send him out of the island; and then at length he did send him on board a vessel from the said island to Carthagena in Spain, as it was lawful for him to do.

The plaintiff has said in answer to this, that he did it of his own wrong, and without any such cause as he has alledged in his justification. Now whether this justification is good in point of law or not, is a matter, gentlemen, that I shall not enter into upon this occasion. For it seems to me, that if what has been laid down by the gentlemen upon the part of the defendant is well founded in law, they ought to have pleaded that matter to the justification of the court. But they have not so done, but have pleaded a justification, which is denied by the plaintiff; and that issue coming here by the king's commission of Nisi Prius to be tried by you and before me, we must therefore see whether he has made out that justification or not. And you will please to recollect he says in it, that the plaintiff was guilty of a riot and disorder, and did endeavour to excite and stir up mutiny and so forth in the island. Thus much I think one may say, that where a conquest is made of a Christian country (there is some strange doctrine relative to infidel countries, as if infidels had no laws to be governed by, that I meddle not with; but as far as relates to the conquest of a Christian country,) certainly it is said, that until the crown does promulge laws among them, they are to be governed by their ancient laws. Indeed, common sense speaks it, because otherwise they would have no laws nor government among them. However, thus far may be said, to be sure, under such a constitution in which we live, that at least natural equity must be the rule, if there is a power that is not circumscribed by clear, positive, and precise rules. Yet both natural justice and equity are the principles that ought to govern such a trust. If any one was to write or speak upon it, it is

impossible but they must lay down that proposition. Then that will be a consideration for you to try upon this occasion; considering this distinction, that we are not trying a cause now that does happen within the compass of this island, but we are trying a fact and a proceeding that happened in a garrison beyond the seas, a place possessed by the crown of Great Britain for the general benefit of this country and of its commerce.

In order to make out the plaintiff's case, in the first place they have called Basil Cunningham, who was serjeant-major in the royal artillery at Minorca in 1771. He says, that the plaintiff was there at that time (it is agreed upon all hands that he is a native of the island of Minorca.) When the plaintiff was brought into prison, an order was given out to put three additional men upon the guard to do duty over the prisoner Fabrigas: this was 24 hours after he had been in custody. The prison was called N° 1, and is a prison where those charged with or guilty of capital crimes or desertion are generally put. He was brought there by a party of soldiers, and the witness thinks handcuffed. It was afterwards admitted that he was. He was confined there four or five days. The centinels informed the witness, that they had orders that he should have no conversation with any but the prevost-marshal, and that was put into the general orders: in fact, that no one did visit him, as he knew of. The provost-marshal has the custody of persons accused of capital crimes, and keeps the key of the prison. He says, that the plaintiff lived like a gentleman in the island. He says that he the witness was at St. Phillip's, and that the plaintiff was not tried for any crime. This witness is cross-examined, and says he has seen the plaintiff at different times for eight or nine years: he never heard but that he was a quiet inoffensive subject: the plaintiff lived in St. Phillip's, and was imprisoned in St. Phillip's castle. This witness was there before Mr. Mostyn became the governor: Mr. Johnston was the governor when the witness came first to that island.

James Tweedy.—He was a corporal in the royal artillery in 1771, and was serjeant of the guard; and in the middle of September the plaintiff was delivered a prisoner by the soldiers of the 61st regiment. He says he was in prison in N° 1; that there were orders from the adjutant-lieutenant not to let any one converse with him; he heard the adjutant read it: the adjutant's duty is to deliver the orders of the commander in chief. To relieve us from any farther examination relative to that, it was admitted by my brother Davy that it was done by the defendant's order. Then a book is produced to you, and the title of it is, "Orders delivered to the troops in Minorca for the year 1771." "Sept. 15, 1771. In order to relieve the main guard at St. Phillip's, which now mounts a centinel extraordinary upon Anthony Fabrigas, confined in prison N° 1, general Mostyn orders, that three men be added to the artillery-guard in the Castle-square, as they are most contiguous, and that duty taken by them. The centinel must be posted night and day, and is to suffer no person whatever to approach the grate in the door of the said prison, either to look in or have any communication with the prisoner, the provost-marshal excepted, who is constantly to keep the key in his possession." Then the witness goes on, and says the plaintiff's wife and two children applied to see the plaintiff; that they were not permitted to come nearer than 30 yards of the prison; that the plaintiff lay upon boards; he had no bed: his wife brought bedding, but was not permitted to carry it to him. He says the guard was sure to be troubled if they had suffered any one to come to him, if they had been guilty of a breach of the order. He subsisted upon bread and water: that when persons are confined for capital offences, they have the provisions of the island, bread and beef, brought them. He says that no one attempted to bring any to the plaintiff, because the order was so strict. There was an air-hole at the top of the prison; a centinel was placed to keep any person from approaching it; and says that was not done in any instance before, even of deserters. He says the plaintiff had a wife and five children. He never heard him speak disrespectfully of the governor, only he complained whilst in prison of his sufferings.

William Johns was garrison-gunner at Minorca in 1771. He had been there nine years. He knew the plaintiff, who lived genteelly, as much so as any one in St. Phillip's. He says the plaintiff was brought to prison by a file of men. Then he was going on about handcuffing, and so on, which the defendant's counsel admitted, as described by the last witness; but he was not kept hand-cuffed in prison. He says the prison is a ground-floor, and is set apart for capital offenders. The first day he was in prison, his son, a lad of fifteen, came to see him, and had provisions in a basket. He desired the men upon duty to let him carry them to his father, and they refused him. You see, gentlemen, it is owing to those strict orders, that no man was to have access to him.

John Craig is a matross. He says he was at Minorca in 1771. He had been there nine years. He knew the plaintiff to be in very good circumstances; that is, he was so reckoned by people in the island. This witness says, that he did duty upon him when he was in prison, and none were admitted to see him: that his wife and child were refused. He says, that after five or six days confinement, the witness was at the quay, and saw him put on board a vessel that was under sail. He says, this was done between three and four in the morning. He says his wife and child came down then to speak to him, but the centinel would not let them come near him, nor let the witness speak to him, though he wanted so to do. Then it is admitted that he was banished, by Mr. Mostyn's order, to Spain for

time year: he ordered him to be landed at Carthagena, and it was so done.

Colonel James Bidulph says, he has been at Minorca; that he knew the plaintiff in June 1763. He staid there, I think, till the year 1771. He says the plaintiff appeared to him as one of the what he calls the second sort of people: he was reputed to have some houses and vineyards: he had a father living. He says, that he was not received as one of the noblesse, but as a gentleman. He says, "I should call him a kind of a gentleman farmer." It was said by the counsel, that the noblesse comprehends all the gentry; but upon my asking the witness, he tells you, "No: they make a very considerable distinction of the higher and inferior noblesse;" so that he is what you may call in England in the light of the middling class of men. He says, that as far as he observed, he behaved very well: and you see this gentleman speaks from 1763 to 1771, that he behaved very well, and had a very good character. He says, that he often employed him to get wine and other things, and he dispatched his commission very well. He says he principally kept company at Citadella with a don Vigo and don Sanchio, who were two of the first rank there (that is I think, the capital of the island;) that he always behaved with very great decency. And, gentlemen, you are told, that the defendant is a lieutenant-general, governor of the island of Minorca, and has a regiment of dragoons. This is the evidence in support of this action by the plaintiff.

Why then, on behalf of the defendant, they tell you that they shall make out this justification; that they shall shew to you that this man behaved in a very turbulent and disorderly sort of way; that he behaved with such earnestness, and in such a manner, under such circumstances, as tended to incite and to raise a sedition. And certainly, gentlemen, if that is the case, it is a matter of very serious and momentous concern indeed. For the governor of a garrison, without a possibility of calling in another armed force to suppress it, to quiet them, if an insurrection should be stirred up and begin amongst them, it is to be sure of very great moment and importance. For a person intrusted in so high and important a station, and of such a delicate and ticklish sort, as the government of the island, the governor should be extremely vigilant to suppress the first seeds of mutiny and sedition. This they say they shall be able to shew you. But, say they, if we shall not be able to make out this justification strictly and duly, according to the way in which it is pleaded; yet, say they, we shall lay such circumstances before you, shewing that the general behaviour of the plaintiff was of that kind, and of that complexion, that it will weigh with you by no means to give large damages. This is what I think was pretty much the substance of what the gentlemen have insisted upon by way of opening the defendant's case.

Why then, in the first place, though it was read at the conclusion of the parole evidence, I may remind you of the several matters in writing that have been read; and I think it would be but mis-spending your time for me to read them at large over again to you. For when I have so done, I am sure I shall not be able to do it with more distinctness than the ingenious officer under me has done: and when I have finished, they would just as much be out of your memory as they are now. But you will remember perfectly the nature of the proceedings. I purpose to collect them as well as I can into a focus; to bring the pith of them as well as I can to you. The true ground of the dispute was this: This Fabrigas the plaintiff wanted, as you understand, the advantage of an order of his late majesty in council, in the year 1752, by which, keeping under the afforation, not exceeding it, but keeping under it, every one was to have a right of selling wines; so as he did not exceed the afforation. Really, gentlemen, an exceeding good plan this is; and that is, a regulation of prices to keep people from imposing in the most immoderate manner on the inhabitants. Very likely, a system of something of the like sort would not be improper, but be of very considerable use even in this metropolis, for what I know. But then it seems that this order lasted only from the year 1752, during the government of general Blakeney. When general Johnston succeeded general Blakeney as governor of this island, he thought proper to make an alteration in that order; and the substance of the alteration which he made was, that for the future it should not be in the suburbs of St. Phillip's (you understand, gentlemen, this island is divided into, I think, four or five departments—four besides this arraval, as it is called, of St. Phillip's); and that for the future it shall not be sold promiscuously by every one when the afforation was made, but that for the future the four wards of the arraval of St. Phillip's should draw lots, and so take it in succession: I suppose, sell one after another till the wine is disposed of. And it does seem to me by the evidence which has been given by one of the witnesses, which you will hear more fully stated by and by, it seems better than when sold helter skelter and promiscuously. And this regulation was pursued with some advantage. Then you see the plaintiff wanted to go back to the first order of 1752, which is the order of the king in council. From thence you see all this business sprung, and from Allimundo's selling wine. That is one grievance that was complained of, and which seemed to be pretty material, I confess, as it strikes me; because I recollect, that by one of the orders it is expressly forbid that the officers or judges, or any of them, should have any intermeddling with trade or traffic. Now the complaint of the plaintiff against this Allimundo is, that he who had the check upon all the rest, this mustastaph, buys great quantities of grapes, and makes a vast quantity of wine himself. So while he kept the others under check,

he sells his own wine. Therefore that is another thing to be considered of. Therefore you see there are repeated petitions upon this occasion. And I will only say this: that to be sure it turns out at length to have been a mistake in Mr. Wright's evidence, that that number of 150 persons that were mentioned by the defendant's counsel as people by him to be produced to back his petition, or people with which his petition should be backed, that he considered as a mob, because he takes it down in writing himself: and when it comes to be read, it does appear that the expression of the plaintiff was, that he would bring 150 people with him, dealers in wine and grapes, in order to shew that his petition was exceedingly reasonable, and would be agreeable to them. Now that you see is the substance of this writing, together with the several particulars, orders, and proceedings, which I dare say you have in your memory. I must observe this, to be sure, these gentlemen are not bred in the train of the law, and in a course of legal proceedings; but general Mostyn seems to me to be as inquisitive as he possibly can to find out the bottom of this thing. It does not appear from the witnesses that the general had the least self-interest to serve in this business of his own, no profit or advantage to himself; there is no evidence whatever, not a spark of that sort that appears. He sends to Dr. Oliver and Dr. Markadal to make enquiry into this matter. He sends to them, and desires to know their opinion. He convokes together a council of the field-officers: and then they are of opinion upon the whole of this business, (whether right or wrong is not to the present question, but it strikes me upon this evidence, that this general Mostyn does seem to me to be extremely solicitous and desirous to inform himself as well as he can, what is to be done upon the occasion;) and at length it ends in a general answer, such as it was, that it would be very right to banish this man. Now they proceed to call several witnesses.

James Wright says, he resided in Minorca from January 1771 to the middle of the year 1772, as secretary to the defendant Mr. Mostyn the governor. He tells you that this island is divided into four districts, exclusive of the arraval of St. Phillip's, which the witness always understood to be separate and distinct from the others, and under the immediate order of the governor (you will observe, that it is in that district that the fortification stands): so, says he, that no magistrate of Mahon could go there to exercise any function, without leave first obtained from the governor. The whole island, he says, is governed by the Spanish laws, subject to be varied by the governor; but not subject to that variation in respect to *meum* and *tuum* of property, but as to the internal police of the island. And he tells you, that his proclamation, with a penalty annexed, is of such force, that where the penalty is annexed, if it is broken, the party is subject to it, and is liable to be imprisoned for non-payment. He says that the party is seized and brought into the court of the chief justice criminal.—I would ask a question of Mr. Wright. Has this justice criminal a commission to try offences?

Wright. He has the king's commission to try and to hear all causes when they come before him. He brings them to the governor, who signs them; and till the governor has signed them, they are not valid.

Q. But when the governor has once signed them, has this gentleman the jurisdiction to try offenders?—*A.* The assesseur criminal, and the officer fiscal, who sits as judge with him, bring their opinion to the governor, who hears and approves of their opinion, and signs it.

Do you make any distinction between one part of the island and another?—The arraval of St. Phillip's is so exempt from all kind of jurisdiction (at least was, when I was there), that it is a rule in the island, that if any body dies, comes by their death by any accident, drowned and fished up, that the criminal assesseur, with I believe the fiscal and his officers, goes to the dead body. They take the thumb, and say, Who killed you? This is a form they go through by way of bringing about a kind of inquisition taken by a coroner. Whenever they have occasion to go there, they ask the governor leave, if within the arraval; and there is a particular instance of a soldier's wife being killed by her husband.

Suppose a person is guilty of a murder within the arraval, whom is he tried by?—The assesseur criminal goes and takes inquisition. That he does not do, till he has the governor's leave.

Suppose a person is murdered, and the murderer is found out, to be sure you don't let the murderer escape with impunity?—No.

Now let me ask you, within the arraval by whom is he tried?—The governor appoints, but he generally appoints the assesseur.

Then the governor does not try him himself?—He never tries any thing of the sort.

Then he deputes somebody to try him?—Yes.

Suppose in lesser offences, of theft or riot, does he not appoint other people?—In small offences, the mustastaph.

Mr. Just. *Gould.* Gentlemen, there was in consequence of this affair, a proclamation, that no memorial, unless for mercy, could be presented, unless it was first signed by an advocate, admitted in their courts. He says that the king in council issues upon application, alterations, which are registered in the court of royal government; which includes, as I understand him, both the civil and the criminal jurisdiction. He says that the defendant being much teazed by the plaintiff, by repeated applications, directed Mr. Wright to enquire what sort of a man he was. He tells you, that the plaintiff's father has some small vineyards; that the plaintiff is a lover of politics; that he spends five days in seven in talking of politics; that at that time he believes the plaintiff had no property at all. Then he speaks as to the character of Mr. Mostyn. It seems not to be disputed at least but he is an officer, and a man of

as great humanity as possible: no one existing has tenderer feelings, and his conduct in general is in that manner. Then this gentleman goes through the whole detail of these several writings which have been read to you, which, as I said before, I shall not take up your time, for the reasons I have already given you, in repeating over again, for you have heard them all read. He tells you, amongst other things, that the inhabitants of the arraval sent a petition to Mr. Mostyn that the regulation might continue, and not be altered, as the plaintiff desired. He tells you, that the plaintiff having been with the general's aid-du-camp, this witness met him, and civilly desired him to point out what he wished; that it should be done. He says there was one Mr. Vedall that acted as an interpreter, and a priest, one Seguy, that joined with Mr. Wright to press the plaintiff to go home and mind his affairs, and not to bring himself into trouble. Then this gentleman swears, that Mr. Vedall said from the plaintiff as interpreter, that he would come with 150 men to back his petition, or with a petition backed wtih 150 men. This gentleman says, he understood by that a mob. I shall presently state to you, as I have already hinted to you, the mistake in that respect. He says there was a long conversation by Vedall with the plaintiff, as his interpreter, to desire him to desist: he still repeated the same. Then he says that he informed the governor, that there were people that he understood were to accompany this man as a mob the next day. That the general sent for the officers to meet him the next morning. They accordingly came. A large number of people were expected, but only four people of the inferior order brought a petition. They were dismissed to go home peaceably. That the result of the whole was, that the plaintiff was banished from the island. He says, that the defendant sent him the witness to the chief justices civil and criminal, who are both Minorquins, to ask what was the governor's power in this case? They sent word back, that his power extended over the man in any shape he pleased; and if he chose to banish him, he might; they would answer it with their ears. He carried the answer to the defendant; but however, doubting himself of the law, the assessour civil delivered him an order in writing, which was dated in 1590; and that imported, that though it was very fit for the governor to ask the advice of the assessours civil, yet that the governor was not by any means bound to follow it; that it was not decisive, as in matters of property. He says, that the assessour civil, upon this occasion, lent his officer, which he called his tipstaff, to the governor, to apprehend the plaintiff, who accordingly was taken, was kept in prison about five days, and then banished.

Then he tells you, upon his cross-examination, that Allimundo makes wine and sells it in gross, but not, as he believes, in retail. He says that the Minorquin language is very bad Spanish. Then he is desired to look at the paper; for he had a paper, with which, in giving his evidence, he refreshed his memory: but upon looking to the words in that paper relative to the 150 men, the words that he has set down are,

"The same day Mr. Fabrigas came for an answer to his petition, he told the governor's secretary, that he should come the next day with a petition of people concerned in grapes and wine, which they would sign and come with themselves, to the number of 150."

So that you see this gentleman says, as I apprehend him, (I don't know whether this paper that he has now produced is the original paper that he set down the minutes on for recollection and for remembrance at the time; I don't know whether that is so or not—however, it may be a copy of it) he said he set it down upon loose pieces of paper at first. If that be the case, the strong probability is, that this entry that I have read to you must have been set down recently after the conversation. You see the words are, that it was to be 150 people concerned in grapes and wines. Then he tells you, that upon the 11th the governor and the field-officers met, and, as you heard upon his original examination, received a memorial by four men signed by blank persons — you see the number is left blank. This gentleman says he cannot recollect the number. He says he was counting them, but he believes there were more than 40, between 41 and 47; he can't be exact; but the number of persons by whom it is signed is in this copy blank. The purport of this memorial is to desire that the old practice may be pursued. To which he answered by the officers, that they should return home, and behave as good and peaceable subjects to his majesty ought to do. I have anticipated it. I see he says, according to his memory, there were from 41 to 47 signatures. There were a great many marks, you understand, to this petition delivered by the four men. He can't say he counted it through, and can't affirm what the number was. He was further examined: and he says, that upon strict enquiry it did not appear that above one in ten supported the plaintiff's desire; he is sure he allows a greater proportion than the truth was: and he says he informed the defendant Mr. Mostyn of that. He made the enquiry at the defendant's request, in order to discover the sense of the inhabitants.

John Pleydell, aid-du-camp to the governor, says, that on the 9th of September 1771, the plaintiff asked him to see the governor. He told him if he had any thing for the governor, he would deliver it. After a little hesitation the plaintiff delivered a memorial, and desired him to tell the governor he should come the next day accompanied by 200 or 250 inhabitants of St. Phillip's. He says he carried the memorial to the governor, and told him what the plaintiff had said; upon which he says, that the governor that day sent to the commanding officers of the corps to meet at the

governor's the next morning, to see how he should receive the plaintiff, and the people that were to come with him. Now here you see in the evidence given by this Mr. Pleydell, there is not that explanation of the nature of the end and design of these 200 or 250 people being to come with him, as there is in that memorandum that Mr. Wright produced: for this is in general said 200 or 250 people. And I can't help remarking to you, that it seemed to make an impression on the governor, and to alarm him: for it was upon his delivering this message to him that Pleydell says he did desire the field and commanding officers of the corps to assemble the next morning, to see how he should receive the plaintiff and the people that were to accompany him. But he says, instead of the plaintiff and such a number of people, four men came the next day and brought a memorial. He believes all the commanding officers were there. He was told by the governor that the sense of all the officers was, that the plaintiff should be taken up as a dangerous and seditious person: he says he had consulted the Minorquin judges, and their opinion was the same with the military officers. He says this gentleman is an inhabitant of the arraval, just by the glacis of the fort: and says that he kept his father's vineyard: and that the defendant, far from being a tyrannical over-bearing man, is one of much temper and humanity, and the witness served under him the last war.

Upon his cross-examination, he understood by the plaintiff's saying he should bring 200 or 250 men, that it was to enforce or give weight to his petition, to certify that that was their opinion; that is, that they concurred in the plaintiff's opinion: but, says he, so many people coming together is an act in itself of a tumultuous kind. He says the people in general wished to have Mr. Johnston's regulation continued. As to the memorial that was brought by the four men, he did not read it, and had it not in his hand; but by just the superficial glance he had of it, he thinks there might be 50 or 60 names to it.

Robert Hudson, fort-adjutant, says, that upon the 10th or 11th of September, the mustastaph of St. Phillip's told him, that upon delivering out a proclamation (though I ought not to sum that up, for what this Allimundo said is no sort of evidence)—but he says that having received this intelligence (so far it is material) he did give the governor an information of it: the governor was then in Mahon. He says, that before the plaintiff made this objection, he never heard any objections to Mr. Johnston's regulation; that it was to prevent the wine from turning sour, by being sold in that hurrying sort of way; that great quantities of it produce fluxes and other diseases among the garrison, for there are few cellars it seems in the garrison. He says after this regulation, in several years experience, none of the wine did turn sour. Then there was a question that occured to me to ask, whether the serving it out in this sparing manner did not influence the price. They said, no, because the afforation fixed the price that it could not exceed it.

Colonel Patrick Mackellar says he knows the plaintiff; he was called Red Toney: I suppose he has red hair. He says he bore a very bad character; that he was a seditious, troublesome, drunken, shuffling fellow; that he had many complaints against him from two mustastaphs. He was in the island from 1736 to 1750, and again from May 1760 to last May. He tells you the arraval of St. Phillip's is surrounded by a lime-wall on one side, and the other side a ditch; that the arraval is a royalty, where the governor has a greater power than any where else; that the judges can't interfere but by the governor's consent.—That corresponds exactly with the explanation that Mr. Wright gives.—He says, in other parts of the island there are jurats, but in the royalty there is only this mustastaph, who is appointed by the governor or commander in chief, and is at pleasure displaced by him. He takes care of weights, measures, and markets, and of all wine and the expenditure of it, and settles little disputes between the inhabitants in the first instance. That the magistrates at Mahon put the afforation within their jurisdictions. This mustastaph does not make any afforation himself, but acquiesces under that of Mahon: he only signifies the afforation that has been made at Mahon. The Minorquins are in general governed by the Spanish laws. When it serves their purpose, they plead the English laws. Some are well affected to our country; some are not. He attended the governor once or twice on account of the plaintiff; and he says that the general opinion of all the officers was, that the plaintiff was a dangerous person, and that it was proper to take him up and bring him to punishment; and were of opinion to banish him. He says the defendant is a good officer, a polite well-bred man, that he carried his command in the genteelest manner, and is a person of great humanity.

On his cross-examination he says, that he and the other field-officers met by the defendant's desire, to know what was their opinion upon this business. Two of the judges of the island thought it entirely in the governor's breast to do as he pleased; but there was no trial. He does not recollect whether major Norton was of that opinion: it was the opinion of the majority. He was asked whether major Rigby was of that opinion or not? He says he can't say how that was, but does not remember that any one officer dissented from that opinion.

Then Edward Blakeney, secretary to the governor of that name, is examined. He says that nothing can be executed in the arraval of St. Phillip's but by the governor's permission: it is a royalty; he has the absolute government there. He says that gen. Blakeney a few months after his arrival in the year 1748,

banished two Franciscan friars into Spain or Italy: that was in time of peace. He says there was afterwards by a great deal of interposition have given to those people to return. He says that the power itself was never disputed, and he took it to be handed down from the Spaniards, by whose laws, as you observe, the Minorquins are governed, and at their own request. He says the judges have applied to the witness for the governor's leave to execute processes in the arraval. He says the late king sent four regiments to relieve the troops stationed there, (an order of humanity, like his majesty) and to have all the wives and children brought home: however, a priest took a liking to one of the young women, and would not deliver her up. The priest was banished; the consequence of which was, the girl was delivered up, and the priest was brought back again. He gives these as three instances where people were banished from the island. He says that these friars, two Franciscans, were, as he believes, natives, Minorquins. This is the parole evidence that is given on the part of the defendant. I have already stated to you the substance of all that written evidence: you have heard it, and you are fully masters of all the circumstances attending this cause.

Now, gentlemen, it is for your consideration, whether the defendant, general Mostyn, has made out his justification; whether he has proved that the defendant was guilty of a riot, and of a disturbance, and that he endeavoured to excite and to stir up a mutiny and a sedition in the garrison. If that is the case, I should imagine, gentlemen, the plaintiff will appear to you as a person of a very dangerous disposition; and that some very strict methods must be necessary to be taken in such a situation, in order to preserve the garrison, and to prevent an insurrection. If it is insinuated to the soldiers that they are abused by the officers under the governor, by the governor's connivance, or by his remissness; we will say, though he has no kind of interest in it, but by his gross encouragement, they are oppressed and imposed upon;—suppose such a persuasion should be infused into the people composing the garrison, I think it is very clear, and I need not argue to you, to shew what dangerous consequences may result from that. Then you will consider how this case stands in that respect. You see that this person, after several years (a new regulation having been made by governor Johnston) is for setting up again and reviving an old regulation made in 1752; and that he could not prevail so to do. Then the sense of the island was to be taken. It is in the governor's power to rescind this, as I apprehend, because it is not disputed but that by his commission, according to his plea, he is entrusted with the whole civil and military government of the island: and I presume, however, if he was to have made such an alteration, he had authority to do it: the governor himself, in short, is entrusted with it. Then this person wants to set that old business on foot again; and he does produce, (for so I must take it from the writing which that gentleman has produced) he does mean to shew to the governor, that there are a vast number of people of his sense in the affair. The misfortune of it is, however, that this is not expressly conveyed to the governor; because, according to the whole belief of the agent, though he understood that it was meant to give weight to the petition, not to proceed to direct violence; for what I can find, that was not directly explained to general Mostyn. Now you will consider upon this evidence, whether you are satisfied that this was such a behaviour in the plaintiff, as to afford a just conclusion, that he was a man that was about to stir up a sedition and a mutiny in the garrison; or whether he meant no more than earnestly to press his suit, and to endeavour to obtain redress from what seemed to him to be a grievance. If you shall see it in that latter light, to be sure there is no question at all that he will be entitled to recover in this action. As for the damages, I shall not say a word upon that matter, because it is your province to consider on it upon all the circumstances. Then there is another consideration, which will be a legal consideration: that supposing you should be of opinion that this was really a seditious behaviour in this plaintiff, which you will consider of, and also whether he acted in such a manner as to stir up sedition, you will be pleased to say, that when you bring in your verdict. The next thing is, that supposing you see the plaintiff's conduct in that light as a mutinous purpose, whether the defendant could be warranted to proceed in that manner. That is, to be sure, a matter of very great consequence. It is not like persons in this country, in England, where no freeman shall be banished his country; which is carried to such an extent, that lord Coke tells us, that it is not in the power of the king to send a man against his will even to be the lord-lieutenant of Ireland (I don't believe there are many gentlemen, that would recoil at that); but it could not be done, because it would be an exile: you drive a man against his will out of his native country. But however, this is a case you see in a conquered island, in a ceded island. And certainly I should conceive myself, that if in a garrison where it is absolutely necessary to keep down all these mutinous spirits, from the apparent reason of danger, that it must certainly be lawful for the governor at least to lay a man up in prison that is turbulent. But I should doubt a great deal myself; it will be a matter that you, gentlemen, will have an opportunity to consider, if you please, if you shall be of opinion that the plaintiff's behaviour was seditious; and that is the reason that I desire you to attend to that, and tell me, when you give in your verdict. It would be carrying matters to a very great length indeed, in my apprehension, to say, that you should exile and banish a man from his native country. I cannot, sitting

here, and as at present advised, think that even in such a situation that could be warranted. I cannot think but that a person might be secured and confined, in order to be brought to trial, and properly punished for it. I leave it to you under these observations, and you will consider upon the whole of it, what damages you shall please to give to the plaintiff. As to the defendant, you hear the character he bears from all the witnesses: a man of great humanity, who has been guilty of an inordinate use of his power, but not with a malevolent, bad, and wicked design. To be sure, you will not deal out the damages with the same view as you would against a man that acted clearly and demonstrably with malice. It is your province, gentlemen, to consider all the circumstances, and to give in your verdict accordingly.

The jury withdrew, and in about an hour returned, and gave in their verdict for the plaintiff, with 3,000*l.* damages, and all costs of suit. —And at the same time said, that, in their opinion, the plaintiff was not guilty of mutiny or sedition, or acted in any way tending thereto.

FURTHER PROCEEDINGS IN THIS CAUSE.

The counsel for the defendant, while the jury withdrew to consider their verdict, tendered to the judge minutes of a bill of exceptions; and on the fourth day of Michaelmas-term, the Court of Common-Pleas was moved for a new trial.

The defendant's counsel made his motion on two grounds.

First, for excess of damages; alledging that the jury had proceeded on a mistake, for they had found that the plaintiff was not guilty of mutiny or sedition; whereas he insisted it was most plain from the written evidence, that the plaintiff had endeavoured to make the garrison believe that he was their friend.

Secondly, that a new trial ought to be granted, because this action could not be maintained, as the Court had no jurisdiction.

The rule to shew cause was, of course, granted.

On the 25th of November, Mr. Just. Gould reported the evidence, which agreed with the printed trial. On the 26th, it was solemnly argued on the first objection of excess of damages, the Court not permitting the defendant's counsel to argue the second objection, as they said it would be introducing a new mode of practice, which might eventually be prejudicial to suitors; and as the bill of exceptions went with the record to the court of King's-bench, that was the proper court to determine on it.

Lord Chief Justice *De Grey* delivered his opinion to the following purport.

I have always considered this mode of application for a new trial, as very salutary to the suitors, who may be injured by mistakes; and likewise to the jury, as it reforms their errors, if they commit any, and is a happy substitute for the much more grievous proceeding that the common law had directed. With regard to the interposition of the courts of justice on the *quantum* of damages, where the subject of the suit is contract, the Court has an easy rule to go by in rectifying the mistakes of the jury, because there is a certain test and standard. As for instance, if a man should bring an action on a note for a 100*l.*, and the jury should give for damages 1,000*l.* under the idea of interest, they would go upon a mistaken principle, as it is certain the party could not have sustained an injury adequate to that compensation: the damages would be excessive, and the Court would correct it. But in personal wrongs, it is much more difficult to draw a line. I do not go so far as to say, that in personal wrongs the Court will never interpose, even upon the article of excessive damages, if they are outrageous, and appear so to the Court; that is, as my brother Gould expressed it, if it appears, in giving the damages, that the jury did not act with deliberation, but with passion, partiality, or corruption. As for instance, if two ordinary men should quarrel at an alehouse, and one should give the other a fillip upon the nose, and 1,000*l.* should be given for damages, which is ten times more than both the parties are worth, such damages would be evidence that the jury had not acted with the deliberation that the administration of justice requires. It is a personal tort, but the damages are excessive. There are other circumstances, where the Court, even upon excessive damages, might interpose: and I think the counsel for governor Mostyn have very wisely endeavoured to ground themselves upon such a principle in this cause; which is, that the jury, in assessing the compensation for the injury, have proceeded on a mistake. It is possible that in many instances that mistake may arise from the direction of the Court; for the Court may perhaps direct the jury to attend to a circumstance, that in point of law is not proved, or is not the subject-matter for their consideration: or it is possible that the jury may so mistake the evidence, as to believe the fact to be true, when it is not so: then it comes to be a proper motion for a new trial, because the verdict is contrary to evidence. Or the jury may give credit to such circumstances, which either have not been proved, or are not true, and they may aggravate the damages upon that account: they then act under a mistake, which most certainly ought to be rectified. That is the ground upon which the present application is made. But if you consider it in your own mind, it will necessarily result to this proposition, that the jury have found a fact contrary to evidence. As my brother Davy was aware that there might be some difficulty in maintaining that proposition, he put it into another shape, and said it was a circumstance that was proper for the jury to consider as a ground for mitigating the damages; instead of which, they had from that circumstance ag-

gravated the damages. So that, upon the whole, it will still recur to the same proposition, that they have acted upon a mistake, in giving aggravated damages upon a fact, which they have found contrary to evidence. For they were unanimously of opinion, that what the plaintiff did, was not done with any seditious view, or tending thereto, but was an earnest pressing of a suit to be relieved from a grievance supposed. That was the enquiry they were particularly ordered by my brother Gould to make; and that was the answer that they gave. Now, if in point of fact, they were so mistaken, as that they ought not to have been of opinion that the plaintiff did not act with a seditious view, but was only pressing importunately a suit for relief from a supposed grievance, then they have given damages upon a false supposition; they have given such as are not proportionate to the injury received. The argument then seems to me to come to this, that they have believed a fact which they ought not to have believed, because the proof was against it. We are therefore to consider, whether the damages ought to have been raised so high or not. And there are two cases insisted upon. One is the behaviour of Mr. Fabrigas, as tending to raise disorder and sedition in the government. The other is the conduct of governor Mostyn, in extenuation of damages, as acting under a mistake, and having taken the best advice the nature of his situation would admit. In order to understand this, we must see for a moment the situation the government stood in.

This island was conquered in 1708. The conquerers (no matter in what mode) had a right to impose what laws they pleased. Upon the cession of the island, by the eleventh article of the treaty of Utrecht, part of the right of the conqueror was given up; for it is stipulated, that the inhabitants shall enjoy their honours, estates, and religion. So far therefore the right of the conqueror is restrained; but with regard to their laws, there was no stipulation, nor was it ever understood so by sober people. It is well known that the earl of Stanhope and the duke of Argyle, as plenipotentiaries upon this subject, and afterwards my lord Bolingbroke, did assure the inhabitants, that they should enjoy their own rights and privileges, still subject to the supreme dominion of the conqueror. Those rights and privileges which they were to enjoy, were the established municipal laws of the island, under such regulations as the legislature of this country should impose upon them. This assurance, made at that time, has been attended to by government ever since; for they have had the enjoyment of their privileges so assured to them, and have had such regulations, as the government and the nature of affairs have from time to time required.

The king in council, in the year 1752, (upon several complaints having been made against general Anstruther, who had been the governor) made the regulation, as it is called, of 1752; by which the king in council intended to provide against that oppressive power of the governor, which the inhabitants had complained of, and that the people of the island should be at liberty to sell their wines at the price fixed by the jurats of the different terminos.—These powers were soon found, or thought, to be abused; which occasioned a representation to be made by the then governor to the king in council, which produced the new regulation of 1753, which leaned on the other side, as the natives said: for as the former was supposed to give too much power to the magistrates of the island, making them independent of the governor; so this threw too much power into the hands of the governor, and laid them too much at his mercy.

There is one thing mentioned in my brother Gould's report, which I think proper to take notice of, because it should not be so mistaken. One of the witnesses in the cause represented to the jury, that in some particular cases, especially in criminal matters, the governor resident upon the island does exercise a legislative power.* It was gross ignorance in that person to imagine such a thing. I may say, it was impossible, that a man who lived upon the island, in the station he had done, should not know better, than to think that the governor had a civil and criminal power vested in him. In the island, the governor is the king's servant: his commission is from the king, and he is to execute the power he is invested with under that commission, which is to execute the laws of Minorca under such regulations as the king shall make in council. How does it stand after the conquest of this island in 1757, by the French, and the relinquishment of it upon the peace? When general Johnston was sent as deputy-governor, he thought fit to make a new regulation. Now, I conceive, it was a vain imagination in the witnesses at the trial, (for we don't want to go to Minorca to understand the consitution of that island) it therefore was a vain imagination in the witnesses to say, that there were five terminos in the island of Minorca. I have at various times seen a multitude of authentic documents and papers relative to that island, and I do not believe, in any one of them, that the idea of the arraval of St. Phillip's being a distinct jurisdiction was ever started. Mahon is one of the four terminos: St. Phillip's and all the district about it, is comprehended within the termino of Mahon. But, however, as it happens to lie near the glacis of the fortification, and the governor's power (I don't mean his legal authority) being there greater than it may be in more distant parts of the island, there has been a respect shewn him, a decency perhaps to the governor, which has prevented the magistrates interfering without his knowledge. But to suppose that there is a distinct jurisdiction, separate from the government of the island, is ridiculous and absurd: it is what I never did hear of, till it was men-

* Vide Mr. Wright's evidence, *ante*.

tioned in my brother Gould's report. General Johnston made an alteration in the arraval of St. Phillip's, which is a district of a mile or two in circumference, with some few hundred inhabitants. He divided this into a subdivision of four other districts, and annulled by his own authority the regulation of 1752, respecting the mode by which the wines were to be sold. As far as appears in this cause, he did that without authority. If he had the sanction of government, his instructions should have appeared, if the defendant intended to avail himself of them. I only mean to be understood, that general Johnston had no authority to supersede the order of counsel by his own power; but at the same time it seems to be a very salutary provision; and if he had represented it to the king in council, no doubt but it would have been approved of. I may say that the inhabitants approved of it, because from that time there never has been any complaint of it. A few years ago there were a multitude of complaints brought against the arbitrary acts, as they were called, and the oppressive conduct of this very general Johnston. They were heard in a full council with a great deal of solemnity for a great number of days, and the council came into a resolution upon them. This alteration of the order in 1752 was not one of their charges against him; therefore it is clear, that the inhabitants of the arraval did not at that time think it an oppression.

We come now to the point of time, when Mr. Fabrigas complained of it. I will not condemn him for referring to the order of council. He had a right to know whether this alteration of governor Johnston was made by authority, and whether it had the effect of the power of the king in council; therefore I do not condemn the thing itself. Mr. Fabrigas not having met with that success which he expected, (though governor Mostyn, I think, till the time of the arrest and commitment, acted with a great deal of caution, judgment, and prudence, I can almost say impartiality) and not being satisfied with the opinion of the governor upon the representation and defence of Allimundo, which he had never seen, desires to see it. His petition is rejected. This produces a peevish application again and again to the governor, and from one complaint another arises. New grievances are supposed to be received, not only by Mr. Fabrigas, but by the inhabitants of the arraval at large: and I cannot say that I approve of the manner in which he did prosecute his claim: the effect of it is another thing. He certainly did not observe that decency and respect to the governor which he ought to have done. If the governor did not attend to his complaints, the king in council was open to him. We all know, that the way to the king in council has been pursued very often, where the governor has not attended to the complaints of the Minorquins. His expressions indeed have the appearance of humility and respect; but yet there is a petulance in the continuing his petitions, which might disturb the governor. Thus the matter goes on; this man still complaining, and earnestly pressing of his suit upon a grievance supposed, till the secretary informed the governor, that the plaintiff would come next day with his petition backed with 150 of the dealers in grapes and wine. This it is that is supposed to alarm the governor. Now I will not reflect so much upon the honour of any governor of the garrison of fort St. Phillip's, as to suppose, that he really thought his garrison was in any more danger than this court is at the present moment; nor will I suppose, that if he did think his garrison was in danger, that he would have taken such feeble means to defend it. The governor was disconcerted by the petulance of the man, and was off his guard; and though he took the advice of those who were the proper persons to advise him there, yet he must have too much sense to imagine, that the advice they gave him was such as he could either in law or reason follow. I am not speaking now of the law of this island; but it is totally contrary to all principles, and to every idea of justice in any country. But the next day, this petition is presented by four men only. Then there is an end of all danger to the garrison and the government; and you plainly see no disturbance was meant; nor is there any evidence of his soliciting the people, of his breeding cabals among them, or exciting any tumult or disorder. The plaintiff had, to say the worst, only behaved himself ill in the mode of his importunity; and when he was open to the laws of that country (for such laws I presume there must be) if he had offended, he might have been prosecuted in the courts of criminal jurisdiction. Whether he acted improperly, from not having succeeded in prevailing upon the majority of the people to think he was right in desiring to inforce the order of 1752, is not the question: the people seemed to be content with the variation, or deviation, made by general Johnston. Now when all these matters are over, this man is committed to prison; and there is the first complaint: and I must take it upon this motion, that it was a false imprisonment. If the governor had secured him, nay, if he had barely committed him, that he might have been amenable to justice; and if he had immediately ordered a prosecution upon any part of his conduct; it would have been another question, and might have received a different consideration. But he commits him to the worst prison in the island; and in a way which I cannot conceive came from general Mostyn. What could induce him to use a man with such hardship and inhumanity? Was not putting him into prison sufficient? Why was he to be deprived of the society of his wife and children, without being allowed any thing for his sustenance but bread and water, and to lie upon the floor? In this condition he remains for six days: then comes a second imprisonment; for I take the whole year to be a continuation of the false imprison-

ment. He is then confined on board a ship, under the idea of a banishment to Carthagena. I do believe Mr. Mostyn was led into this, under the old practice of the island of Minorca, by which it was usual to banish: I suppose the old Minorquins thought fit to advise him to this measure. But the governor knew that he could no more imprison him for a twelvemonth, than that he could inflict the torture; yet the torture, as well as banishment, was the old law of Minorca, which fell of course when it came into our possession. Every English governor knew he could not inflict the torture; the constitution of this country put an end to that idea. This man is then dragged on board a ship, with such circumstances of inhumanity and hardship, as I cannot believe of general Mostyn; and he is carried into a foreign country, and of all countries the worst; for I believe there are directions given, that no persons should go to Spain, or be permitted to quit the port of Carthagena. All his continuance in Spain, I look upon as a continuance of the false imprisonment; because every constraint upon personal liberty, without legal authority, is a false imprisonment: and if a captain leaves a sailor upon a desert island, though he is left at liberty there, yet the keeping him from that place to which he had a right by law to come, is an imprisonment.

If upon proper cause the courts of justice there had in a judicial way exercised any power which their laws would have supported, and which the laws of this country might not, what the effect of that would have been has nothing to do with this cause; for now we take it upon the general issue, Not Guilty. In this case, the man has been imprisoned under circumstances of great hardship for twelve months, and kept from the communication of his family and his own concerns. In this situation he brings his action; and the jury have thought fit to give 3,000*l.* damages. To be sure, 3,000*l.* is an immense sum for a Minorquin to recover: my brother Davy thought proper to use the expression of its being an outrageous sum. To say what is the value of the liberty of a man's person, secluded from his family, under circumstances of hardship, for twelve months, is a difficult matter. Men's minds will vary much about it: I should think one thing, another would think another. In this case of personal wrongs, what has the law said? The law has said, that a jury of twelve men shall be the judges to determine and assess the compensation for that personal wrong. We cannot but recollect what passed in those unfortunate affairs that happened about the secretary of state and a printer's boy. A servant is taken up under a mistake, and carried to a better house than his own, is fed with better provisions than he had of his own, and is treated better than he would have been treated when at home; yet he brings an action of false imprisonment, and has 300*l.* damages.* It was more than he could earn for years. The Court was applied to for a new trial, upon excessive damages. What did the Court say? (and I never heard their judgment in that matter arraigned) "We are not the judicature to determine upon the deliberate judgment of a jury, upon such a subject as this. Have the jury exercised their judgment? or, is there any imputation upon their conduct except the idea of the compensation not being proportioned? Not at all." How can a court of justice, that is to determine upon law, set a value upon this, and say, it is wrong? What would be the consequence of it? If we say this is wrong, we must say what is right. Then we are to tell the jury, "You are not to find 3,000*l.*" "May we find 2,000*l.* 1,000*l.* 500*l.* or 100*l.*? Tell us where you think we should be right?" "We must not tell you; we have no authority to do that; but you must not give outrageous damages." For though I may know in my own mind whereabouts I should compensate the injury, without saying whether it would be more or less than this, yet I cannot prescribe to the jury what I think the value of personal liberty. But it is said, that the governor did what he could in his situation; but was mistaken. If he was mistaken, it is a matter of mitigation before the jury, and it comes exactly to the same point. I presume it was pressed before the jury, and they paid such attention to it as they thought proper; and therefore it would be totally evoking the cause from its proper determination to say, that the jury ought to give some other damages than they have. As to the ground on which the defendant's counsel have made this motion, it arises from an accident, and I think an accident which was very properly provided for: for had it not been, that the learned judge who tried the cause had particularly in terms recommended the consideration of this point to the jury, and taken their answer, the defendant could not have had any ground to apply for a new trial. In my opinion, the learned judge did very right, and acted with great prudence and justice to the parties, and to the future questions that may arise in this cause; for it looks as if the parties from the beginning intended to apply either here or elsewhere. Now it is a very different question, whether the governor of Minorca, finding a subject mutinous and seditious, and disturbing his government, can arrest and imprison him? or, whether he can justify what he has done, the jury having found that he was neither mutinous nor seditious? Had they found the contrary, that fact might have been taken into consideration in a court of justice; but as they have exercised that jurisdiction the constitution has given them, I think there ought not to be a new trial.

Mr. Just. *Gould* said, that the Court was not warranted in determining that the damages were excessive, without breaking in upon the fundamental principles of the constitution.

Mr. Just. *Blackstone* observed, that these damages could not be called angry or vindictive

* See the Addenda to vol. 19, p. 1405.

damages, as the injury was as outrageous as the damages could be excessive.

Mr. Just. *Nares* declared, that Mr. Fabrigas had been imprisoned and treated in such a manner that he did not care to repeat.

The whole bench were unanimous in refusing a new trial, and the rule was consequently discharged.

Farther Proceedings in the Cause of Fabrigas and Mostyn.

The Court of Common Pleas having refused governor Mostyn a new trial, he resorted to a Writ of Error, which was allowed on the 14th of December 1773.

On the 16th of December he was obliged to put in bail.

A rule was given to transcribe the record in Hilary term, 1774.

The first Scire Facias issued in Easter term.

The second Scire Facias issued in the same term, on the 16th of May, returnable in Trinity-term.

Mr. Fabrigas, the defendant in error, was served with a summons on the 7th of June, that the plaintiff might have time to assign errors till judge Gould had put his seal to the bill of exceptions.

On the 8th of June, judge Gould came into the court of King's-bench, and acknowledged his seal.—The errors were assigned on the 16th of June. The defendant pleaded *in nullo est erratum* on the 20th.—A Concilium was moved for on the 21st of June.—It was set down for argument for the first Friday in Michaelmas term.

It was argued on Tuesday the 15th of November 1774; and the record is as follows:

"The Record of the Proceedings in Fabrigas and Mostyn.

"The Writ of Error.

"As yet of Trinity-term, in the 14th year of the reign of king George the third.

"Our lord the king sent to his trusty and well-beloved sir William de Grey, knight, his chief justice of the bench, his close writ, in these words; that is to say: George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To our trusty and well-beloved sir William de Grey, knight, our chief justice of the bench, greeting. Forasmuch as in the record and process, as also in giving of judgment in a plaint which was in our court before you and your associates, our justices of the bench, by our writ between Anthony Fabrigas and John Mostyn, esq. of a plea of trespass, assault, and false imprisonment, as it is said, manifest error hath intervened, to the great damage of the said John, as by his complaint we are informed: we, willing that the said error (if any be) be duly amended, and full and speedy justice done to the said parties in this behalf, do command you, that if judgment be given thereupon, then you send to us distinctly and plainly, under your seal, the record and process of the said plaint, and all things touching the same and this writ; so that we may have them in fifteen days of St. Hilary, wheresoever we shall then be in England; that inspecting the record and process aforesaid, we may cause further to be done thereupon for amending the said error, as of right, and according to the law and custom of England, shall be meet to be done. Witness ourself at Westminster, the 6th day of December, in the 14th year of our reign, Hil. A. L.

"The Return to the Writ.

"The Answer of sir William de Grey, knight, chief justice within named.—The record and process of the plaint within mentioned, with all things touching the same, I send before our lord the king, wheresoever, &c. at a day within contained, in a certain record to the writ annexed, as I am within commanded, &c. William de Grey.

"Pleas. Inrolled at Westminster before sir William de Grey, knight, and his brethren, justices of his majesty's court of Common Bench, of Easter-term, in the 13th year of the reign of our sovereign lord George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth. Rolls 616 and 617.

"The Declaration.

"In the Common Pleas. *London* to wit. *John Mostyn*, late of Westminster, in the county of Middlesex, esquire, was attached to answer Anthony Fabrigas of a plea, wherefore he with force and arms made an assault upon the said Anthony at Minorca, (to wit) at London aforesaid, in the parish of Saint Mary-le-Bow, in the ward of Cheap, and beat, wounded, and ill-treated him, and there imprisoned him, and kept and detained him in prison there for a long time without any reasonable or probable cause, contrary to the laws and customs of this realm, against the will of the said Anthony, and compelled the said Anthony to depart from and leave Minorca aforesaid, where the said Anthony was dwelling and resident, and carried and caused to be carried the said Anthony from Minorca aforesaid, to Carthagena in the dominions of the king of Spain, against the will of the said Anthony; whereby the said Anthony was put to great expence and trouble, and the goods and effects of the said Anthony there were diminished, lost, spoiled, and consumed, and the family of the said Anthony were brought to great want and distress, and the said Anthony, during all the said time, was thereby deprived of the comfort of his said family: and also wherefore the said John with force and arms made another assault upon the said Anthony at Minorca, (to wit) at London aforesaid, in the parish and ward aforesaid, and beat, wounded, and ill-treated him, and there imprisoned him, and kept and detained him there in prison for a long time, without any

reasonable or probable cause, contrary to the laws and customs of this realm, against the will of the said Anthony; and did other wrongs to him, to the great damage of the said Anthony, and against the peace of our lord the now king: and thereupon the said Anthony, by Richard Gregory, his attorney, complains, that the said John, on the first day of September, in the year of our Lord 1771, with force and arms, (to wit) with swords, staves, sticks, and fists, made an assault upon the said Anthony, at Minorca, (to wit) at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time, (to wit) for the space of ten months, without any reasonable or probable cause, contrary to the laws and customs of this realm, against the will of the said Anthony, and compelled the said Anthony to depart from and leave Minorca aforesaid, where the said Anthony was then dwelling and resident, and carried and caused to be carried the said Anthony from Minorca aforesaid to Carthagena, in the dominions of the king of Spain, against the will of the said Anthony; whereby the said Anthony was then and there put to great expence and trouble, and the goods and effects of the said Anthony there were diminished, lost, spoiled and consumed, and the family of the said Anthony were thereby brought to great want and distress, and the said Anthony during all the said time was deprived of the comfort of his said family; and also, for that the said John on the said first day of September, in the year of our Lord 1771 aforesaid, with force and arms, (to wit) with swords, staves, sticks, and fists, made another assault upon the said Anthony, at Minorca, (to wit) at London aforesaid, in the parish and ward aforesaid, and then and there beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him there in prison for a long time, (to wit) for the space of other ten months, without any reasonable or probable cause, contrary to the laws and customs of this realm, against the will of the said Anthony; and then and there did other wrongs to him the said Anthony, to the great damage of the said Anthony, and against the peace of our said lord the king: and thereupon the said Anthony saith, that he is injured and hath sustained damage to the value of 10,000*l.* And thereof he bringeth suit, &c.

"The Plea.

"And the said John, by James Dagge his attorney, comes and defends the force and injury, and says he is not guilty of the premises above laid to his charge in manner and form as the said Anthony hath above complained thereof against him; and of this he puts himself upon the country, &c. and the said Anthony doth so likewise. And for further plea in this behalf as to the making the said assault upon the said Anthony in the first count in the said declaration mentioned, and beating and ill-treating him, and imprisoning him, and keeping and detaining him in prison for the said space of time in the said declaration mentioned, and compelling the said Anthony to depart from and leave Minorca aforesaid, and carrying and causing to be carried the said Anthony from Minorca aforesaid to Carthagena, in the dominions of the king of Spain, by the said John above supposed to have been done; he the said John, by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, says, that the said Anthony ought not to have or maintain his said action thereof against him the said John, because he says that he the said John, at the said time, &c. and long before, was governor of the said island of Minorca, and during all that time was invested with and did hold and exercise all the powers, privileges, and authorities, civil and military, belonging and relating to the government of the said island of Minorca, in parts beyond the seas; and the said Anthony before the said time when, &c. (to wit) on the said 1st day of September, in the year aforesaid, at the said island of Minorca aforesaid, was guilty of a riot and disturbance of the peace, order, and government of the said island, and was endeavouring to create and raise a mutiny and sedition among the inhabitants of the said island, in breach of the peace, violation of the laws, and in subversion of all order and government; whereupon the said John, so being governor of the said island of Minorca as aforesaid, at the said time when, &c. in order to preserve the peace and government of the said island, was obliged, and did then and there order the said Anthony to be banished from the said island of Minorca, and to leave and quit the said island. And in order to banish and send the said Anthony from and out of the said island, did then and there for that purpose gently lay hands upon the said Anthony, and did then and there seize and arrest him, and did keep and detain the said Anthony, before he could be banished and sent from out of the said island, for a short space of time, (to wit) for the space of six days then next following; and afterwards, to wit, on the 7th day of September, in the year aforesaid, at Minorca aforesaid, did carry and cause to be carried the said Anthony, on board a certain vessel, from the island of Minorca aforesaid to Carthagena aforesaid, as it was lawful for him to do for the cause aforesaid, which are the same, making the said assault upon the said Anthony in the first count of the said declaration mentioned, and beating and ill-treating him, and imprisoning him, and keeping and detaining him in prison for the said space of time in the said first count of the said declaration mentioned, and compelling the said Anthony to depart from and leave Minorca aforesaid, and carrying and causing to be carried the said Anthony from Minorca to Carthagena, in the dominions of the king of Spain, whereof the said Anthony hath above complained against

him: and this he is ready to verify. Wherefore he prays judgment if the said Anthony ought to have or maintain his said action thereof against him, &c. without this that the said John was guilty of the said trespass, assault, and imprisonment, at the parish of St. Mary le Bow, in the ward of Cheap, or elsewhere out of the said island of Minorca aforesaid.

"THOMAS WALKER.

"The Replication.

"And the said Anthony, as to the said plea of him the said John, by him secondly above pleaded in bar, as to the said assaulting the said Anthony in the said first count of the said declaration mentioned, and beating and ill-treating him, and imprisoning him, and keeping and detaining him in prison for the said space of time in the said declaration mentioned, and compelling the said Anthony to depart from and leave Minorca aforesaid, and carrying and causing to be carried the said Anthony from Minorca aforesaid to Carthagena, in the dominions of the king of Spain, by the said John above done, protesting that the said plea, and the matters therein contained are insufficient in law to bar the said Anthony from maintaining his said action against the said John. For replication in this behalf, he saith, that the said Anthony ought not, by reason of any thing by the said John above in pleading alleged, to be barred from having his said action thereof maintained against him; because, he saith, that the said John, of his own wrong, and without such cause as the said John hath above in his said plea alleged, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, assaulted the said Anthony, and beat and ill-treated him, and imprisoned him, and kept and detained him in prison for the said space of time in the said declaration mentioned, and compelled the said Anthony to depart from and leave Minorca aforesaid, and carried and caused to be carried the said Anthony from Minorca aforesaid to Carthagena, in the dominions of the king of Spain aforesaid, in manner and form as the said Anthony hath above complained against him; and this he prays may be enquired of by the country. And the said John doth so likewise. JOHN GLYNN.

"Award of the Venire.

"Therefore, as well to try this issue as the said other issue between the said parties above joined, it is commanded to the sheriffs, that they cause to come here, in three weeks of the Holy Trinity, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

"At which day the jury between the said parties of the plea aforesaid, was respited here until on the morrow of All Souls then next following, unless sir Henry Gould, knight, one of the king's justices of the bench here assigned by form of the statute, &c. should first come, on Friday the 2nd of July last past, at the Guildhall of the city of London. And now here at this day cometh the said Anthony, by his said attorney, and the said justice, before whom, &c. hath sent here his record in these words.

"The Postea.

"That is to say, afterwards, on the day and in the year, and at the place within-mentioned, come as well the within-mentioned Anthony Fabrigas as the within-named John Mostyn, by their attornies within-named, before sir Henry Gould, knight, one of the justices of the bench within-named, and certain of the jurors, whereof mention is within made, summoned to be upon that jury, (that is to say) Thomas Zachary, Thomas Ashby, David Powell, and Walter Ewer, being required, come, and on that jury are sworn; and because the rest of the jurors of the same jury do not appear, therefore eight other persons of the by-standers, being by the sheriffs within-written hereunto elected, at the request of the said Anthony, and by the command of the said sir Henry Gould, are now newly set down, whose names are affiled in the within-written pannel, according to the form of the statute, &c. which said jurors so newly set down, (that is to say) William Tomkyn, Gilbert Howard, Thomas Boulby, and John Newball, John King, James Smith, William Hurley, and James Selby, being also required, come likewise, and, together with the said other jurors before impannelled, are tried and sworn to speak the truth of the matters within contained; who, upon their oath say, that as to the first issue within-joined, the said John Mostyn is guilty of the premises within laid to his charge, in manner and form as the said Anthony hath within complained against him: and as to the other issue within joined, the said jurors on their said oath further say, that the said John Mostyn, of his own wrong, and without such cause as he hath in pleading within alledged, on the day and in the year within mentioned, at London, in the parish and ward within mentioned, assaulted the said Anthony, and beat and ill-treated him, and imprisoned him, and kept and detained him in prison for the space of time in the within declaration mentioned, and compelled him the said Anthony to depart from and leave Minorca within mentioned, and carried and caused to be carried the said Anthony from Minorca aforesaid to Carthagena, in the dominions of the king of Spain within mentioned, in manner and form as he the said Anthony hath by his replication within alledged; and they assess the damages of the said Anthony, by reason of the premises within specified, besides his costs and charges by him laid out and expended about his suit in this behalf, to 3,000*l.* and for his said costs and charges, to forty shillings. Therefore it is considered, that the said Anthony recover against the said John his damages aforesaid, to 3,000*l.*, and 2*l.* by the jury aforesaid, in form aforesaid assessed, and 88*l.* to the said Anthony, at his request, for the

costs and charges aforesaid, by the Court here for increase adjudged; which said damages in the whole amount to 3,090*l.*, &c. Afterwards (that is to say) before our lord the king at Westminster, comes the said John Mostyn, in his proper person, and says, that at the trial of the said cause before the said sir Henry Gould, knight, the counsel of him the said John Mostyn proposed certain exceptions to the opinion of the said sir Henry Gould, which exceptions were written in a bill, and sealed by the said judge; which bill of exceptions the said John Mostyn now brings into this court; and prays a writ of our lord the king to the said sir Henry Gould, to confess or deny his seal so put to the said bill of exceptions, according to the form of the statute in such cases made and provided, which writ is granted to him returnable in 15 days from the day of the Holy Trinity; at which day, before our lord the king at Westminster, comes the said John Mostyn in his proper person; and the said sir Henry Gould, knight, likewise in his proper person, comes and acknowledges his seal put to the said bill of exceptions, which bill of exceptions follows in these words.

"The Bill of Exceptions.

"That is to say, on the morrow of the Holy Trinity, 13 Geo. 3. Be it remembered, that in the term of Easter, in the 13th year of the reign of our sovereign lord George the third, now king of Great Britain, and so forth, came Anthony Fabrigas, by Richard Gregory his attorney, into the court of our said lord the king of the Bench at Westminster, and impleaded John Mostyn, late of Westminster, in the county of Middlesex, esq. in a certain plea of trespass on which the said Anthony declared against him.

[The declaration, plea, and replication, are here set out verbatim, which, to avoid repetition, are now omitted. After those pleadings the bill of exceptions proceeds in these words.]

"And afterwards (to wit) at the sittings of Nisi Prius, holden at the Guildhall of the city of London aforesaid, in and for the said city, before the hon. sir Henry Gould, knight, one of the justices of our said lord the king of the Bench, Thomas Lloyd, esq. being associated to him according to the form of the statute in such case made and provided, on Monday the 12th day of July, in the 13th year of the reign of our said lord the now king, the aforesaid issues so joined between the said parties as aforesaid, came on to be tried by a jury of the city of London aforesaid, for that purpose duly impannelled; at which day came there as well the said Anthony Fabrigas as the said John Mostyn, by their attornies aforesaid. And the jurors of the jury aforesaid, impannelled to try the said issues, being called over, some of them, namely, Thomas Zachary, Thomas Ashby, David Powell, and Walter Ewer, came and were then and there in due manner chosen and sworn to try the same issues; and because the rest of the jurors of the same jury did not appear, therefore others of the by-standers being chosen by the sheriffs, at the request of the said Anthony, and by command of the said justice, were appointed anew, whose names were affixed to the pannel of the said jury, according to the form of the statute in such case made and provided; which said jurors so appointed anew, (to wit) William Tomkyn, Gilbert Howard, Thomas Boulby, John Newball, John King, James Smith, William Hurley, and James Selby, being likewise called, came, and were then and there in due manner tried and sworn to try the same issues. And upon the trial of the said issues, the counsel learned in the law for the said Anthony Fabrigas, to maintain and prove his said declaration, on his part gave in evidence, that the said John, at the island of Minorca, on the 17th day of September, in the year of our Lord 1771, seized and took the said Anthony, and without any trial imprisoned him for the space of six days, against his will, and banished him for the space of twelve months from the said island of Minorca, and caused him to be put by soldiers on board a ship, and to be transported from the said island of Minorca to Carthagena in Spain, for the said space of twelve months: whereupon the counsel for the said John Mostyn did then and there, on the part of the said John Mostyn, give in evidence, that the said Anthony was a native of Minorca, and at the time of taking, seizing, and imprisoning him, and banishing him as aforesaid, was residing in and an inhabitant of the arraval of St. Phillip's in the said island. And it was further given in evidence on the part of the said defendant, that the said island of Minorca was ceded to the crown of Great Britain by the king of Spain, by the treaty of Utrecht, in the year of our Lord 1713; and that the article in the said treaty, relative to the said island, is as follows: "Rex porrò Catholicus, pro se, hæredibus et successoribus suis, cedit pariter coronæ Magnæ Britanniæ totam insulam Minorcæ, ad eâmque transfert in perpetuum jus omne dominiúmque plenissimum supradictam insulam, speciatim verò super urbem arcem portum munitiones et sinum Minorisenses, vulgò Port Mahon, unà cum aliis portubus locis oppidísque in præfatâ insulâ sitis; provisum tamen est ut in articulo suprascripto quod nullum perfugium, neque receptaculum patebit Maurorum navibus bellicis quibuscúnque in Portu Mahonis, aut in alio quovis portu dictæ insulæ Minorcæ, quò oræ Hispaniæ ipsorum excursionibus infestæ reddantur. Quinimò commorandi solummodò causâ secundùm pacta conventa Mauris eorúmque navigiis introitus in insulam præfatam permittetur. Promittit etiam ex suâ parte regiâ Magnæ Britanniæ, quòd si quandò insulam Minorcæ et portus oppida locáque in eâdem sita a coronâ regnorum suorum quovis modo alienari in posterum contigerit, dabitur coronæ Hispaniæ ante nationem aliam quamcúnque prima optio possessionem et proprietatem præmemoratæ insulæ redimendi. Spondet insuper

regia sua majestas Magnæ Britanniæ, se fautorum ut incolæ omnes insulæ præfatæ tam ecclesiastici quam seculares bonis suis universis, et honoribus tutò pacatéque fruantur. Atque religionis Romanæ Catholicæ liber usus iis permittetur, utque etiamejus modi rationes ineantur, ad tuendam religionem prædictam in eâdem insulâ, quæ à gubernatione civili atque à legibus Magnæ Britanniæ, penitùs abhorrere non videantur. Poterunt etiam suis honoribus et bonis frui, qui nunc suæ Catholicæ majestatis servitio addicti sunt, etiamsi in eodem permanserint; et liceat cuicunque, qui præfatam insulam relinquere voluerit, bona sua vendere et liberè in Hispaniam transvehere." And it was further given in evidence on the part of the said defendant, that the Minorquins are in general governed by the Spanish laws, but, when it serves their purpose, plead the English laws. And it was further given in evidence on the behalf of the said defendant, that there are certain magistrates, called the chief justice criminal, and the chief justice civil, in the said island. And it was further given in evidence by James Wright, the secretary to the defendant, that the said island is divided into four districts, exclusive of the arraval of St. Phillip's, which the witness always understood to be separate and distinct from the others, and under the immediate order of the governor; so that no magistrate of Mahon could go there to exercise any function without leave first had from the governor. And it was further given in evidence on the part of the said defendant, by colonel Patrick Mackellar, that the arraval of St. Phillip's is surrounded by a line-wall on one side, and on the other by the sea, and is called the royalty, where the governor has greater power than any where else in the island, and where the judges cannot interfere but by the governor's consent. And it was further given in evidence by Edward Blakeney, who had been secretary to governor Blakeney, that nothing can be executed in the arraval but by the governor's leave; and the judges have applied to him the witness for the governor's leave to execute process there. And it was further given in evidence by the said James Wright, that for the trial of murder and other great offences committed within the said arraval, upon application to the governor, he generally appoints the assesseur criminal of Mahon, and for lesser offences the mustastaph; and that the said John Mostyn, at the time of the seizing, taking, imprisoning, and banishing the said Anthony, was the governor of the said island of Minorca, under and by virtue of certain letters patent of his present majesty, under the great seal of Great Britain, bearing date the 2d day of March, in the 8th year of his reign, whereby his majesty constituted and appointed the said defendant to be captain-general and governor in chief in and over the said island of Minorca, and the town and garrison of Port Mahon, and the castles, forts, and other works and fortifications thereunto belonging, and all other towns and places within the said island; and his majesty did thereby giv and grant unto the said defendant John Mos tyn, or in his absence to the lieutenant-gover nor, or commander in chief for the time being all powers, privileges, and authorities, civil an military, unto the said office belonging, t have, hold, and exercise the said office, power privileges, and authorities, during his majesty' will and pleasure; and the said defendant Joh Mostyn, or in his absence the lieutenant-go vernor, or commander in chief for the tim being, are to observe and obey all the order and instructions therewith given to him, an all such further and other orders and instruc tions as shall be from time to time given to hin under his majesty's royal sign manual or sig net, or by his majesty's order in privy-coun cil; and his said majesty did thereby strictl charge and command all his officers, ministers magistrates, civil and military, whatsoever, an soldiers, and all others his loving subjects, in habiting or being in the said island, to obe him the said John Mostyn, as captain-genera and chief governor thereof; and that the de fendant, being so governor of the said island caused the said Anthony to be seized, taken imprisoned, and banished as aforesaid, withou any reasonable or probable cause, or any othe matter alledged in the defendant's plea, or an act tending thereto. But nevertheless the said counsel for the said John Mostyn did then an there insist before the said justice, on the behal of the said John Mostyn, that the said severa matters so produced and given in evidence o the part of the said John Mostyn as aforesaid were sufficient and ought to be admitted an allowed as decisive evidence, to entitle the said John Mostyn to a verdict, and to bar the said Anthony of his aforesaid action; and the said counsel for the said John Mostyn did then an there pray the said justice to admit and allow the said matters so produced and given in evi dence for the said John Mostyn, to be conclu sive evidence in favour of the said John Mos tyn, to entitle him to a verdict in this cause and to bar the said Anthony of his action afore said. But to this the counsel learned in th law of the said Anthony, did then and ther insist before the said justice, that the same wer not sufficient nor ought to be admitted or al lowed to entitle the said John Mostyn to a ver dict, or to bar the said Anthony of his actio aforesaid. And the said justice did then an there declare and deliver his opinion to the jur aforesaid, that the said several matters so pro duced and given in evidence on the part of th said John Mostyn, were not sufficient to ba the said Anthony of his action aforesaid, an with that direction left the same to the sai jury; and the jury aforesaid then and ther gave their verdict for the said Anthony, an 3,000*l.* damages, Whereupon the said coun sel for the said John Mostyn did then and there on the behalf of the said John Mostyn, excep to the aforesaid opinion of the said justice, an insisted on the said several matters as an ab solute bar to the said action. And inasmuc

as the said several matters so produced and given in evidence on the part of the said John Mostyn, and by his counsel aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said John Mostyn did then and there propose their aforesaid exceptions to the opinion of the said justice, and requested the said justice to put his seal to this bill of exception, containing the said several matters so produced and given in evidence on the part of the said John Mostyn as aforesaid, according to the form of the statute in such case made and provided. And thereupon the said justice, at the request of the said counsel for the said John Mostyn, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, on the said 12th day of July, in the 13th year of the reign of his present majesty.

"Assignment of Errors.

"And hereupon the said John Mostyn says, that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict upon the said issues between the parties aforesaid joined, and also in giving the judgment aforesaid, there is a manifest error in this, that the justice before whom, &c. had no power, authority, or jurisdiction to try the said issues, or either of them, at the time when the same were tried as in the record mentioned; nor had the said justice any power or authority to take or swear the said jury thereon. There is also error in this, that the said justice before whom, &c. at and upon the trial of the said issues between the parties aforesaid joined, did declare and deliver his opinion to the jury aforesaid, that the said several matters mentioned in the said bill of exceptions, and so as aforesaid produced and proved on the part of the said John Mostyn, were not upon the whole of the case sufficient to bar the said Anthony Fabrigas of his said action against him, and with that opinion left the same to the jury; whereas the same were sufficient to bar the said Anthony of his said action. There is also error in this, that by the record aforesaid it appears, that the verdict aforesaid was given upon the said issues between the said parties joined, for the said Anthony Fabrigas; whereas by the law of the land, the verdict on the said issues ought to have been given for the said John Mostyn, against the said Anthony Fabrigas. There is also error in this, that it appears by the record aforesaid, that judgment, in form aforesaid given, was given for the said Anthony Fabrigas against him the said John Mostyn; whereas by the law of the land, judgment ought to have been given for the said John Mostyn against the said Anthony Fabrigas. And the said John Mostyn prays, that the judgment aforesaid, for the errors aforesaid, and others in the record and proceedings aforesaid, may be reversed, annulled, and altogether had for nothing; and that he the said John Mostyn may be restored to all which he has lost by occasion of the judgment aforesaid, &c.

"In Nullo est Erratum.

"And the said Anthony hereupon voluntarily comes in his own proper person into court here, and says, that neither in the record or proceedings aforesaid, nor in the matters recited and contained in the said bill of exceptions, nor in giving the verdict upon the said issues between the parties aforesaid joined, nor in the giving the judgment aforesaid, is there any error: and the said Anthony prays, that the court of our lord the king now here will proceed to the examination, as well of the record and proceedings aforesaid, as of the matters recited and contained in the said bill of exceptions and of the matters aforesaid above assigned for error, and that the said judgment may be in all things affirmed. But because the Court of our lord the king now here is not yet advised to give their judgment of and concerning the premises, a day is therefore given to the parties aforesaid, to be before our lord the king, until on the morrow of All Souls now next ensuing, wheresoever, &c. to hear judgment of and upon the premises; for that the Court of our said lord the king now here is not yet advised thereof, &c."

Mr. Buller. My lord, there are some strange blunders upon this record, which though I might make objections to, I will not mis-spend the time of the court in stating them, because I can easily conceive myself that they will admit of a very short answer; and therefore, waving all objections to the formal part of the record, the general question upon this record will be, Whether an action can be maintained in this country against a governor of Minorca, for an imprisonment committed by him there, in his character and office of governor, upon the person of a Minorquin, even though the governor should have erred in his judgment, and have been mistaken in the necessity which he conceived demanded an immediate and resolute exercise of the powers of his office? My lord, though this be the general question, I shall beg leave in the argument to divide it into two: first, whether in any case an action can be maintained in the courts at Westminster, for an imprisonment committed at Minorca upon a native of that place: and secondly, if it should be admitted that an action will lie against any other person, yet whether such action can be maintained against a governor, acting as such within the peculiar district of the arraval of St. Phillip's? My lord, in the consideration of both these questions, it may be material to attend a little particularly to the situation and constitution of the island of Minorca, and arraval of St. Phillip's, within which this transaction arose. As to that the Court will be much relieved by the contents of this record; for it is there stated, that this island, till the year 1713, was a part of the dominions of

the kingdom of Spain, and then it was ceded to the crown of Great Britain, reserving to the inhabitants their property, their religion, and the laws necessary for the preservation of their religion. It is further stated in the record, that the island is not governed by the laws of England, but by the laws of Spain; and that the arraval of St. Phillip's is subject only to the controul and government of the governor himself, for in that there is no regular law-officer; there is no power to which the subject can apply for justice but to the governor himself; he is therefore the sole and absolute judge within the arraval; his will is the law there, and that district at least is a despotic government. Whatever may be the case in colonies and newly-discovered countries, I fancy it will not now be denied, that, even in countries obtained by conquest, the old laws of the place continue in force till they are changed or altered by the conquerors: much less can it be contended, that in a country ceded as this was, the laws of the place receive any alteration till a change is declared by the new sovereign. In the present case, there has been no new code of laws established in this island; and therefore, independently of the particular facts which are stated as proved in this cause, I think I may safely assert it as an undeniable proposition, that this island is now governed by the same laws as it was before the year 1713.

It is stated in the record, that the district where the present cause of action arose is subject only to the immediate order of the governor; so much so, that no judge of the island can exercise any function there, without the particular leave of the governor for that purpose. If the laws of the country where the offence is committed are different from the laws of this kingdom, it seems to me to make no difference with respect to the propriety of an action, whether such country is subject to the crown of Great-Britain, or to any other state; for whether the fact be an offence or not, must be decided by the particular laws of the place where it was committed, and not by the laws of this country. This is a case where the law of the place is different from the law of this country; and therefore the question might have been taken much larger than I have done it: namely, whether the subject of a foreign power, who rules by laws different from ours, can, for an act done in his own country, seek redress in the courts of England. I believe there are no authorities in support of such a position; and whatever may be the case, where the laws of different countries agree, and where the transaction has been between British subjects, with a view to the laws of England, (which was the case of Robinson and Bland, Bur. 1078), that can be of no avail in the present instance: for I take it in this case, if the action can be maintained at all, it must be governed by the laws of Minorca, and not by the laws of England. It is said in the case of Robinson and Bland, that the laws of the place where the thing happened does not always prevail; and there an instance is put by Mr. Justice Wilmot, that in many countries an action may be maintained by a courtesan for the price of her prostitution, but that no such action can be allowed in this country. That is undoubtedly true; for wherever the foreign law is contrary to the law of God, to the law of nature, or 'contra bonos mores,' this Court will not recognize it; but neither of these is the present case. My lord, besides, there is a great difference between entertaining a suit, and giving a remedy upon an immoral transaction, and punishing a man for an act, which, if done here, would be deemed a crime, but, in the country where it is committed, is esteemed none. In such a case as that, the law of that country can never be the rule by which this Court will govern themselves, nor could they with propriety give a judgment contrary to the known law of this land; and therefore, I should apprehend, that in such case they would refuse to hold plea at all. That seems to have been the opinion of lord chief justice Pratt, in a case that came before him in the year 1765: that was the case of Pons against Johnson, and a like case of Ballister against Johnson. Those were two actions tried at the sittings after Trinity-term 1765; an action of trespass and false imprisonment, brought by the plaintiff, a native of Minorca, against the defendant, who was governor. The facts were, that in Minorca there is a court called 'Tribunal of Royal Government:' the governor is president, the assessor is judge: the fiscal is in nature of attorney general, during the pendency of a cause, but, when sentence is to be passed, he has a voice as well as the assessor. If they agree, the governor is bound to confirm: if they disagree, the governor has the casting voice. It was proved, that this is the only court of criminal jurisdiction, and that slanders are considered as criminal suits; that the defendant wrote a letter to the assessor and fiscal, complaining that the plaintiff had spread reports injurious to him and desiring them to enquire into it, and act as they thought just and fit. Upon this letter the fiscal directed an enquiry, and the assessor ordered plaintiff to be imprisoned: he applied to defendant Johnson to be bailed, who refused to bail him; but it appeared that the assessor was the person whose business it was to bail, though orders, as well for imprisoning as bailing, often passed in the name of the court. Upon this evidence it was objected, first, that by the treaty of Utrecht, the inhabitants have their own laws preserved to them, and are not to be sued here, and therefore have no right to sue here: secondly, admitting them to have a right to sue here, the action is misconceived &c. Lord chief-justice Pratt said, "I think it very improper such action should be brought here, where foreign law is to be brought in question: the inconvenience appears here where all the evidence we have had is a testimony of one witness; and I should think if I were under the necessity of pronouncing

upon the point, that parole evidence ought not to be sufficient, but a commission should go, and the law be certified." As to the question of jurisdiction, his lordship said, "It is certain there are many cases of transitory actions between subject and subject, where, though the cause arises in a foreign country, the action may be brought here; such as contract, trespass, or even false imprisonment of some kinds: and the rule that should govern seems to be, where the subject matter is of that kind, that the law of nature should govern all over the world. And I think, that a person who is an alien should have a right to sue here in cases of that kind: but I think this is not to be extended to transitory actions of every kind, where the *lex loci* is so intermixed with the case as to alter the case, and vary the legality of the transaction." His lordship then expressed some doubts on the form of the plea; and finally nonsuited the plaintiffs on another point. My lord, I cite this case for the sake of the reasoning contained in it; and there was the opinion of a very learned judge, that an action in this country was improper, where it was so intermixed and blended with the law of another country, as to vary or change the legality of the transaction. My lord, another thing which appears by that case is, that though lord Camden seems to think an action may in some cases lie on a foreign transaction, yet he confines it to cases where the transaction happened between subject and subject. This is not a transaction which happened between subject and subject, (speaking as of the realm of England) nor is it a case where the same law governs all over the world; but it is that particular case pointed out by lord Camden, so mixed with the *lex loci*, that it alters the case, and varies the legality of the transaction. In criminal cases I take it to be clear, that an offence committed in foreign parts cannot, unless under particular statutes, be tried in this country; and of that opinion was the Court of Exchequer in a case reported in 1st Vezey, 246, The East-India Company against Campbell, 7th of June, 1749: an information was brought in the name of the Attorney General, that the defendant might discover how he came by the possession of certain goods, whether it was not by fraud, violence, contrivance, or other means; and whether they were not the property of the Indians, from whom they were so taken by the defendant and others. The court there say the rule is, that this court shall not oblige one to discover that, which, if he answers in the affirmative, will subject him to the punishment of a crime; for it is not material, that if he answers in the negative, it will be no harm: and that he is punishable, appears from the case of Omichund v. Barker, Atk. 21. as a jurisdiction is erected in Calcutta for criminal facts, where he may be sent by government and tried, though not punishable here: like the case of one who was concerned in a rape in Ireland, and sent over there by the government to be tried, although the court of B. R. here refused to do it. My lord, here is a positive opinion, that in criminal cases arising abroad there is no jurisdiction in the common law courts in England. The only thing to be done is to send the party to the country where the offence was committed; but it shall not be tried here. If a man were to marry two wives in a country where bigamy is allowed, it can never be contended in such a case, if the man came into England, he should be liable to be hanged here, because it is an offence in this country, though none where it was committed. If a crime committed abroad cannot be tried here, upon what ground shall a civil personal injury, done out of the kingdom, be tried here? There are many reasons why a crime committed abroad might be tried here, and a civil injury not; but no reason occurs to me why a civil injury should, and a crime not. Civil injuries depend much upon the police and constitution of the country where they occur, and the same conduct may be actionable in one country which is justifiable in another: but in crimes, as murder, perjury, and many other offences, the laws of most countries take for their basis the law of God and the law of nature; and therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of distributing equal justice in such cases, than in civil actions. The case mentioned in Keilwey, 202, and confirmed in the 4th Institute, 283 and 4, is also an authority in my favour. It first of all gives a history of sir John Stanley's family, and there five points were resolved: first, that the isle of Man was an ancient kingdom of itself, and no part of the kingdom of England; secondly, they affirmed the case reported by Keilwey, anno the 14th Henry the 8th, to be law; namely, Michaelmas the 14th Henry 8th, an office was found, that Thomas earl of Derby, at the time of his death was seized of the isle of Man in fee; whereupon the countess his wife, by her counsel, moved to have her dower in the Chancery; but it was resolved by Brudnell, Brook, and Fitzherbert, justices, and all the king's counsel, that the office was merely void, because the isle of Man was no part of the realm of England, nor was governed by the laws of this land; but it was like to Tournay in Normandy, or Gascoign in France, when they were in the king of England's hands, which were merely out of the power of the Chancery, which was the place to endow the widow, &c. Then goes on, and says, it was resolved by them, that neither the statute of William the 2d, *de donis conditionalibus*, nor of the 27th of Henry the 8th, of wills, nor any other general act of parliament, did extend to the isle of Man, for the cause aforesaid. So there it is held, that for a right in the isle of Man, though it was part of the territorial dominions of the crown of England, yet that no suit would lie in the court of Chancery; and that this suit instituted by the widow for her dower there was improper, and they could not entertain it. The cases where the courts of Westminster have

taken cognizance of transactions arising abroad, and entertained actions founded on them, seem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of England, and between English subjects: and even there it is done by a quaint legal fiction; namely, by supposing, under the sanction of a videlicet, that the cause of action did arise within this country, and that the place abroad lay either in London or in Islington. But where the contrary has appeared, namely, that the place where the transaction did arise was not in London or Islington, there the courts have said such matters were not triable here. There is a pretty strong case arising upon a demurrer in Lutwyche, 946, Davis against Yale. That was an action for false imprisonment of the plaintiff in Fort St. George, in the East-Indies, in parts beyond the seas, videlicet, in London, in the parish of St. Mary-le-Bow, in the ward of Cheap. It was resolved by the whole court, that the declaration was ill, because the trespass is supposed to be committed at Fort St. George, in parts beyond the seas, videlicet in London, which is repugnant and absurd: and it was said by the chief justice, that if a bond bore date at Paris, in the kingdom of France, it is not triable here; so that judgment was given upon the ground, that it appearing upon the face of the record to be in foreign parts, the supposition that it was in England was absurd and repugnant.

In Ward's case, in Latch. 4, in debt, the plaintiff declares upon a bill, bearing date in the parish of St. Mary-le-Bow, London; and upon oyer of the deed, it bore date at Hamburgh, and the writ was in detinet only. Serjeant Bridgman objected, that although it was usual to lay such actions in any place, to wit, in Kent, London, &c. yet as this case is, that cannot be; because when any place is named, it shall be understood *primâ facie*, that the place named is a town, and not a particular place, as a house, as appears by 3 Ed. 3, 68, et Brev. 638: from whence it followed, that Hamburgh here should be understood to be a town, which cannot be in London; and therefore the declaration was faulty, for not laying Hamburgh within London. But it was argued on the other side by Barners, who took this difference in pleading: "I confess that a place named shall be understood to be a city or town, as the serjeant has said, but nevertheless the date of the deed shall be understood to be a particular place or a house; and therefore, if an obligation bears date at Antwerp, or Callis-Sands, it shall be understood to be of those taverns in London, and not of those places beyond the seas, 21 Edw. 4. 26. And in the case of one Highans and Flowers, 3 Jac. B. R. the date of an obligation was at Athlone in Ireland, and therefore the action could not be laid here, inasmuch as Ireland cannot be in England: but if it had been in Athlone only, then it was agreed that it could be sued here, because Athlone might be alleged to be in England. So here in our case, if the date had been at Hamburgh, 'in partibus transmarinis,' it could not be sued here, inasmuch as it could not be in London; but bearing date at Hamburgh only, it may be understood to be in England." Whitlock agreed with him: Brook faith, 9, and so have been all deeds by experience. 10 Jac. an obligation dated at Elvin was sued in this court, and the action laid in Kent and allowed; and yet Elvin is in Poland. Dodderidge said, "I agree also, if the deed bears date in Little Britain or in Scotland, it shall be understood to be dated at those places; so here being named in London, we, as judges, ought to maintain the jurisdiction of our court, if the case is not plainly and evidently out of our jurisdiction: and for this reason we ought to understand Hamburgh to be in London, to maintain the action, because otherwise it would be out of our jurisdiction. And if in truth we should know the date to be at Hamburgh ouster le mere, yet, as judges, we should not take notice that it is ouster le mere." In this case it does appear upon the record, that the offence complained of was committed in parts beyond the seas, and not in England. My lord, the plea states, that it was committed in the island of Minorca, in parts beyond the seas; these are the words of the plea; and the defendant has concluded his plea with a traverse, that he was not guilty in London, in the parish of St. Mary-le-Bow, or elsewhere, out of the island of Minorca. Now, my lord, this stands admitted by the plaintiff, because if he had thought fit to have denied the place mentioned in the plea, and which was absolutely essential for the defendant to mention, because his justification was a local one, (and though the cause of action be transitory in its nature, yet, if the defence be local, the defendant has a right to state it so in his plea, and by that means make that local which before was transitory,) he should have made a new assignment, or have taken issue on the place.

It was incumbent upon the defendant to aver, that what he had done was within the arraval, because his authority was confined to that particular place: and therefore, however unjustifiable he might be elsewhere, he was justified there. That part of his allegation stands admitted by the plaintiff; therefore it does appear from the record, that the cause of action did arise out of the kingdom, and consequently, as Dodderidge says in Latch, it does arise out of the jurisdiction of this court; and where it so appears, the judges cannot help taking notice of it; for, as Lutwyche says, as I mentioned before, it is not triable here. Even in cases the most transitory, before the statute of Jeofails, if an action was brought in London, and there was a local justification at Oxford, the cause could not have been tried in London. That was the case in 1st Saunders, 247, an action for words laid in London, charging him with having stolen plate out of Wadham-College, viz. in London. The defendant justifies speaking the words, because

the plaintiff stole plate out of Wadham-College in Oxford. It was admitted in that case, that it would have been a fatal error, had it not been for the statute of Jeofails. Now the statute of Jeofails does not extend to Minorca; therefore this case will stand entirely upon the common law; and by that the trial is bad, and the verdict void: for supposing that this or any court at Westminster could hold cognizance of any cause that arises abroad, yet it should not have been tried in London, but should have been tried in the next English county to Minorca. If the law in criminal cases be as I conceive it is, that for a murder committed by a foreigner in another country the criminal could not be punished here, I am at a loss for a reason why he should be punished here for a trespass committed under like circumstances. In order to support that doctrine, this absurdity must be contended for: if Mr. Mostyn, who stood there in the capacity of a governor, and had the sole direction and government of this place, had thought Fabrigas guilty of an offence which forfeited his life, and had punished him accordingly, he could not have been punished; but because he has proceeded in a milder way, and has imprisoned and banished him, therefore he shall be punished.

The inconveniences of entertaining such an action in this country are many, and some of them would certainly be intolerable; but the inconveniences that would ensue from rejecting the action would be very slight, if any: and the argument, 'ab inconvenienti,' lord Coke says, has been ever allowed to be very forcible in our law. Now if the action be maintained here, it must be determined by the law of this country, or by the law of the place where the offence was committed. If it be determined by our law, that would be unjust indeed; for then a man, who is compelled to regulate his conduct by one law, would be condemned by another, which is totally opposite. And yet the law of this country is the law the plaintiff has thought fit to put this cause upon; and I doubt not but he hopes, under the idea of English liberty, totally to destroy the Minorquin constitution. His declaration is founded on the law of England. The imprisonment is laid in the declaration to be contrary to the law and customs of this realm; so that the law of England is the law to which he appeals, and by which he desires his case may be determined. If an imprisonment is committed there agreeable to the laws of that place, but not consonant to the laws of this realm, is that a ground for punishment in this country? If it is not, the plaintiff cannot support his case upon the law of England in the manner he now attempts to do. If the cause is to be tried here by the law of Minorca, how is that law to be proved? There is no legal mode of certifying the law, and till the trial it may not be known what points of law it may be requisite to inquire into: witnesses cannot be compelled to attend, nor can this court by any means oblige them to answer here; so the defendant would stand in the situation of being called upon to make his defence, without the power of proving either the law or the facts of his case. If this action succeeds, every Frenchman that is confined in the Bastile, and has the good fortune afterwards to escape to this country, would be bringing actions against the officers that confined him; every soldier, who in time of war thinks himself ill used by his commander, when he returns home will harrass the commander with a law-suit for any confinement or correction that he may have suffered abroad; and in the end it would be nothing less than that a German army would be governed by an English jury. It would be necessary for every general officer to have a lawyer always at his elbow; and even that, as Mr. Mostyn has found by fatal experience, would not be sufficient to secure him from censure and punishment: for in this cause it was proved, that Mr. Mostyn had consulted all the lawyers, and all the military gentlemen in the island, on the expediency and necessity of the measure he took, before he did what is now complained of, and that they were all unanimous in their ideas of the absolute necessity of the business. Some of them openly professed their opinions, and the rest acquiesced by their silence. The lawyers went further, and undertook to answer for the legality of the measure, even at the peril of their heads.

In the second place, supposing an action could be maintained here at all for a thing done in Minorca, I shall beg leave to submit to your lordship, that whatever might be the case of other persons, though they might be liable to an action here for things done in foreign parts; yet that the governor or general officer, who has the immediate command and absolute direction of the place, shall not be called upon in an action here to answer for his conduct in that character. Minorca is an absolute government. The governor for the time being is the immediate representative of the king there; and he, at least within the arraval of St. Phillip's, whatever may be the case in the rest of the island, as all absolute sovereigns do, governs as he thinks convenient, without being tied up to any fixed rules. There it is not lawful for him to deviate from, which is no government wherein the power over the lives, as well as the liberties and properties of the subject, is not vested in the supreme power; and whether that power be lodged in a single person, as a monarch, or many, as a parliament or an aristocracy, whatever that supreme power does, it is accountable for to none but God; and the deputy of that power is answerable only to God and his principal. That a judge cannot be punished for any thing he does in his capacity as a judge will not, I believe, be disputed; if it be, there are the strongest authorities upon that point. The strongest perhaps in Salkeld, 396, and 2 Mod. 218; in the latter of which cases, the judge had been guilty of the most unconstitutional conduct. My lord, that in Salkeld is Groenvelt against Burwell and others. The case was

this: the censors of the College of Physicians in London are empowered to inspect, govern, and censure all practisers of physic in the city of London, and seven miles round, so as to punish by fine, amerciament, and imprisonment. They convicted Dr. Groenvelt of administering 'insalubres pillulas et noxia medicamenta,' and sentenced him to a fine of 20*l.* and 12 months imprisonment. Accordingly, the doctor was taken in execution upon this sentence, and brought trespass against the officers and the censors. And it was holden by Holt, chief justice, first, 'that the censors had a judicial power; for a power to examine, convict, and punish, is judicial, and they are judges of record, because they can fine and imprison: secondly, that being judges of the matter, what they have adjudged is not traversable; and the plaintiff cannot be admitted to gainsay what the censors have said by their judgment, which is, that they were 'insalubres pillulas et noxia 'medicamenta,' 43d Ed. 3, 17, 9th E. 4, 3, 12 Co. 24, 25: thirdly, that though the pills and medicines were really wholesome pills and good medicines, yet no action lies against the censors, because it is a wrong judgment in a matter within the limits of their jurisdiction; and a judge is not answerable either to the king or the party for the mistakes or errors of his judgment, in a matter of which he has jurisdiction. It would expose the justice of the nation, and no man would execute the office, at the peril of being arraigned by action or indictment for every judgment he pronounces. The other case, which is in 2d Modern, 218, is as strong a case, if an action could be maintained against a judge at all, as any that can exist: that is, an action for false imprisonment. The defendant pleaded specially, that there was a commission of Oyer and Terminer directed to him amongst others, &c. and that before him and the other commissioners, Mr. Penn and Mr. Mead,* two preachers, were indicted for being at a conventicle, to which indictment they pleaded Not Guilty; and this was to be tried by a jury whereof the plaintiff was one; and that after the witnesses were sworn and examined in the cause, he and his fellows found the prisoners, Penn and Mead, Not Guilty, whereby they were acquitted; and *quid* the plaintiff *malè se gesserit* in acquitting them, both against the direction of the Court in matter of law, and against plain evidence, the defendant and the other commissioners then upon the bench fined the jury forty marks a-piece, and for non-payment committed them to Newgate. This was a case where a judge had taken upon himself to fine a juryman, because he did not find agreeably to his direction, and had committed him to Newgate. Serjeant Goodfellow, who argued for the defendant, said, he would not offer to speak to that point, whether a judge can fine a jury for giving a verdict contrary to evidence, since the case was so lately and solemnly resolved by all the judges of England in Bushell's case, that he could not fine a jury for so doing. But, says he, admit a judge cannot fine a jury, yet, if he doth, no action will lie against him for so doing, because it is done as a judge: but the Court told him he need not labour that point, but desired to hear the argument on the other side. In this manner the Court would not suffer the question to be argued, whether an action would lie or not against a judge for that which was done by him in that character. On the other side it was urged, that what was done was not warranted by the commission: but at last the whole Court say, that the bringing this action was a greater offence than fining of the plaintiff, and committing him for non-payment; and that it was a bold attempt both against the government and justice in general. Lord Coke in his 12th Report, 25, says, that the reason and cause why a judge, for any thing done by him as a judge, by the authority which the king has committed to him, and as sitting in the seat of the king, concerning his justice, shall not be drawn in question before any other judge for any surmise of corruption, except before the king himself, is for this: the king himself is *de jure* to deliver justice to all his subjects; and for that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath. And forasmuch as this concerns the honour and conscience of the king, there is great reason that the king himself shall take account of it, and no other. My lord, within the arraval of St. Phillip's, general Mostyn was *quatenus* judge; there was no magistrate within the place but himself; he might appoint another, or might preside himself, to decide upon offences committed within that district. It was so stated in the record, that it was subject to the immediate order of the governor, and no judge could interfere there unless particularly deputed by him; so that the absolute government of that part at least of the island rested solely in his hands. He acted there under an authority committed to him by the king, and there (which is the reason in the 12th Report why an action will not lie against a judge) he had the custody and guard of the king's oath; and therefore, as lord Coke says, if he acts improperly in the discharge of the functions of his office, he is accountable to the king only, and no other. My lord, there is another case in the law-books, upon which I shall beg leave to lay great stress; and at present I am not aware how that case will be distinguished, so as to make it inapplicable to the present: but I can find many circumstances even in that, which are much stronger against the determination there, than any that exist in this case against a determination in favour of the defendant. The case I allude to is that of Dutton against Howell, in Shower's Parliamentary Cases, 24; that is a writ of error upon a judgment given in the King's-bench. The case from the record is this; the plaintiff

* See their Case, vol. 6, p. 951, and Bushell's Case, vol. 6, p. 999.

declared against Dutton, for that he with several others assaulted, beat, wounded, and imprisoned him, and took and seized his goods, and imprisoned the plaintiff for three months. There is a plea as to part not guilty, and as to the rest there is a justification, that the defendant at this time was governor of Barbadoes, and sets out the patent constituting him governor; that after the making this patent, and before the time of the assault, the defendant arrived at Barbadoes, and did take upon him and exercise the government of that and the other islands in the patent mentioned, till the first of May, when he had licence to return to England; that before his departure he constituted the plaintiff to be his deputy-governor, and that the first of August following the defendant arrived at London, in England; that the 4th of May, after defendant's departure, the plaintiff took upon himself the administration of the government of the island of Barbadoes, and did unlawfully and arbitrarily execute that government and office, to the oppression of the king's subjects; that after the return of the defendant, the plaintiff at a council was charged with misbehaviour in the administration of his office, in not taking the oath of office, not observing the act of navigation, assuming the title of lieutenant-governor and altering decrees in Chancery; that it was then ordered by the defendant and council, that the plaintiff should be committed. To this there is a demurrer. In this court judgment was given for the plaintiff; on which a writ of error was brought in the House of Lords; and though the particular reasons of the judgment in the House of Lords do not appear further than can be collected from the argument, yet there are several things in the argument, from whence it may be collected upon what grounds the judgment of the House of Lords went. It was argued upon the part of the plaintiff in error, that this action did not lie against him, because it was brought against him for that which he did as a judge; that the rule seems to be the same for one sort of a judge as another, and that this person was lawfully made a governor, and so had all the powers of a governor. As to the plea, it was admitted there were several informalities in that. It was said it might be much shorter than it was; but that it sufficiently shewed what the plaintiff in error's authority was. That this action cannot lie, because the fact is not triable here: the laws there may be different from ours. Besides, no action lies, unless it were a malicious commitment as well as causeless; that no man will pretend that an action can lie against the chief governor or lieutenant of Ireland or Scotland; and by the same reason it ought not in this case. He had a power to make judges, and therefore was more than a judge. Other reasons alledged against the action lying here are, first, that all the records and evidence are there; secondly, the laws there differ from what they are here; and governments would be very weak, and the persons intrusted with them very uneasy, if they were subject to be charged with actions here for what they do in those countries. In the argument on the part of the defendant in error, much pains are taken to shew, and it is insisted, that the law of Barbadoes is the same as the law of England. Another thing that is there relied on is, that this was an action between two Englishmen, for an injury done by one Englishman against another. These grounds are strongly relied upon on the part of the then defendant in error; and they shew at least that his counsel thought these distinctions very necessary and material in order to support the action at all: for though it is denied in one part that the laws of Barbadoes were the same as in England, yet on the other side it is insisted they were, and that this action arose between Englishman and Englishman, and that therefore the action ought to be maintained in this court. The House of Lords finally determined that the action could not lie here, and the judgment was given for the plaintiff in error. As to the form of the plea, it was impossible for any one to say a word in vindication of that, or to say that the judgment could go upon any other ground than that of the defendant's being governor, and the offence complained of committed by him in that character. That was the substance of the case, and upon that the judgment of the House of Lords was founded; for as to the plea, it is admitted by the counsel for the defendant, that in other respects it was bad upon the face of it. In that case, one argument relied on is, that it was an injury committed by one Englishman against another. Now that is not the case here: for the plaintiff himself was a Minorquin; he was so by birth, and had always lived in that country. My lord, in this case, the argument cannot hold, that the action shall lie because Minorca is governed by the same laws as England; for it is otherwise, and it is stated to be governed by the law of Spain. The acts upon which the commitment was founded, in the case of Dutton and Howell, were done by the plaintiff in the character of governor of the place, which is an objection against that case that will not hold in the present; for that is not this case. Mr. Fabrigas never stood in the character that the plaintiff in that action did, for there the acts complained of were done by him in the character of governor; and that was urged as one ground why it should not be canvassed here. But neither of these distinctions will hold in the present case; but all the inconveniences pointed out against the action in that case will hold very strongly in the present. This is an action brought against the defendant for what he did as judge; he had a power in that case to make judges there, and therefore he was something more than a judge; all the records and evidence which relate to the transaction are there, and cannot be brought here; the laws there are different from what they are in this country; and, as it is said in the conclusion of that argument, government must be very weak indeed, and the persons intrusted with them very

uneasy, if they are subject to be charged with actions here for what they do in that character in those countries. My lord, unless that case can be materially distinguished from the present, it will be an authority, and the highest authority that can be adduced, to shew that this action cannot be maintained, and will be a sufficient authority to entitle the plaintiff in error in this cause to your lordship's judgment. What answer may be given to that case, or distinctions made between that case and the case now before the Court, I cannot at present foresee; but if any are attempted, when I hear them, I shall be at liberty to give such answers to those arguments, as may occur to me by way of reply.

Mr. Peckham. My lord, as the moderation and mildness of governor Mostyn's proceedings have been insisted on by Mr. Buller, I trust it will not be thought irrelative to the present question, if I shortly state to your lordships the nature of those injuries which gave birth to the action.

It appeared in evidence on the trial, that Mr. Fabrigas was a natural-born subject, being born in Minorca subsequent to the cession by the Spaniards at the treaty of Utrecht, and prior to the capture by the French in the year 1758; that he was a man of irreproachable character and good property; not of the first class of nobility, but, to borrow an expression from colonel Bidulph, 'what we should call in England a gentleman farmer;' that he lived in friendship with the first noblesse in the island; and that he had a father living, and a wife and five children.

Thus circumstanced and thus situated, he was at the express command of the governor taken from his house by a party of soldiers, and dragged at noon-day through the streets of Mahon as a criminal, and thrown into a dungeon appropriated solely to capital offenders.

It appeared likewise in evidence, that he was confined six days in this dungeon, with nothing but the boards to lie on, and with no other sustenance than bread and water, though felons under sentence of death were allowed the common food of the island; that he was refused the consolation of his friends, and denied all intercourse with his family; that on the seventh morning he was hurried aboard a ship, without being permitted to take leave of his children, to see his wife, or to be accommodated with money or other necessaries for his subsistence; that during this whole time he had heard of no charge against him, he had been confronted with no accuser, he had not even seen his judge: yet he was to be banished to Carthagena in Spain for the space of twelve months. The sentence was faithfully executed; and Mr. Fabrigas, having experienced that distress which a moneyless stranger must necessarily be reduced to in a country whose language he did not understand, as fortunately for himself as unexpectedly to governor Mostyn, escaped from the Spaniards: I say unexpectedly, my lord, because he little thought that Mr. Fabrigas would live to tell an English jury of his sufferings and the governor's oppression.

I thought it necessary to state these facts to your lordships, that you might judge of the mildness of that treatment which Mr. Buller deemed it prudent to expatiate on.

It now becomes requisite for me to state the conduct of the governor through the subsequent stages of his very extraordinary defence; and that I must do with some precision, as I mean to contend, that the plaintiff in error by that defence is estopped from agitating the question of jurisdiction.

The declaration was delivered in Hilary term, 1773; a rule to plead was given, and a plea demanded. Had the governor then pleaded to the jurisdiction, the question would have come before the Court on a demurrer; and if that had been determined in our favour, a writ of enquiry would have been executed, and Mr. Fabrigas would in a short space of time, at a little expence, have received a satisfaction adequate to the injury, and would have been enabled to return to his friends and to his family. But that would not have answered the purpose of the governor, as Mr. Fabrigas would not then have been delayed in England, nor have been harassed with this expensive litigation.

Had the governor at the expiration of the four days pleaded in chief, he might then have had the appearance of an argument in his application to your lordships; for it then would have been competent for him to have said, 'I was hurried into this plea before I had time to advise with my counsel, and consult upon the propriety of admitting the jurisdiction.' But he has debarred himself even of this shadow of an argument; for instead of pleading at the usual time, he applied to the Court of Common Pleas for six weeks time to plead. Here then was an admission of the jurisdiction; for he could not apply for time to plead, unless the Court had cognizance of the matter.

I shall presently state to your lordships some cases, whose authority cannot be shaken, to prove, that even after imparlance the question of jurisdiction cannot be gone into.

But this was not the only submission to the jurisdiction of the Court; for he then applied to put off the trial till after Easter Term. It would have been nugatory, it would have been absurd, to have prayed the Court to put off that trial, which they had no power to try at all. When Easter Term arrived, the governor made a second attempt to postpone the trial; but the Court saw through his design, and, satisfied that he did it only for the purpose of delay, they tied him down by the rule to try it peremptorily in Trinity Term, and that he should not bring a writ of error for delay.

When he saw the Court of Common Pleas would not lend him their power for so base a purpose, he next made application to the Court of Exchequer for an injunction to stay proceedings, and a bill was filed in Trinity Term

to effectuate that intention; but the bill was dismissed on argument, and the governor was at length driven in the subsequent sittings to trial. When the cause came on, the defendant's counsel did not object to the jurisdiction, they did not request the learned judge to nonsuit the plaintiff; but they suffered us to go into our case, they cross-examined our witnesses, and finding that we had made good our declaration by evidence irrefragable, they then went into their justification, and called many witnesses in support of it. But a verdict being found for the plaintiff, they tendered a bill of exceptions; and in last Michaelmas Term, they applied to the court of Common Pleas for a new trial; first, for excess of damages; secondly, because the Court had no jurisdiction —the most extraordinary reason perhaps that ever was given; to desire a second trial because the Court had no jurisdiction to try it at all.

Governor Mostyn having in so many instances admitted the jurisdiction of the Court, I must beg leave to state some authorities to your lordship, which prove that he is now too late to take any advantage of a defect of jurisdiction.

The first case I shall mention to your lordships is to be found in the year books in the 22d H. 6, f. 7, where there was a special imparlance, 'salvis 'omnibus allegationibus et exceptionibus, tam 'ad breve quam ad narrationem'; and the Court would not allow the defendant's privilege, because, says the case, by imparling he has admitted the jurisdiction of the Court. This doctrine is confirmed by lord Coke, in his comment on the 195th section of Littleton, where speaking of a personal action he says, three parts are to be considered; first, when the defendant defends the wrong and force, he maketh himself a party to the matter; secondly, by the defence of the damages he affirmeth, that the plaintiff is able to sue and to recover damages upon just cause; and by the last part, viz. 'all that which he ought to defend when and where he ought,' he affirmeth the jurisdiction of the Court.

The case of Barrington and Venables, 13 C. 2, reported in sir Thomas Raymond, 34, is very clear on this head. The defendant after imparlance pleaded to the jurisdiction; the plaintiff demurred: the judgment was, that he should answer over, for such plea cannot be pleaded after imparlance.

The next case in order of time is reported in 1 Modern, 81, Cox and St. Alban's, 22 Car. 2. A prohibition was prayed for the city of London, because the defendant had offered a plea to the jurisdiction which had been refused. Lord chief justice Hale said, "in transitory actions, if they will plead a matter that ariseth out of the jurisdiction, and swear it before imparlance, and it be refused, a prohibition will go." There was a case, said his lordship, in which it was adjudged that the jurisdiction must be pleaded and the plea sworn, and it must come in before imparlance. It was also agreed in that case, "that the party should never be received to assign for error, that it was out of the jurisdiction, but it must be pleaded." I have in vain endeavoured to find this case; but it is sufficient for my purpose to observe, that lord chief justice Hale would not have cited it unless it had been law. If therefore the opinion of that great man, solemnly given in the court of King's-bench, is authority, I am bold to say, that governor Mostyn not having pleaded to the jurisdiction, cannot now assign it for error.

In a few years after, lord chief justice Hale was again called upon to consider this question in the case of Mandyke and Stint, 2 Modern 273, 22 Car. 2. There was a prohibition to the sheriff's court of London: the suggestion was, that the contract was made in Middlesex, therefore the cause of action did not arise within their jurisdiction. The chief justice and justice Wyndham were of opinion, "that after the defendant had admitted the jurisdiction by pleading to the action, especially if verdict and judgment pass, the court will not examine whether the cause of action did arise out of the jurisdiction or not;" on which a prohibition was denied, and judgment was given for the plaintiff. I cannot distinguish this from the present case; for as the Court will not examine whether the cause of action did arise out of the jurisdiction, there can be no difference whether it was in Middlesex or in Minorca; and that question cannot now be asked, because verdict and judgment have passed.

Lord chief justice Holt, in the case of Andrews and Holt, 2 lord Raymond, 884, said, that he was counsel in the case of Denning and Norris (reported in 2 Levintz, 248) and that the Court held there, "that since the defendant had admitted the judge to be a judge by a plea to the action, he was estopped to say, that he was not a judge afterwards." If then a defendant, by having submitted the decision of his cause to a judge, precluded himself from objecting to him afterwards, how much stronger is the present case, where the defendant has submitted his cause to the determination of a court which has cognizance over all transitory actions. It is again laid down by lord chief justice Holt, "that there ought to be no plea to the jurisdiction after imparlance, and that a special imparlance admits the jurisdiction." Holt's Reports, Pasch. 5 W. and M.

I must trouble your lordships with the case of Trelawney and Williams, to shew, that there has been but one opinion on both sides of the hall respecting a plea to the jurisdiction; and that equity and common law have united in saying, that if the jurisdiction is not pleaded to, it must be afterwards admitted. This case is reported in 2 Vernon 483, Hil. 1704. The plaintiff prayed an account relative to a tin-set: the defendant insisted that he ought to have been sued in the Stannary-court. The lord-keeper decreed an account; and as to the objection that the plaintiff ought to have sued in the Stannary-court, he said, "to oust this court

of its jurisdiction, the defendant must plead to the jurisdiction, and not object to it at the hearing."

There are a great variety of cases tending to establish this position, that when a defendant has once submitted to the jurisdiction, he has for ever precluded himself from objecting to it. To state them all, after the great authorities I have mentioned, would be to multiply the witnesses without strengthening the testimony: I shall therefore only cite a few passages from lord chief baron Gilbert's History of the Common Pleas, which are decisive upon this part of the argument. In page 40, speaking of the order of pleading, he says, "the defendant first pleads to the jurisdiction of the Court; secondly, to the person of the plaintiff; and thirdly, to the count or declaration. By this order of pleading, each subsequent plea admits the former. As, when he pleads to the person of the plaintiff, he admits the jurisdiction of the Court; for it would be nugatory to plead any thing in that court which has no jurisdiction in the case. When he pleads to the count or declaration, he allows that the plaintiff is able to come into that court to implead him, and he may be there properly impleaded." He lays it down in a subsequent part of his treatise (p. 148,) as a positive rule of law, that, "if a defendant pleads to the jurisdiction of the Court, he must do it *instanter* on his appearance; for if he imparls, he owns the jurisdiction of the Court, by craving leave of the Court for time to plead in, and the Court shall never be ousted of its jurisdiction after imparlance." When I find this doctrine in our old law-books, when I see it ratified in modern times, and stamped with the authorities of Coke, Hale, Holt, and Gilbert, I am warranted in saying, that governor Mostyn cannot now agitate the question of jurisdiction: and if he cannot, the judgment must be affirmed.

Notwithstanding which, I have no objection to follow Mr. Buller through the grounds of argument that he has adopted; and I shall endeavour to prove,

That an action of trespass can be brought in England for an injury done abroad:

That Mr. Fabrigas is capable of bringing such action:

And, that governor Mostyn may be the subject of it.

It cannot be contended, but that an action of trespass is a transitory action, and may be brought any where: "all personal actions," says lord Coke, "may be brought in any county, and laid any where." Co. Litt. 282.

In the earl of Derby's case, 12 Coke, the chancellor, the chief justice, the master of the Rolls, and justices Dodderidge and Winch, resolved, "that for things transitory, although that in truth they be within the county palatine, the plaintiff may by law alledge them to be done in any place within England; and the defendant may not plead to the jurisdiction of the Court, that they were done within the county palatine." This doctrine is not confined to counties palatine; for lord Coke, in his comment on Littleton, 261, *b*, says, "that an obligation made beyond the seas at Bourdeaux, in France, may be sued here in England in what place the plaintiff will." Captain Parker brought an action of trespass and false imprisonment against lord Clive, for injuries received in India, and it was never doubted but that the action did lie. Even at this moment there is an action depending between Gregory Cojimaul, an Armenian merchant, and governor Verelst, in which the cause of action arose in Bengal. A bill was filed by the governor in the Exchequer for an injunction, which was granted; but on appeal to the House of Lords, the injunction was dissolved. The supreme court of judicature, by dissolving the injunction, acknowledged that an action of trespass could be maintained in England, though the cause of action arose in India.

The next point to be considered is, whether there is any disability attending the person of Mr. Fabrigas, that incapacitates him from bringing this action. But it will be requisite for me first to state, that governor Mostyn pleaded not guilty, and then justified what he had done by alledging, that the plaintiff had endeavoured to create mutiny among the troops; therefore he, as governor, had a right to imprison and banish him. Your lordship observes, that, according to his own plea, he does not pretend to justify what he has done as governor merely from the plenitude of his power, but from the necessity of the act, because the plaintiff had endeavoured to create mutiny and sedition. The learned judge who tried the cause, foreseeing the importance of this justification, requested the jury, at the same time they brought in their verdict, to find whether the governor's justification had been proved. The jury found a verdict for the plaintiff, with 3,000*l.* damages, and, that the plaintiff had not endeavoured to create mutiny or desertion, or had acted in any way tending thereto.

In consequence of that decision, the question now is, whether Mr. Fabrigas, a man perfectly innocent, can bring an action against governor Mostyn for this wanton and unparalleled injury?

As the law grants redress for all injuries, so it is open to all persons, and none are excluded from bringing an action, except on account of their crimes or their country. Littleton says, there are six manner of persons who cannot bring actions: Mr. Fabrigas is not included in either of those descriptions. The only person that can bear the least resemblance to him is an alien, who, Littleton says, to be incapacitated from bringing an action, must be born out of the ligeance of the king. Lord Coke, in his comment on that passage, observes, that "Littleton saith not, out of the realm, but out of the ligeance; for he may be born, says Coke, out of the realm of England, yet within the ligeance, and shall be called the king's liegeman, for *ligeus* is ever taken for a natural-born subject." Co. Litt. 129.

Mr. Fabrigas was born in Minorca subsequent to the cession of Spain, consequently he is a natural-born subject; every natural-born subject, according to lord Coke, owes allegiance to the king; allegiance implies protection, the one is a necessary consequence of the other; the king of England can protect only by his laws; by the laws of England there is no injury without a remedy; the remedy for false imprisonment and banishment is an action of trespass, which is a transitory action, and may be brought any where, therefore rightly brought in the city of London, where this action was actually tried, and Mr. Fabrigas recovered 3,000*l.* damages. I hope your lordships will justify me in saying, that this is a fair deduction from established principles.

Coke (Co. Litt. 130), mentions three things whereby every subject is protected, 'rex, lex, 'et rescripta regis;' and he adds, "that he that is out of the protection of the king, cannot be aided or protected by the king's law, or by the king's writ." The natural inference to be drawn from thence is, that he who is under the king's protection may be aided by the king's law. Mr. Fabrigas is under the king's protection, because he owes him allegiance, therefore he may be aided by the king's laws; consequently is warranted in bringing this action, the only aid the laws of England can afford him for that injury.

Mr. Buller has mentioned the case of Pons and Johnson, lieutenant-governor of Minorca, and seems to rely on what was said by lord Camden on that occasion. If my memory does not mislead me, the plaintiff could not make good his case, being unable to prove Mr. Johnson's hand-writing to the order for the fiscal to commit him, and the question of jurisdiction was not agitated; but if it had, however respectable lord Camden's opinion ever will be, yet it was only the opinion of a judge at Nisi Prius. And according to Mr. Buller's own state of the case, he makes lord Camden confess, that an action might lie in a transaction between subject and subject. That concession is sufficient for me; for I have your lordship's own words to prove, that Mr. Fabrigas, being born in a conquered country, is a subject.

In the king and Cowle, 2 Burr. 858, your lordship, speaking of Calvin's case, said, "the question was, whether the plaintiff Calvin, born in Scotland after the descent of the crown of England to king James the first, was an alien born, and consequently disabled to bring any real or personal action for any lands within the realm of England;" and your lordship added, "but it never was a doubt whether a person born in the conquered dominions of a country is subject to the king of the conquering country." From this two points are gained: first, that Calvin, though born in Scotland, was not an alien, and might bring a real action; and that there never was a doubt, but that a person born in a conquered country was subject to the conqueror. As therefore the twelve judges determined that Calvin could bring a real action, because he was not an alien; certainly Fabrigas may bring a transitory action, as he is a subject, being born in a country that was conquered by the state of Great Britain.

There is an anonymous case in 1 Salkeld, 404, 4 Ann. A bill was brought in Chancery to foreclose a mortgage of the island of Sarke: the defendants pleaded to the jurisdiction of the court, viz. that the island of Sarke was governed by the laws of Normandy; and it was objected, that the party ought to sue in the courts of the island, and appeal. On the other side, it was said, that if the person be here, he may be sued in Chancery, though the lands lie in a county palatine, or in another kingdom, as Ireland, or Barbadoes. Lord-keeper Wright over-ruled the plea, saying, "that the Court acted against the person of the party and his conscience, and there might be a failure of justice if the Chancery would not hold plea in such a case, the party being here." How much stronger then is the present case? for this is a transitory action that may be brought any where; Mr. Fabrigas on the spot to bring it, and governor Mostyn in England to defend it.

The case Mr. Buller has cited, of the East-India Company and Campbell, admits of a short answer; for had the defendant confessed the matter charged, he would have confessed himself to be guilty of a felony; and the humanity of the laws of England will not oblige a man to accuse himself: but this is not a public crime, but a civil injury. As Mr. Buller has gone to the East-Indies for a case, I shall be excused mentioning the case of Ramkissenseat and Barker, 1 Atkyns, 51, where the plaintiff filed a bill against the representatives of the governor of Patna, for money due to him as his banyan. The defendants pleaded, that the plaintiff was an alien born, and an alien infidel, and therefore could have no suit here: but lord Hardwicke said, as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court; and he over-ruled the defendant's plea without hearing one counsel of either side. As therefore lord Hardwicke was of opinion, that by the laws of England an alien infidel, a Gentoo merchant, the subject of the great mogul, could claim the benefit of the English laws against an English governor for a transaction in a foreign country; I trust that your lordships will determine, that Mr. Fabrigas, who is neither an infidel nor an alien, but a subject of Great-Britain, may bring his action here for an injury received in Minorca.

The case of the countess of Derby, Keilway 202, does not affect the question; for that was a claim of dower, which is a local action, and cannot, as a transitory action, be tried any where. The cases, mentioned by Mr. Buller, from Latch and Lutwyche, were either local actions, or questions upon demurrer, therefore not applicable to the case before the Court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error.

Mr. Buller's endeavouring to confound tran-

sitory with local action, must be my apology for mentioning another case in support of the distinction. The case I allude to is Mr. Skinner's, which was referred to the twelve judges from the council-board. In the year 1657, when trade was open to the East-Indies, he possessed himself of a house and warehouse, which he filled with goods at Jamby; and he purchased of the king of Great Jamby the islands of Baretha. The agents of the East-India company assaulted his person, seized his warehouse, carried away his goods, and took and possessed themselves of the islands of Baretha. Upon this case, it was propounded to the judges, by an order from the king in council, dated the 12th April 1665, whether Mr. Skinner could have a full relief in any ordinary court of law? Their opinion was, "that his majesty's ordinary courts of justice at Westminster can give relief for taking away and spoiling his ship, goods, and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas: but that as to the detaining and possessing of the house and islands, in the case mentioned, he is not relievable in any ordinary court of justice."

Your lordships will collect from this case, that the twelve judges held that an action might be maintained here for spoiling his goods, and seizing his person, because an action of trespass is a transitory action; but an action could not be maintained for possessing the house and land, because it is a local action.

I trust I have proved that an action of trespass may be brought here for an injury received in Minorca; and that Mr. Fabrigas, a natural-born subject, is capable of bringing such action. The only remaining question is, whether Mr. Mostyn, as governor, can tyrannize over the innocent inhabitants within his government, in violation of law, justice, and humanity, and not be responsible in our courts to repair by a satisfaction in damages the injury he has done? Mr. Buller has contended, that general Mostyn governs as all absolute sovereigns do, and that 'stet pro ratione voluntas' is the only rule of his conduct. I did not expect to hear such an assertion advanced in this court. From whom does the governor derive this despotism? Can the king delegate absolute power to another, which he has not in himself? Can such a monster exist in the British dominions as tyranny uncontrouled by law? Mr. Buller asserts, that the governor is accountable to God alone; but this Court I hope will teach him, that he is accountable to his country here, as he must be to his God hereafter, for this wanton outrage on an unoffending subject. Many cases have been cited, and much argument adduced, to prove that a man is not responsible in an action for what he has done as a judge. I neither deny the doctrine, nor shall endeavour to impeach the cases; but I must observe, that they do not affect the present question. Did governor Mostyn sit in judgment? Did he hear any accusation? Did he examine a witness? Did he even see the prisoner? Did he follow any rule of law in any country? 'Stet pro ratione voluntas' was his law, and his mercy was twelve months banishment, to an innocent individual.

As Mr. Buller has dwelt so much upon the case of Dutton and Howell, it will be expected that I take some notice of it. I need not go over the case again, as it has been already very accurately stated; but I must beg leave to read the reasons which were given with the printed case to the Lords, before it came on to be argued in the House of Peers. It is stated, that sir Richard Dutton ought to have the judgment that was obtained against him below, reversed; for

1st, That what he did, he did as chief governor, and in a council of state, for which he ought not to be charged with an action. If he shall, it may be not only the case of sir Richard Dutton, but of any other chief governor or privy-counsellor in Scotland, Ireland, or elsewhere.

2. What was done, was in order to bring a delinquent to justice, who was tried in Barbadoes and found guilty; and if for this he shall be charged with an action, it would be a discouragement to justice.

3. What was done, was done in court; for so is a council of state, to receive complaints against state delinquents, and direct their trials in proper courts. What a judge acts in court, as sir Richard Dutton did, no action lies against him for it.

4. There never was such an action as this maintained against a governor for what he did in council; and if this be made a precedent, it will render all governments unsafe.

5. If a governor of a plantation beyond the seas shall be charged with actions here, for what he did there, it will be impossible for him to defend himself: first, for that all records and evidences are there: secondly, the laws there differ in many things from what they are here.

Though the first part of this reason seems to operate in favour of governor Mostyn, yet it goes no farther than this; that if an action is brought here, it will be impossible for him to defend himself. The latter part shews the meaning of the whole; that is, if an action is brought here against the governor for any thing done by him in his judicial capacity, then he will not be able to defend himself, because all the records and evidences are there. This clearly proves, that it refers to what he did as judge, otherwise there could have been no occasion to have mentioned the records being there.

These reasons must have been the ground of the counsel's argument, and the whole is bottomed in sir Richard Dutton's having acted with his council in a judicial capacity. I take no notice of the arguments of counsel, as reported by Shower, because it can be no authority for this court. I shall only observe, that in respect to the jurisdiction, which was

but slightly touched on, that the assertion of the counsel for the defendant in error, affirming the jurisdiction, is as good authority for me, as the denial of it by sir Richard Dutton's counsel is for Mr. Buller. The report is silent as to the grounds of the judgment: it only says, "that the action was reversed;" but not one word that the action could not be maintained. But I venture to affirm, that this case has not the least resemblance to the present. My duty calls on me to draw the invidious parallel.

Governor Dutton sat with his council, to hear and enquire in the supreme court of judicature in Barbadoes:

Governor Mostyn sat neither as a military nor a civil judge.

Mr. Fabrigas was not brought before him, neither was he accused by any man:

Sir John Witham was publicly accused before the governor and council of state:

Mr. Fabrigas was thrown into a dungeon, and treated with the most unheard-of severity:

Sir John Witham was only confined for the purpose of securing his person.

Mr. Fabrigas was banished for twelve months to the Spanish dominions:

Sir John was kept in custody for 14 days, till he could be brought to his trial:

Mr. Fabrigas, on the governor's justification, was found to be innocent:

Sir John Witham, when brought before the court of general sessions, was found guilty, and recommitted:

The governor of Barbadoes followed the laws of Barbadoes:

The governor of Minorca acted in diametrical opposition to all laws, and in violation of the natural dictates of humanity:

Sir Richard Dutton let the law take its course against a criminal:

But governor Mostyn went out of his way to persecute the innocent.

Having shewn the difference between the two cases, permit me to mention an observation of lord chief-justice de Grey, in his opinion on the motion for a new trial. "If the governor had secured him," said his lordship, "nay, if he had barely committed him, that he might have been amenable to justice, and if he had immediately ordered a prosecution upon any part of his conduct, it would have been another question: but the governor knew he could no more imprison him for a twelvemonth, (and the banishment for a year is a continuation of the original imprisonment) than that he could inflict the torture."

Lord chief-justice de Grey then undoubtedly thought that governor Mostyn had acted illegally: if so, I hope I shall be able to shew, that he is amenable to the courts of law in England.

Lord Bellamont's case, in 2 Salkeld 625, B. R. Pasch. 12 W. 3, evinces, that a governor abroad is responsible here. "The attorney-general moved for a trial at bar the last paper-day in the term, in an action against the governor of New-York, for matter done by him as governor, and granted, because the king defended it." I collect from this case, that the attorney-general knew the Court had jurisdiction, or he would not have made the motion; and the Court would not have granted it, if they had not been legally impowered to try it. The legislature, in the same year (12 W. 3, cap. 12,) enacted, that governors beyond the sea should be tried in the King's-bench, or in such county as shall be assigned by his majesty, by good and lawful men, for offences committed in their governments abroad against the king's subjects there. As, by the common law, an indictment could be preferred only in that county where the offence was committed, governors abroad were not criminally amenable till this act had passed. When the legislature so carefully provided to bring governors to justice for the offences they might commit in their governments, they would indisputably, by the same law, have protected the subjects from civil injuries, had they not known that such provision was unnecessary, and that, by the common law, all personal actions might be brought in England; of which lord Bellamont's case was a recent instance.

In Michaelmas-term, 11 Geo. 2, 1737, Stephen Conner brought an action against Joseph Sabine, governor of Gibraltar: and he stated in his declaration, that he was a master carpenter of the office of ordnance at Gibraltar; that governor Sabine tried him by a court-martial, to which he was not subject; and that he underwent the sentence of receiving 500 lashes, and that he was compelled to depart from Gibraltar, which he laid to his damage of 10,000*l.* The defendant pleaded Not Guilty, and justified by trying him by a court-martial. There was a verdict for the plaintiff, with 700*l.* damages. A writ of error was brought, and the judgment affirmed. No distinction can be made between the governor of Gibraltar and the governor of Minorca; except only, that the one tried Conner by a court-martial, and punished him by military law; while the other, without any trial, banished Mr. Fabrigas, contrary to all ideas of justice and of law.

I must now beg leave to advert to the bill of exceptions; in which it is alledged, that "Minorca is divided into four districts, exclusive of the arraval, which the witnesses always understood to be distinct from the others, and under the immediate order of the governor."

I am well aware, that I am not at liberty to go out of the record; if I was, the fact warrants me in saying, that the evidence is most untrue.

It is notorious that Minorca is divided into four terminos only; Cientadella, Alayor, Marcadel, and Mahon, which latter includes the arraval of St. Phillip's. This is known to every man who has been at Minorca, and to every man who has read Armstrong's history of that island. That the governor has a legislative authority within the arraval, is too absurd to dwell on. By what law, by what provision,

does he claim that power? When process is executed within St. Phillip's, or its environs, the civil magistrate usually pays the governor the compliment of acquainting him with it; but the same compliment is paid to the commanding officer at Cieutadella, where an exclusive jurisdiction is not even pretended. In fact, it is a matter of civility merely, but never was a claim of right.

Lord chief justice de Grey in the solemn opinion which he gave upon the motion for a new trial, has been explicit on these two heads. "One of the witnesses in the cause (said his lordship) represented to the jury, that in some particular cases, especially in criminal matters, the governor resident upon the island does exercise a legislative power. It was gross ignorance in that person to imagine such a thing: I may say, it was impossible, that a man who lived upon the island, in the station he had done, should not know better, than to think that the governor had a civil and criminal power in him. The governor is the king's servant; his commission is from him, and he is to execute the power he is invested with under that commission, which is to execute the laws of Minorca, under such regulations as the king shall make in council. It was a vain imagination in the witnesses to say, that there were five terminos in the island of Minorca. I have at various times seen a multitude of authentic documents and papers relative to that island; and I do not believe, that, in any one of them, the idea of the arraval of St. Phillip's being a distinct jurisdiction was ever started. Mahon is one of the four terminos, and St. Phillip's, and all the district about it, is comprehended within that termino; but to suppose, that there is a distinct jurisdiction, separate from the government of the island, is ridiculous and absurd."

These were the words of lord chief justice de Grey; to which, I am confident, this Court will pay a proper attention.

The bill of exceptions then states, that general Mostyn was appointed governor by the king's commission, which gives him all the powers belonging to the said office. I wish to ask Mr. Buller, whether to persecute the innocent, and to banish those subjects committed to his care, is a power incident to or springing out of the office of governor? If it is not, the governor cannot justify himself under his commission.

It is then stated, that the king ordered "all his loving subjects in the said island to obey him, the said John Mostyn;" but nothing in particular is mentioned of the arraval. Had it been a peculiar district, under the despotic will of the governor, there must have been some notice taken of it, either in the commission, or in his majesty's orders. The governor then confesses in his bill of exceptions, "that he banished Mr. Fabrigas without any reasonable or probable cause, or any other matter alledged in his plea, or any act tending thereto." Notwithstanding which admission, in the very next sentence, he insists that the plaintiff ought to be barred his said action, although it is stated in the bill of exceptions, that "the Minorquins plead sometimes the English laws."

Were the bill of exceptions less absurd than it is, yet I should contend, that the governor, by pleading in chief, and submitting his cause to the decision of an English jury, has precluded this Court from enquiring into the original jurisdiction. Were it possible that this ground should fail me, when supported by so many great authorities, yet I should be very easy about the event; for, as an action of trespass can be brought in England for injuries abroad, and as every subject can bring that action, and as governor Mostyn (being a subject) must answer to it, I have no doubt but the judgment will be affirmed. Should it be reversed, I fear the public, with too much truth, will apply the lines of the Roman satirist on the drunken Marius to the present occasion; and they will say of governor Mostyn, as was formerly said of him,

Hic est damnatus inani judicio;

and to the Minorquins, if Mr. Fabrigas should be deprived of that satisfaction in damages which the jury gave him,

At tu victrix provincia ploras.

Mr. Buller. I beg leave to trouble the Court with a few words by way of reply: and though Mr. Peckham has thought fit to declaim so much upon the particular facts of this cause, yet I was confident at first, and do not now find I was deceived in thinking, I should not be contradicted in what I said about the propriety of governor Mostyn's conduct; that he had taken every precaution that a man in his situation could do, had consulted many persons there, civil and military, and that they were all unanimous in advising the governor to do what was done.

The first objection made by Mr. Peckham has been, that Mr. Mostyn should be precluded from contending that this Court hath not a jurisdiction, because he has submitted to the jurisdiction of the Court in so many instances during the whole of these proceedings. He has stated the whole proceedings during the stages of this cause, by which he supposes Mr. Mostyn hath done such acts as shall be construed into a submission to the jurisdiction of the Court, and is therefore now precluded from entering into the question. Further, Mr. Peckham has insisted upon it, that at the trial we did wrong in making a defence; because, if we meant to go into the question, whether the Court has jurisdiction or not, we should have then insisted upon a non-suit, and not gone into the merits of the cause. I do not apprehend any of the cases he has cited will come up to the present: and as to the different periods of the cause, where he supposes we have submitted to the jurisdiction of the Court, if this Court hath no jurisdiction at all, I do not know how it can then be said we have submit-

ted to it. Saying, that at the trial we should have insisted upon a non-suit, is saying we should have insisted upon what we could not demand; for it is at all times at the option of the plaintiff, whether he will submit to a non-suit or not. If the defendant can avail himself of the objection at all, it must be by entitling himself by that means to a verdict; for it is in the power of the plaintiff to get up and say, I will not be non-suited. It was impossible for us to insist upon the objection in any other way than it is now done: the objection arises out of the facts of the case, and what was proved at the trial. It was there proved, that Mr. Mostyn was the governor; that what he did was in that character; and therefore, says he, these facts being proved, I insist I am not answerable in a court of justice in England, for what I have done in this character: therefore the objection would have been improper, if it had come at any other time; it could only come when these facts appeared in evidence upon which this objection was founded. As to the many cases that have been cited, I believe I may safely give this general answer to them all: they are cases where an action has been brought in a court in England, for a transaction arising in England, but, on account of a charter or statute, the jurisdiction of the superior court has been excluded. Where that is so, and this Court has a general superintendent jurisdiction, but it is taken away by a particular law, in such case it is necessary to plead to the jurisdiction: but when the question arises upon a transaction happening in foreign parts, and where the courts of England cannot have any controul whatsoever, suppose, for instance, in France, where the king or parliament of England can make no laws to bind the inhabitants, it is just the same as a court of inferior record in England, where it holds plea of a thing done out of their jurisdiction. In that case, if it appears upon the proceedings that the cause of action arose out of the jurisdictions, the whole proceedings are void; they are *coram non judice;* and an action will lie against the party, the officers and the judges, for what is done under them.

In this case, as I submit to your lordship, the question is the same; because it is not on a transaction happening within the limits, or within the country where this Court resides or has a jurisdiction, but on a transaction arising in foreign dominions. I beg leave to mention too, that if these cases were so very general as Mr. Peckham wishes to have them understood, it is not possible that the case in Latch, or the case in Lutwyche, ever could have existed; because, if it was to hold as a general rule, that where the cause of action arises out of the kingdom you must plead to the jurisdiction, it would have been a sufficient answer in those cases to say, it was not so pleaded. In the case in Lutwyche, there was a plea in bar, and demurrer to that plea; but it appearing, that the cause of action did not arise in this kingdom, but in foreign parts, the Court agreed, that the supposition and quaint legal fiction, which otherwise would avail, that it was in London or England, was absurd, and the plaintiff could not support his action. It was the same in the case in Latch; for that was not on a plea to the jurisdiction, but the objection arose long after, and in a subsequent period of the cause: the judges there agreed, that if it appeared on the record, that the case was plainly and evidently out of their jurisdiction, they were bound to take notice of it.

Mr. Peckham has divided his argument into three heads: first, whether a transitory action is capable of being brought in England, if the cause of that action arise beyond the seas: secondly, whether the plaintiff is capable of bringing such action: and, in the third place, whether the defendant is a proper object of it. On the first of these questions it has been insisted, that an action of false imprisonment is a transitory action; and some cases cited, where transitory actions, arising abroad, are holden to be maintainable here. An action of false imprisonment certainly is a transitory action: but, my lord, the cases cited from 12th Co. and Co. Lit. were not cases of action for false imprisonment, but debt upon bond. These cases were where the law, in the different countries, was the same; and they therefore come within the distinction laid down in the case before lord Camden. For, where the law of the different countries is the same, this Court may hold plea; it may do as much justice as the foreign courts, and can be involved in no difficulty with respect to the rules by which they are to decide. But in the case of transactions arising in foreign dominions, where the law of the foreign country is different from the law of this kingdom, this Court has no way of informing themselves what the foreign law is, nor can they know what rules to decide by; and therefore every inconvenience arises against their entertaining such a suit. Mr. Peckham then cited the case of Parker against lord Clive, in this court, and observed, that there never was any objection taken there, that the action would not lie. That case is different from the present. That was a case between English subjects, and a case that was to be determined, not by the law of the East Indies, (for that was not set up as a defence, or at all intermixed with the case) but by the law of England; and therefore is still within the distinction I have laid down and endeavoured to support. Then the second question Mr. Peckham has made is, whether the plaintiff can maintain this action? The plaintiff, he says, is not an alien, but a natural-born subject, and as such he owes allegiance, and is entitled to protection; and that the king of England can protect only by the laws of England, and therefore this man has a right to bring his action here. The proposition will itself shew how enormous it would be, if it were to hold in this case. How is the king to rule by the laws of England? Is it meant that this case is to be determined by the laws of England? If so, that would be injustice in the most

glaring light; because it would be condemning the defendant by one law, when he was bound to regulate his conduct by a different. But it is not true that the king of England can protect by the laws of England only; for, in other places, a transaction must be tried by the laws of that place where it arises; and the king can, in other places, govern by other laws than those of England: and I contend, this question must be determined by such laws, and not by the laws of this country. Mr. Peckham has then insisted, that this is a case between subject and subject. If he means it is between subject and subject, speaking of the king of England, it is true; but Fabrigas is not a subject of this realm, nor subject to be governed by the laws of this country, and therefore shall not avail himself of the laws of this country. The case in Salkeld, 404, was then cited, where the Court of Chancery proceeded against a foreigner; and the reason there given for so doing is, because that Court acts *in personam*. But, my lord, that case does not appear to be at all blended with foreign law; nor is any thing there stated, which called on the Court to determine that case by any other law than the known laws of this country, and the rules of their own court. The case in the 4th Institute was then endeavoured to be distinguished from the present, by insisting, that the subject-matter of that case was local: but that answer cannot hold. If it had been an action in a court of law, the answer would have been a good one; because an action of dower is local, and can only be tried in the county where the land lies; but that was a suit in Chancery, and not an action; and, as is said in the case cited from Salkeld, the Court of Chancery don't proceed against the thing, but against the person.

Then the last question that has been made is, whether the defendant in this case is the proper subject of an action? My lord, Mr. Peckham has observed, I said the governor was absolute; but that he insists is impossible, because there is no person who could delegate such an authority to him; that if he derived such authority from any one, it must be from the king; but the king, not being absolute himself, could not grant such authority to Mr. Mostyn. If it be meant only, that the king is not absolute in this country, I most readily accede to the proposition; but what the constitution of this country is, can be no argument to prove what is the state or constitution of Minorca. That Minorca is of a different constitution, and is governed by different laws from what prevail in this country, is stated in the record; which record is decisive upon that point, for the Court cannot depart from it. It is there stated, that the arraval of St. Phillip's is subject to the immediate order of the governor, and to his order and direction only; for no judge, either criminal or civil, can interfere, or has any jurisdiction there, unless under his express leave: therefore the argument, as to the authority or power of the king here, is totally foreign to the situation of the governor of Minorca, or the power or jurisdiction he has there. Then it is said, it does not appear on the record, that the defendant did act as judge. This also must be decided by the record; and it is there stated, that the defendant was governor, and so being governor he caused the plaintiff to be taken, imprisoned, &c. The case of Dutton *v.* Howell has been much observed upon, and the printed reasons given in that case particularly stated; but I do not perceive the case has been distinguished from the present. Some of the reasons alledged for the defendant there, are equally strong in favour of the present defendant. It is said, there never was such an action maintained before; and if a governor beyond sea be charged here, he cannot defend himself, because all the records and evidence are there. Mr. Peckham has not been able to produce one case, in which such an action as this has been maintained before. But then another distinction he endeavoured to avail himself of is, that, in the case of Dutton and Howell, the action was for an act done in council, and therefore varied from this case, because here there was no council at all. I cannot see how that difference will at all avail Mr. Peckham's client. In the first place, in Barbadoes, there was a council, and the governor had no power without the council; but is that the case here? In Minorca, there is no council at all; and therefore, in this case, the governor stands in the same situation as the governor and council of Barbadoes. As to the necessity of pleading in abatement to the jurisdiction, it is very observable, that in the case of Dutton *v.* Howell, the counsel who argued in that case do not venture to rely upon that objection. But they insist further, that the jurisdiction cannot be examined in the Exchequer chamber, because both the statute and writ of error expressly provide against it: and therefore, say they, it is questionable, whether it can be insisted upon in the House of Lords: and it is admitted by them, that a question might have been made on the trial of an issue, if one had been joined. However, that question was gone into in the House of Lords, and the final decision of the cause appears from the book; namely, that the judgment in that case was for the defendant, and that the action could not be maintained. Then the words of lord chief justice de Grey, in this present cause, upon a motion for a new trial, have been much relied upon; and his lordship is made to say, that if the governor had secured the present plaintiff, merely for the sake of a trial, it would be a different affair. In this case, I apprehend it would be quite sufficient for me, if the governor had a power of committing at all; for if he had, that is sufficient to prevent the defendant's being a trespasser by such commitment: and the reasonableness of the time for which he was committed, would be a very different question; for, if the governor had a power of committing, he has pursued that power, and then this action cannot be main-

tained. The next case that has been cited, is lord Bellamont's case in 2d Salkeld, which was an action against a governor for what he did in that character: but that is simply a motion for a trial at bar. The merits of the case, or the propriety of the action, were not before the Court, or at all entered into; nor was any objection made to the jurisdiction of the Court; and where a thing is not objected to, the case can never be an authority on the point: there is not one syllable said about it; and therefore that case cannot have the least weight whatsoever respecting this question. Then Mr. Peckham cited the statute of the 12th of William the third: but that was admitted by him to extend only to criminal prosecutions at the king's suit, and therefore can have nothing to do with the present question. The case of Conner against Sabine is as different from this case, as any one case can be from another. There the defence was put upon the ground, that the plaintiff was amenable to a court-martial. The fact turned out otherwise: they stated a limited jurisdiction, and it appeared the plaintiff was not the object of that jurisdiction. Then it is said, that Minorca is not a military camp, but that there are judges both criminal and civil. Here again I must have recourse to the record itself; for there it is stated, that within the arraval of St. Phillip's, where this transaction occurred, there is no judge either criminal or civil; there is no power but that of the governor. Mr. Peckham observed, that it is stated in the record, that the inhabitants sometimes claim protection from the law of England, as well as the law of Spain. It is so stated; but what is said further? Not that they ever have it allowed to them, or that they are governed by it; but it is expressly stated, that they are in general governed by the law of Spain: therefore the record does not prove, that the people in Minorca are governed by the same laws as the people here; but it does prove, that they are governed by laws which are totally different, and that within the arraval of St. Phillip's, the will of the governor is the law. Mr. Peckham then attacks the veracity of the record with respect to the different districts which there are within the island; and has insisted, that though in the execution of process, &c. the law-officers may consult the governor, or inform him what they are going to do, yet that they are not bound by law to do so. My lord, the record must, in these respects, also decide for us. It is there stated what the districts are; that the arraval of St. Phillip's is distinct from the others; and that no magistrates can come there, nor can any process be executed there, without the governor's particular leave. Mr. Peckham asks, where is the authority that enables a governor to banish an innocent man? In the first place, as to his being an innocent man, it is not competent to this Court to enquire whether he was innocent or not, or whether the governor was strictly justifiable or not; but it is sufficient to prove, that the governor had an authority to imprison. That authority appears upon the face of the record; for it is there stated that he was governor, and had every power, civil and military, and that all he did was in the character of a governor. These facts being proved, I submit are a sufficient bar to this action, and the Court cannot go into the question, whether the plaintiff was innocent or guilty. The last argument that has been relied upon by Mr. Peckham is, some other expressions of lord chief justice de Grey, in the course of this cause; in which his lordship said, that the witnesses must have been mistaken in the account they gave of the constitution and law of the island. Here it is impossible for the Court to go out of the record: but these observations of lord chief justice de Grey go certainly a great way towards proving the impropriety of maintaining such an action here as the present. If the account given by lord chief justice de Grey of the island be true, and I make no doubt it is, the consequence is this: that even though all the evidence was obtained in this cause that could be had; though persons were called as witnesses, who, from their situation, and the departments they had officiated in, were most likely to be conversant with the law and constitution of the island; yet that all the accounts that have been given are imperfect, erroneous, and unworthy of credit. That is the strongest evidence of the impropriety of maintaining such an action as this in England. For if, as lord chief justice de Grey says, the evidence that has been given of the foreign law in this case is not to be relied upon, but is all a mistake; it may happen, and it must naturally be expected, that in every case which is brought here from foreign dominions, where the cause of action arises abroad, all the evidence is abroad, and the Court can get no other evidence of the law of the place than the loose opinions of those who have occasionally been there; and the courts here having no established legal mode of obtaining certificates from such country, properly authenticated, to say what the law there is, the same mistakes and inconvenience will arise.

Therefore, on the whole, I trust the Court will be of opinion, that this action is improper, and ought not to be maintained here.

Lord *Mansfield*. Let it stand for another argument. It has been extremely well argued on both sides.

On Friday the 27th January, 1775, it was very ably argued by Mr. Serjeant Glynn, on the part of Mr. Fabrigas, and by Mr. Serjeant Walker, on behalf of governor Mostyn: but as no new cases were cited, we shall proceed to give the Judgment of the Court of King's-bench, which was in substance as follows:

Lord *Mansfield*. This was an action for an assault and false imprisonment by the defendant upon the plaintiff. And part of the com-

plaint being for banishing him from the island of Minorca to Carthagena, in Spain, it was necessary for the plaintiff to take notice in the declaration of the real place where the cause of complaint arose; which he has stated to be at Minorca, with a *videlicet* in London, at St. Mary-le Bow. Had it not been for that particularity, he might have stated it to have been in the county of Middlesex; but part of the complaint making the locality, where the cause of action arose, necessary to be stated, being a banishment from Minorca to Carthagena, he states it with this *videlicet*. To this declaration the defendant put in two pleas; first, Not Guilty; and then he pleads, that he was governor of Minorca, by letters patent from the crown, and that the defendant was raising sedition and mutiny; in consequence of which he did imprison him and send him out of the island, which he alledges he had an authority to do, for that sedition and mutiny that he then was raising. To this plea the plaintiff does not demur, nor does he deny that it would be a justification, in case it was true; but he denies the truth of the fact, and puts in issue whether the fact of the plea was true. The plea avers, that the assault for which the action was brought arose in the island of Minorca, out of the realm of England, and no where else. To this the plaintiff has made no new assignment, and therefore by his replication he admits the locality of the cause of action. Thus then it stood upon the pleadings. When the trial came on, the plaintiff went into the evidence of his case, and the defendant went likewise into his evidence. But, upon the part of the defendant, evidence different from any fact alledged in his plea of justification was given; and witnesses were called to prove that the district in Minorca called the arraval, where the injury complained of was done, was not within either of the four precincts, but that it is in the nature of a peculiar liberty, more immediately under the power of the governor, and that no judge of the island can exercise jurisdiction there without an appointment from him. That is the substance of their evidence.

The judge left it to the jury upon the facts of the case; and they found for the plaintiff. The defendant then tendered a bill of exceptions, upon which bill of exceptions it comes before us. And the great difficulty I have had upon both these arguments is, to be able clearly to comprehend what question it is that is meant seriously to be brought before the Court for their judgment. If I understand the counsel for governor Mostyn right, what they say is this: the plea of Not Guilty is totally immaterial, and the plea of justification is totally immaterial, for it appears on the plaintiff's own shewing that this matter arose in Minorca; and the replication to the plea admits it: and it likewise appears that the defendant was governor of Minorca; and as the imprisonment arose in Minorca by the authority of the defendant, the judge ought to have stopped all evidence whatsoever, and have directed the jury immediately to have found for the defendant. Why? There are three reasons given. One of them insisted upon in the first argument (but abandoned to-day) is, that the plaintiff is a Minorquin, born in the island of Minorca. To dispose of that objection at once, I shall only say that it is wisely abandoned to-day. A Minorquin; what then? Has not a subject of the king, born at Minorca, as good a right to apply to the king's courts of justice, as a person born within the sound of Bow-bell, in Cheapside? If there is no other objection to him, would that make any? To be sure not. But it is abandoned, so I shall lay it out of the case.

The other two grounds which are enforced to-day are, if I take them right—but I am under some difficulties, because they are such propositions that you may argue as well whether there is such a court existing as this which I am now sitting in—the first is, that he was governor of Minorca, and therefore for no injury whatsoever that is done by him, right or wrong, can any evidence be heard, and that no action can lie against him; the next is, that the injury was done out of the realm: I think these are the whole amount of the questions that have been laid before the Court. Now as to the first, there is nothing so clear as that in an action of this kind, which is for an assault and false imprisonment, the defendant, if he has any justification, must plead it; and there is nothing more clear than that, if the Court has not a general jurisdiction of the matter, he must plead to that jurisdiction, and he cannot take advantage of it upon the general issue: I therefore, upon that ground, at once lay out of the case every thing relative to the arraval; for if he acted as a judge, it is synonimous to a court of record: and though it arises in a foreign country, where the technical distinction of a court of record does not exist, yet if he sat in a court of justice, and subject to a superior review, it is within the reason of the law of England, which says, that shall be a justification, and he would, if he had acted according to the law of the land, be entitled to a justification in the fact that is complained of; but that must be pleaded. If an action is brought against a person who is a judge of record, he must lay it before the court, by way of plea and justification, that he was a judge. I don't lay a stress upon the word record, but there is no colour upon the evidence that he acted as a judge of a court of justice; therefore every thing stated relative to the arraval, which is stated in the bill of exceptions, is nothing at all to the purpose. The first point that I shall begin with is the sacredness of the person of the governor. Why, if that was true, and if the law was so, he must plead it. This is an action of false imprisonment: *primâ facie*, the Court has jurisdiction. If he was guilty of the fact, he must shew a special matter that he did this by a proper authority. What is his proper authority? The king's commission to make him

governor. Why then, he certainly must plead it: but, however, I will not rest the answer upon that. It has been singled out, that in a colony that is beyond the seas, but part of the dominions of the crown of England, though actions would lie for injuries committed by other persons, yet it shall not lie against the governor. Now I say, for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor. In every plea to the jurisdiction, you must state a jurisdiction; for if there is no other method of trial, that alone will give the king's courts jurisdiction. If an action is brought here for a matter arising in Wales, you must shew the jurisdiction of the court in Wales: and in every case to repel the jurisdiction of the king's courts, you must shew a better and a more proper jurisdiction.* Now in this case no other jurisdiction† is shewn, even by way of argument; and it is most certain, that if the king's courts cannot hold plea in such a case, there is no other court upon earth that can do it: for it is truly said, that a governor is in the nature of a viceroy, and, of necessity, part of the privileges of the king are communicated to him during the time of his government. No criminal prosecution lies against him, and no civil action will lie against him; because, what would the consequence be? Why, if a civil action lies against him, and a judgment obtained for damages, he might be taken up and put in prison on a Capias; and therefore, locally, during the time of his government, the courts in the island cannot hold plea against him. But in this peculiar case, it is said to have happened in the arrival. Why, it is stated in the evidence, that no judge can sit there at all without his leave. If he is out of the government, he leaves it; he comes and lives in England, and he has no effects there to be attached: then there is no remedy whatsoever, if it is not in the king's courts. But there is another very strong reason alluded to by Mr. Serjeant Glynn, which would alone be decisive. This is a charge against him, which, though a civil injury, has a mixture of criminality in it: it is an assault; which is criminal by the laws of England, and is an abuse of that authority given him by the king's letters patent under the great seal. Now, if every thing within a dominion is triable by the courts within that dominion, yet the consequence of the king's letters patent, which gives the power, must be tried here; for nothing concerning the seigniory can be tried in the place where it is. In the proprietary governments in America, they cannot try any question concerning the seigniory, in their own courts; and therefore, though questions concerning lands in the isle of Man are triable in the courts of the isle of Man, yet wherever there is a question concerning the seigniory, it must be tried in some courts in England. It was so held by the chief justice and many of the judges in the reign of queen Elizabeth, upon a question arising concerning the seigniory of the isle of Man. Or whenever there is a question between two provinces in America, it must be tried in England by analogy to what was done with respect to the seigniories in Wales being tried in English counties; so that emphatically the governor must be tried in England, to see whether he has exercised legally and properly that authority given him by the king's letters patent, or whether he has abused that authority, contrary to the law of England, which governs the letters patent by which he is appointed. It does not follow from this, that, according to the nature of the case, let the cause of action arise where it may, that a man is not entitled to give every justification that ought to be a defence to him. If, by the authority of that capacity in which he stood he has done right, he is to lay that before the Court by a proper plea, and the Court will exercise their judgment whether that is not a sufficient justification. In this case, if the justification had been proved, perhaps the Court would have been of an opinion that it was a sufficient answer, and he might have moved in arrest of judgment afterwards, and taken the opinion of the Court; but the Court must be of opinion that it is a sufficient answer, and that the raising a mutiny in a garrison, though in time of peace, was a reason for that summary proceeding, in taking him up and sending him out of the island. I could conceive cases in time of war, in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose in a siege, or when the French were going to invade Minorca, suppose that the governor should think proper to send a hundred of the inhabitants out of the island, and that he did this really acting for the best: or suppose, upon a general suspicion, he should take people up as spies: why, upon proper circumstances laid before the Court for their judgment and opinion, it would be very fit to see whether he had acted as the governor of the garrison ought, according to the law of England and the justice of the case. But it is said, if there is a law in the garrison, or if he acts as the Spanish governor might have done before, how is that to be known here?—How?

* As to this, see the Case of the hon. Robert Johnson, 6 East, 583. See also the Case of the Kinlochs, vol. 18, p. 395.

† Speaking of lord Mansfield's judgment in this case, Mr. Butler in his long disquisitorial note to Co. Litt. 391 a, says, "wherever a personal injury is done to an English subject abroad, the remedy must be sought in the jurisdiction where the cause of action happens, if it is subject to the king's jurisdiction; if the king has no jurisdiction in that place, this necessarily gives the king's courts a jurisdiction within, which it is brought, by the known fiction of laying the venue in some county of England. This is explained by lord Mansfield with his usual clearness and ability." Mr. Butler refers to Phillybrown v. Ryland, Stra. 624. Lord Raym. 1388, and 8 Mod. 354.

Why, there are ways of knowing foreign laws as well as our own, but in a different manner: it must be proved as a fact, and in that shape the court must assist the jury in finding out what the law really is. Suppose there is a French settlement (there is a case in point of the sort I am stating) which depends upon the custom of Paris; why, we must receive witnesses with regard to it, to shew what the custom is, just as you receive evidence of a custom with respect to trade.

The judges in the courts of England do determine all cases that arise in the plantations, all cases that arise in Gibraltar or Minorca, in Jersey or Guernsey, and they must inform themselves by having the law stated to them. As to suggestions with regard to witnesses, the plaintiff must prove his case, and the court must take care that the defendant is not surprised, and that he has a fair opportunity of bringing his evidence, if it is a case proper in other respects for the jurisdiction of the court. There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor injuring a man, contrary to the duty of his office, and in violation of the trust reposed in him by the king's commission. If he wants to send for witnesses to prove his justification, and applies to the court, they will do what this court did in a case of a criminal prosecution which arose in Scotland. This court forced the prosecutor (and would have put off the trial from day to day if he had not submitted to it) to suffer the witnesses to be examined by a commission where the cause arose, who could not be compelled to come here. The court obliged them to come into these terms; or, if they did not, it is a matter of course, in aid of a trial at law, to apply upon a real ground, and not upon a fictitious pretence of delay, to a court of equity to have a commission and injunction in the mean time; and the court will certainly take care that justice shall be done to the defendant as well as to the plaintiff, who must come with witnesses to prove his case: and therefore, in every light in which I see this matter, it holds emphatically in the case of a governor, if it did not hold in respect of any other man within the colony, province, or garrison. But to make questions upon matters of settled law, where there have been a number of actions determined, which it never entered into a man's head to dispute—to lay down in an English court of justice such monstrous propositions as that a governor, acting by virtue of letters patent under the great seal, can do what he pleases; that he is accountable only to God and his own conscience—and to maintain here that every governor in every place can act absolutely; that he may spoil, plunder, affect their bodies and their liberty, and is accountable to nobody—is a doctrine not to be maintained; for if he is not accountable in this court, he is accountable no-where. The king in council has no jurisdiction of this matter; they cannot do it in any shape; they cannot give damages, they cannot give *reparation*, they cannot punish, they cannot *hold* plea in any way. Wherever complaints have been before the king in council, it has been with a view to remove the governor; it has been with a view to take the commission from him which he held at the pleasure of the crown. But suppose he holds nothing of the crown, suppose his government is at an end, and that he is in England, they have no jurisdiction to make reparation to the party injured; they have no jurisdiction to punish in any shape the man that has committed the injury: how can the arguments be supported, that, in an empire so extended as this, every governor in every colony and every province belonging to the crown of Great Britain, shall be absolutely despotic, and can no more be called in question than the king of France? and this after there have been multitudes of actions in all our memories against governors, and nobody has been ingenious enough to whisper them, that they were not amenable.

In a case in Salkeld, cited by Mr. Peckham, there was a motion for a trial at bar in an action of false imprisonment against the governor of New-York; and it was desired to be a trial at bar, because the Attorney General was to defend it on the part of the king, who had taken up the defence of the governor. That case plainly shews that such an action existed; the Attorney General had no idea of a governor's being above the law. Justice Powell says, in the case of Way and Yally, in 6 Modern, that an action of false imprisonment had been brought here against the governor of Jamaica for an imprisonment there; and the laws of the country were given in evidence. The governor of Jamaica in that case never thought that he was not amenable. He defended himself. He shewed, I suppose, by the laws of the country, an act of the assembly which justified that imprisonment; and the court received it, to be sure, as they ought to do. Whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried. I remember (it was early in my time; I was counsel in it) an action against governor Sabine, and he was very ably defended. Nobody thought the action did not lie against him. He was governor of Gibraltar, and he barely confirmed the sentence of a court-martial, which tried one of the train of artillery by martial law. Governor Sabine affirmed the sentence. This plaintiff was a carpenter in the train. It was proved at the trial, that the tradesmen that followed the train were not liable to martial law; the court were of that opinion; and therefore the defendant was guilty of a trespass in having a share in that sentence which punished him by whipping. There is another case or two, but they don't occur to me at present.

Let us see now what the next objection is, with regard to the matter arising abroad; and that is a general objection, that as the matter arose abroad, it cannot be tried here in Eng-

land. There is a formal distinction that prevails in our courts, and likewise a substantial one as to the locality of trials. The substantial distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had if it is laid in a wrong place. This is the case of all ejectments where possession is to be delivered by the sheriff of the county: and as trials here are in particular counties, the officers are county officers; therefore the judgment could not have effect if it was not laid in the proper place and in the proper county. But there likewise is a formal distinction, where, perhaps, complete justice could be done, let it be laid in what county it might; that is mere matter of form as to cases that arise within the realm: but even with regard to matters that arise out of the realm, to be sure there is a distinction of locality too; for there are some cases that arise out of the realm, that ought not to be tried any where but in the county where they arise, as the case alluded to by serjeant Walker. If there is a sort of fighting in France between two Frenchmen, and they happen both casually to be here, and an action of assault is brought by the one against the other, which charge a criminality too, that it is done against the king's peace, and the laws and customs of England; in that case it may be a very material question whether that could be maintained here: for though it is not a criminal prosecution, yet it has that sort of criminality that, perhaps, without giving an opinion, it ought to be tried by the laws of that country where both parties are subjects; it may be a substantial objection of locality. So likewise, if it is concerning an estate in a foreign country, where it is a matter of title and not of damages, it may be a substantial distinction. There is likewise a question of form, and that arises upon the trial; for trials in England being by a jury, and the kingdom being divided into counties, and every county, in respect of trial, considered almost as if a separate kingdom or principality, it is absolutely necessary that there should be some county where the action is particularly brought, that there may be a process to the sheriff of that county, to bring a jury from thence to try it; and that is matter of form, which goes to all cases that arise abroad. But the law makes a distinction between transitory actions and local actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county; the place is not material: and if an imprisonment in Middlesex, it may be laid in Surrey; and though proved to be done in Middlesex, the place not being material, it does not at all prevent the plaintiff recovering damages: for the place of transitory actions is never material. But where, by particular acts of parliament, it is made so, as in the case of churchwardens and constables, and other cases that require the action to be brought in the county; there, by the force of the act of parliament, the objection is fatal: but otherwise it must be laid in any county in England, let it be done where it will: the parties had an opportunity of applying to the court in time to change the venue. But if they go to trial without it, that is no objection; and all actions of a transitory nature that arise abroad may be laid as happening in an English county. But there are occasions which make it absolutely necessary to state in the declaration, that it really happened abroad; as in the case of specialties, where the date must be set forth. When an action is brought upon a specialty which bears a date, if that specialty is set out, or if oyer is prayed of it, by which the place where it was made must appear; if the declaration states it to have been made at Westminster, in Middlesex, and upon producing the deed it bears date at Bengal, there is a variance between the deed and the declaration, which makes it appear to be a different instrument. I don't put the case, though there are some in the books that seem to me to have confounded the statute of the 6th of Richard the second, therefore I don't put the objection upon the 6th of Richard the second; but it goes singly upon this: if you don't state the true date or true description of the bond, it is a variance. What does the law in that case? (and it has done it for hundreds of years) Why, the law invented a fiction, and has said, "You shall set out the description truly, and then give a venue only for form for the trial; *videlicet*, in the county of Middlesex, or any other county you please." Did any judge ever think that when the declaration said, in fort St. George in Cheapside, that the plaintiff meant that it was in Cheapside? No; it is a fiction in form: every country has its forms: it is for the furtherance of justice that these fictions were invented; to get rid of formalities; to further and advance justice. This is a certain rule: you never shall contradict the fiction so as to defeat the end for which it was invented, but you may contradict it for every other purpose. Now this fiction is invented barely for the mode of trial; to every other purpose you shall contradict it, but not for the purpose of saying, You shall not try it. It is just like that question that was long agitated and finally determined some years ago, upon a fiction of the teste of writs taken out in the vacation, which bore date as of the last day of the term. That is a fiction of the Court. You never shall contradict that fiction, and go into the truth of the case, to destroy the writ, and shew it a bad writ. Why? Because the Court invented the fiction to make the writ good, for the furtherance of justice, that it may appear right in the form; but for every other purpose in the world you may contradict it. I am sorry to observe there are some sayings which have been alluded to, inaccurately taken down. Perhaps there were short-hand writers in those days, as there are at present, who mistake every word they hear, and, being unable to correct it, have printed it improperly: but to say, that as men they have one way of thinking, and as judges they have another, is an absurdity. No; they meant to support the fic-

tion. I will mention a case or two to shew that is the meaning of it. There is a case in 6 Modern, 208, of Roberts and Harnage. The plaintiff declares, that the defendant became bound to him at Fort St. David's in the East Indies at London, in such a bond. Upon demurrer the objection was, that the bond appeared to have been sealed and delivered at fort St. David's in the East Indies, and therefore the date made it local; and, by consequence, the declaration ought to have been of a bond made at Fort St. David's in the East Indies, viz. at Islington in the county of Middlesex, or in such a ward or parish in London; and of that opinion was the whole Court. You see how this case is stated. But I will state it from another book, where it is reported more truly; I mean in lord Raymond, 1042. There it is stated thus. It appeared by the declaration, that the bond was made at London, in the ward of Cheap. Upon oyer, the bond was set out, and it appeared on the face of it to be dated at fort St. George in the East Indies. The defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad; but the Court said, that it would have been good, if laid at Fort St. George in the East Indies, to wit, at London, in the ward of Cheap. What was the objection there? Why, they had laid it falsely. They had laid the bond as made at London. The bond is produced, and appears to be made at another place: that is a variance. You must take the bond as it is. Then how do you get to trial? Why, introduce a fiction, and the formality gives you the trial in that county by the *videlicet*, and the bond is truly described. A case was quoted from Latch, and a case from Lutwyche, on the former argument; but I will mention a case posterior in point of time, where the Court took it up upon the true ground, where both these cases were cited, and no regard at all was paid to them; and that is the case of Parker and Crook, 10 Modern 255. This was an action of covenant upon a deed indented. It was objected to the declaration, that the defendant is said in the declaration to continue at Fort St. George in the East Indies; and upon the oyer of the deed it bears date at Fort St. George; and therefore the Court, as was pretended, had no jurisdiction. Latch, fol. 4. Lutwyche, 56. Lord chief justice Parker said, that an action will lie in England upon a deed dated in foreign parts, or else the party can have no remedy; but then, in the declaration, a place in England must be alledged, *pro formâ*. Generally speaking, the deed, upon the oyer of it, must be consistent with the declaration; but in these cases *propter necessitatem*, if the inconsistency be as little as possible, not to be regarded: as here, the contract, being of a voyage which was to be performed from Fort St. George to Great Britain, does import, that Fort St. George is different from Great Britain: and after taking time to consider of it, in Hilary term the plaintiff had his judgment, notwithstanding the objection. Why then, it all amounts to this: that where the action is substantially such a one as the Court can hold plea of, as the mode of trial is by jury, and as they must be called together by process directed to the sheriff of the county, matter of form is added to the fiction, to say it is in that county; and then the whole of the inquiry is, whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts, which follow the persons, but for injuries done by subject to subject; especially for injuries where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects within the jurisdiction of the Court? We know it is within every day's experience. I was embarrassed a great while to find out whether it was really meant to make a question of it. It is so in sea-batteries; but is it to be supposed that the judge thought it happened in Cheapside, when the party proves where the place was? In sea-batteries, the plaintiff often lays the injury to have been done in Middlesex, and then proves it to be done a thousand leagues distant, on the other side of the Atlantic. There are cases of offences on the high seas, where it is of necessity to lay in the declaration, that it was done upon the high seas; as the taking of a ship as a prize. A case of that sort occurs to my memory:—the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before lord chief justice Lee, and another before me, in which I quoted that determination, to shew that when the lords commissioners of prizes have given judgment, that is conclusive in the action; and likewise, when they have given judgment, it is conclusive as to the costs, whether they have given costs or not. But how is that action laid? It is necessary to be laid, that his ship was taken or seized on the high seas, *videlicet*, in Cheapside. Now is it seriously contended, that the judge and jury, and counsel, who tried the cause, fancied that ship was sailing in Cheapside? No; it is plain sense; the ship was taken upon the high-seas, for which an action lies in England; and you say in Cheapside, which is saying no more than that, I pray this action may be tried in London; it is plainly understood: but if you offer reasons of fact contrary to the truth of the case, there is no end of the embarrassment. At the last sittings, there were two actions brought by the Armenian merchants for assaults and trespass in the East-Indies, and they are very strong authorities. Serjeant Glynn said, that the defendant, Mr. Verelst, was ably assisted. So he was; and by men who would have taken the objection, if they thought it had been maintainable: and that was after this case had been argued once; yet the counsel did not think it could be supported. Mr. Verelst would have been glad to have made the objection: he would not have left it to a jury, if he could have stopped them short, and said, "You shall not try it at

all." I have had some actions before me, going rather further than these transitory actions; that is, going to cases which in England would be local actions: and I remember one, I think it was an action brought against captain Gambier, who by order of admiral Boscawen had pulled down the houses of some suttlers who supplied the navy and sailors with spirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the sailors' health were affected by it. They were pulled down. The captain was inattentive enough to bring the gentleman over in his own ship, who would never have got to England otherwise; and as soon as he came here, he was advised that he should bring an action against him. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses; and the case of Skinner and the East India Company was cited in support of the objection. On the other side, they produced, from a manuscript note, a case before lord chief justice Eyre, where he over-ruled the objection; and I over-ruled the objection upon this principle, that the reparation here was personal, and for damages; that there would be a failure of justice, for it was upon the coast of Nova Scotia, where there were no regular courts of justice, but if there had been, captain Gambier might never go there again; and that the reason of locality in such an action in England did not hold in this case. I quoted a case of an injury of that sort in the East-Indies, where even in a court of equity lord Hardwicke had directed satisfaction to be made in damages. That case was not fully argued; but this was argued, and there were large damages given against Gambier. I do not quote it for the opinion I was of there, because that opinion is very likely to be erroneous; but I quote it for this reason, that there were large damages given against captain Gambier: and though he was not at the expence, for he acted by the orders of admiral Boscawen, yet the admiral's representatives paid the expence, therefore their inclination was to have got rid of that verdict if they could; but there never was any motion for a new trial. I recollect another cause that came on before me: that was the case of admiral Palliser; there the very gist of the action was local. It was for destroying fishing-huts upon the Labrador coast. It was a nice question; when the Canadians settled, and when they had a right to it. It was a dispute between them and the fishermen in England. The cause went on a great way: the defendant would have turned it short at once, if he could have made that objection; but that objection was not made. There are no local courts among the Esquimaux Indians upon that part of the Labrador-coast. Whatever injury had been done there by any of the king's officers would have been altogether without redress, if that objection of locality would have held: and the consequence of that circumstance shews, that where the reason fails, even in actions which in England would be local actions, yet that does not hold to places beyond the seas within the king's dominions. That of admiral Palliser's went off upon a proposal of a reference, and ended by an award. But as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas: and when it is absolutely necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not make use of the truth of the case against that fiction, but you may make use of it to every other purpose. I am clearly of opinion not only against the objections made, but that there does not appear a question upon which the objections could arise.

The other judges declared themselves of the same opinion, and the Court ordered, "That the judgment should be affirmed."

In consequence of the above judgment, on Saturday the 4th day of February 1775, the gentlemen who were bail for governor Mostyn, to prevent his being taken in execution and carried to prison, were obliged to pay to Mr. Fabrigas the sum of 3,000*l.* for his damages, and 159*l.* which the Court amerced the governor in costs.

I have not ventured to alter the nonsensical passages in the former report of this case. The case in Shower, which is alluded to in p. 115, I suppose to be that of sir Richard Dutton *v.* Howell and others, executors of Witham, p. 24.

See the Case of Louisa Calderon v. General Picton, B. R. A. D. 1809.

See, also, the following Case of the Island of Grenada (Campbell *v.* Hall), and the Canadian Freeholder, as therein cited.

550. The Case of the Island of Grenada; in relation to the Payment of Four and one-half in the Hundred of Goods exported therefrom; between ALEXANDER CAMPBELL, esq. Plaintiff, and WM. HALL, esq. Defendant, in the Court of King's-Bench, before Lord Chief-Justice Mansfield: 15 GEORGE III. A. D. 1774.

[The following account of this Case is compiled from the Reports of Mr. Lofft and Mr. Henry Cowper, together with the short-hand writer's report of the Arguments of Mr. Macdonald (now Lord Chief Baron of the Exchequer), and Mr. Hargrave. Both those learned persons have assented to the publication of this Manuscript, which was imparted to me by Mr. Hargrave, with his accustomed kindness of assistance in the improvement of this Work.]

THIS cause came on to trial before the right honourable William lord Mansfield, on Friday the 2d of July, at the sittings after Trinity term, for the city of London, at Guildhall, when a special verdict was found. The proceedings in the cause were as follows:

'Trinity-term, in the 13th year of the reign of 'king George the third.

'*London* to wit, Be it remembered, that 'heretofore, that is to say, in Easter-term last 'past, before our lord the king at Westmins-'ter, came Alexander Campbell, esq. by Ben-'jamin Rosewell, his attorney, and brought in 'the court of our said lord the king then there, 'his bill against William Hall, esq. being in 'the custody of the marshal of the Marshalsea 'of our said lord the king, before the king him-'self, of a plea of trespass on the case; and 'there are pledges for the prosecution, to wit, 'John Doe and Richard Roe. Which said 'bill follows in these words, to wit, London, to 'wit, Alexander Campbell, esq. complains of 'William Hall, esq. being in the custody of the 'marshal of the Marshalsea of our lord the 'king himself, of a plea [of trespass on the 'case; and also] for that whereas the said Wil-'liam, on the first day of January, in the year 'of our Lord 1773, at London aforesaid, to wit, 'in the parish of St. Mary-le-Bow, in the 'ward of Cheap, was indebted to the said 'Alexander in the sum of 20*l.* of lawful money 'of Great Britain, for the like sum of money 'by the said William before that time had and 'received, for and to the use of the said Alex-'ander: and being so indebted, he the said 'William, in consideration thereof, afterwards, 'to wit, on the same day and year aforesaid, at 'London aforesaid, in the parish and ward 'aforesaid, undertook, and to the said Alex-'ander then and there faithfully promised, that 'he the said William would well and truly pay 'and satisfy the said Alexander the said sum of 'money whenever he the said William should 'be thereunto afterwards required. Yet the 'said William, not regarding his said promise 'and undertaking, but contriving and fraudu-'lently intending craftily and subtilly to de-'ceive the said Alexander in this behalf, hath not 'paid the said Alexander the said sum of money, 'or any part thereof, (although the said Wil-'liam afterwards, to wit, on the same day and 'year aforesaid, and often afterwards, at Lon-'don aforesaid, in the parish and ward afore-'said, was by the said Alexander required so 'to do) but to pay the same, or any part there-'of, to the said Alexander he the said William 'hath hitherto altogether refused, and still 'doth refuse, to the damage of the said Alex-'ander of 20*l.* And thereof he brings his 'suit, &c.'

"And now on this day, to wit, on Friday next after the morrow of the Holy Trinity, in this same term, (to which said day the said William had leave to imparle to the said bill, and then to answer, &c.) before our lord the king at Westminster, comes as well the said Alexander, by his attorney aforesaid, as the said William, by Robert Want, his attorney; and the said William defends the wrong and injury. When, &c. and says he did not undertake and promise in manner and form as the said Alexander Campbell above complains against him. And of this he puts himself upon the country; and the said Alexander doth the like.

"Therefore let a jury thereupon come before our lord the king on Wednesday next after three weeks of the Holy Trinity, by whom the truth of the matter may be better known, [and who neither are of kin to the aforesaid Alexander nor to the aforesaid William] to recognize the truth of the issue between the said parties, because as well the said Alexander as the said William, between whom the issue is, have put themselves upon the said jury. The same day is given to the party aforesaid.

"Afterwards the process being continued between the parties aforesaid, of the plea aforesaid, by the jury between them being respited (before our lord the king, at Westminster, until Saturday next after the morrow of All Souls then next following, unless the king's right trusty and well beloved William, lord Mansfield, his majesty's chief justice assigned to hold pleas before our lord the king himself,

shall first come on Friday the 2d day of July, at the Guildhall of the city of London, according to the form of the statute in such case made and provided) for default of jurors, because none of them did appear.

"At which day, before our lord the king at Westminster, came the aforesaid Alexander Campbell, by the said Benjamin Rosewell, his attorney aforesaid. And the said chief justice, before whom the issue was tried, sent hither his record had in these words, to wit, "'Afterwards, that is to say, on the day and at the place within contained, before the right honourable William, lord Mansfield, the chief justice within written, John Way, gentleman, being associated unto him according to the form of the statute in that case made and provided, comes as well the within named Alexander Campbell, esq. by his attorney within named, as the within named William Hall, esq. by his attorney within mentioned.

"'And the jurors of the jury within mentioned being summoned, some of them, that is to say, Anthony Highmore, Peter Bostock, David Chambers, James La Motte, John Wilkinson, Joshua Bedshaw, and Silvanus Grove, come, and are sworn upon that jury: And because the residue of the jurors of the same jury do not appear, therefore other persons, of those standing by the court, by the sheriffs of the city and county aforesaid, at the request of the said Alexander, and by the command of the said chief justice, are now newly set down, whose names are filed in the within written pannel, according to the form of the statute in that case made and provided. Which said jurors, so newly set down, that is to say, John Lee, William Kersil, Charles Hougham, John German, and Richard Hatt, being required, come, who, together with the said other jurors before impannelled, and sworn to declare the truth of the within contents, being elected, tried, and sworn, upon their oaths say,

"'That the island of Grenada, in the West-Indies, was in the possession of the French king until it was conquered by the British arms in 1762. And that during that possession there were certain customs and impost duties collected upon goods imported and exported into and out of the said island, under the authority of his most Christian majesty. And that in the said year 1762, the said island was conquered by the king of Great Britain, then in open war with the French king: and that the said island of Grenada surrendered to the British arms upon the same articles of capitulation as had been before granted to the inhabitants of the island of Martinico, upon the surrender thereof to the British arms. And that in the articles of capitulation demanded by and granted to the inhabitants of the said island of Martinico, upon the surrender thereof to the British arms, dated the 7th day of February, 1762, are the following articles, that is to say,

"'Article the fourth—They shall be strictly neuter, and shall not be obliged to take arms against his most Christian majesty; nor even against any other power.

"'Answer—They become subjects of his Britannic majesty, and must take the oath of allegiance, but shall not be obliged to take arms against his most Christian majesty until a peace may determine the fate of the island.

"'Article the fifth—They shall preserve their civil government, their laws, customs, and ordinances: justice shall be administered by the same officers who are now in employment; and there shall be a regulation made for the interior police between the governor of his Britannic majesty and the inhabitants: and in case that at the peace the island shall be ceded to the king of Great Britain, it shall be allowed to the inhabitants to preserve their political government, and to accept that of Antigua or St. Christopher's.

"'Answer—They become British subjects, (as in the preceding article) but shall continue to be governed by their present laws until his majesty's pleasure be known.

"'Article the sixth—The inhabitants, as also the religious orders, of both sexes, shall be maintained in the property of their effects, moveable and immoveable, of what nature soever, and shall be preserved in their privileges, rights, honours, and exemptions; their free negroes and mulattoes shall have the entire enjoyment of their liberty.

"'Granted, in regard to the religious orders—The inhabitants, being subjects of Great Britain will enjoy their properties, and the same privileges as in the other his majesty's Leeward islands.'

"'Article the seventh—They shall not pay to his majesty any other duties than those which have been paid hitherto to his most Christian majesty; and the capitation of negroes upon the same footing it is paid at present, without any other charges or imposts: and the expences of justice, pensions to curates, and other occasional expences, shall be paid by the domain of his Britannic majesty, as they were by that of his most Christian majesty.'

"'Answered in the sixth article, as to what regards the inhabitants.

"'Article the eleventh—No other than the inhabitants resident in this island shall, till the peace, possess any estates, either by acquisition, agreement or otherwise: but in case at the peace the country shall be ceded to the king of Great Britain, then it shall be permitted to the inhabitants, who shall not be willing to become his subjects, to sell their estates, moveable and immoveable, to whom they please, and retire where they shall think proper; in which case they shall be allowed convenient time. [Answer.] All subjects of Great Britain may possess any lands or houses by purchase. The remainder of this article granted, provided they sell to British subjects.'

"And the jurors aforesaid, upon their oaths aforesaid further say—That in the definitive

treaty of peace and friendship between his Britannic majesty, the most Christian king and the king of Spain, concluded at Paris the 10th day of February 1763, amongst others are the following articles:

" ' Article the fourth—His most Christian ' majesty renounces all pretensions which he ' has heretofore formed or might form to Nova ' Scotia, or Acadia, in all its parts; and guar- ' anties the whole of it and with all its depen- ' dancies to the king of Great Britain: more- ' over his most Christian majesty cedes and ' guaranties to his said Britannic majesty in ' full right Canada, with all its dependancies, ' as well as the island of Cape Breton, and all ' the other islands and coasts in the gulph and ' river of St. Lawrence. And in general every ' thing that depends on the said countries, ' lands, islands and coasts, with the sovereignty, ' property, possession, and all rights acquired ' by treaty or otherwise, which the most ' Christian king and the crown of France have ' had until now over the said countries, islands, ' lands, places, coasts, and their inhabitants: ' so that the most Christian king cedes and ' makes over the whole to the said king and to ' the crown of Great Britain; and that in the ' most ample manner and form without re- ' striction, and without any liberty to depart ' from the said cession and guaranty under ' any pretence, or to disturb Great Britain in ' the possessions above mentioned.—His Bri- ' tannic majesty on his side agrees to grant the ' liberty of the Catholic religion to the inhabi- ' tants of Canada: he will consequently give ' the most precise and effectual orders, that his ' new Roman Catholic subjects may profess the ' worship of their religion, according to the ' rights of the Romish church, so far as the ' laws of Great Britain can permit—His Bri- ' tannic majesty further agrees that the French ' inhabitants or others who had been subjects ' of the most Christian king in Canada, may ' retire with all safety and freedom wherever ' they shall think proper, and may sell their ' estates provided it be to subjects of his Bri- ' tannic majesty, and bring away their effects ' as well as their persons without being re- ' strained in their emigration under any pre- ' tence, except that of debts or criminal prose- ' cutions. The term limited for this emigra- ' tion, shall be fixed to the space of eighteen ' months to be computed from the day of the ' exchange of the ratifications of the present ' treaty.'

" ' Article the ninth—The most Christain ' king cedes and guaranties to his Britannic ' majesty in full right the islands of Grenada, ' with the same stipulations in favour of the in- ' habitants of this colony, inserted in the 4th ' article for those of Canada. And the parti- ' tion of the islands called Neutral is agreed ' and fixed; so that those of St. Vincent, Do- ' minica, and Tobago, shall remain in full right ' to Great Britain, and that of St. Lucia shall ' be delivered to France, to enjoy the same ' likewise in full right. And the high con- ' tracting parties guaranty the partition so ' stipulated.'

" And the jurors aforesaid upon their oaths aforesaid further say, that his majesty, by his royal proclamation bearing date at Westminster the 7th day of October, 1763, amongst other things declared as follows, ' And whereas ' it will greatly contribute to the speedy settling ' our said new governments that our loving ' subjects should be informed of our paternal ' care for the security of the liberties and pro- ' perties of those who are and shall become in- ' habitants thereof; we have thought fit to ' publish and declare, by this our proclamation, ' that we have, in the letters patent under our ' great seal of Great Britain, by which the said ' governments are constituted, given express ' power and direction to our governors of our ' said colonies respectively, that, so soon as the ' state and circumstances of the said colonies ' will admit thereof, they shall, with the advice ' and consent of the members of our council, ' summon and call general assemblies within ' the said governments respectively, in such ' manner and form as is used and directed in ' those colonies and provinces in America, ' which are under our immediate government. ' —And we have also given power to the said ' governors, with the consent of our said coun- ' cils and the representatives of the people, so ' to be summoned as aforesaid, to make con- ' stitutions and ordain laws, statutes and or- ' dinances, for the public welfare and good go- ' vernment of our said colonies and of the peo- ' ple and inhabitants thereof, as near as may ' be, agreeable to the laws of England, and ' under such regulations and restrictions as are ' used in other colonies. And in the mean time ' and until such assemblies can be called as ' aforesaid, all persons inhabiting in, or resort- ' ing to our said colonies, may confide in our ' royal protection for the enjoyment of the be- ' nefit of the laws of our realm of England: ' for which purpose we have given power under ' our great seal to the governors of our said co- ' lonies respectively, to erect and constitute, ' with the advice of our said councils respec- ' tively, courts of judicature and public justice ' within our said colonies, for the hearing and ' determining all causes as well criminal as civil ' according to law and equity, and as near as ' may be agreeable to the laws of England; ' with liberty to all persons who may think ' themselves aggrieved by the sentences of such ' courts in all civil causes to appeal, under the ' usual limitations and restrictions, to us in our ' privy council.'

" And the jurors aforesaid, upon their oaths aforesaid, further say—That his majesty by his royal proclamation bearing date at Westminster, the 26th day of March 1764, amongst other things did also declare as follows, ' Whereas we have taken into our considera- ' tion the great benefit that will arise to the ' commerce of our kingdoms and the interest ' of our subjects, from the speedy settlement ' of the islands of Grenada, the Grenadines,

'Dominica, St. Vincent and Tobago, we do 'therefore think fit, with the advice of our 'privy council, to issue this our royal proclamation, to publish and declare to our loving 'subjects that we have with the advice of our 'said privy council, given the necessary powers 'and directions for an immediate survey, and 'division into proper parishes and districts, of 'such of the said islands as have not hitherto 'been so surveyed and divided; and for laying 'out such lands in the said islands as are in our 'power to dispose of, into allotments for plantations of different size and extent, according 'as the nature of the land shall be more or less 'adapted to the growth of sugar, coffee, cocoa, 'cotton, or other articles of beneficial culture; reserving to us, our heirs and successors, 'such parts of the said islands as shall be necessary for erecting fortifications thereon, and 'for all other military purposes; for glebes 'for ministers, allotments for school-masters, 'for wood-lands, high-roads, and all other 'public purposes: and also reserving such 'lands in our islands of Dominica and St. 'Vincent, as at the time of the surrender 'were and still are in the possession of the 'French, inhabitants of the said islands; 'which lands it is our will and pleasure should 'be granted to such of the said inhabitants as 'shall be inclined to accept the same upon 'leases for terms absolute, or for renewable 'terms upon certain conditions, and under 'proper restrictions. And we do hereby farther 'publish and declare, that the allotments for 'plantations in our islands of Grenada, the 'Grenadines, Tobago and St. Vincent, shall 'contain from one hundred to three hundred 'acres, with some few allotments in each island 'of five hundred acres; and that the allotments in our island of Dominica, which is 'represented to be not so well adapted to the 'cultivation of sugar, and which from its 'situation requires in policy to be well peopled 'with white inhabitants, shall be in general from 'fifty to an hundred acres. That each purchaser 'of lands which have been cleared and improved, shall within the space of three months 'from the date of the grant settle and constantly 'keep upon the lot purchased one white man 'or two white women, for every hundred 'acres contained in the said lot, and in default 'thereof shall be subject to the payment of '20*l.* per annum for every white woman, and '40*l.* per annum for every white man, that 'shall be wanting to complete the number. 'That the purchaser of uncleared lands shall 'clear and cultivate one acre in every twenty 'in each year, until half the land so purchased 'shall be cleared, and in default thereof shall 'pay 5*l.* per annum for every acre not cleared 'pursuant to such condition. And such purchaser shall also be obliged to settle and constantly keep upon the lot so purchased one 'white man or two white women for every 'hundred acres as the same shall be cleared. 'That each purchaser, besides the purchase 'money, shall be subject to the paytment of an

'annual quit-rent to us, our heirs and successors, 'of sixpence per acre, under the penalty of 5*l.* 'per acre upon non-payment thereof. Such 'quit-rents in the case of the purchase of cleared lands to commence from the date of the 'grant, and the first payment to be made at the 'expiration of the first year; and in case of the 'purchase of the uncleared lands, such quit-rents to commence at the expiration of twelve 'months from the time each acre is cleared. 'That in case of failure in the payment of the 'purchase money in the manner above directed, 'the purchaser shall forfeit all right to the 'lands purchased.'

"And the jurors aforesaid, upon their oaths aforesaid, further say, that his majesty by his letters patent, under his writ of privy seal bearing date, at Westminster, the 9th day of April 1764, appointed Robert Melville, esq. captain general and governor in chief in and over the islands of Grenada, the Grenadines, Dominica, St. Vincent, and Tobago, in America; and of all other islands and territories adjacent thereto: which said letters patent are as follows.—'George 'the third by the grace of God, of Great Britain, France and Ireland, king, defender of 'the faith, &c. To our trusty and well beloved Robert Melville, esq. greeting: whereas 'we did by our letters patent under our great 'seal of Great Britain, bearing date at Westminster, the 4th day of April, in the first year 'of our reign, constitute and appoint Charles 'Pinfold, esq. captain-general, and governor in 'chief in and over our islands of Barbadoes, 'St. Lucia, Dominica, St. Vincent, Tobago, and 'the rest of our islands, colonies and plantations in America, commonly called or known 'by the name of our Carribee islands lying 'and being to the windward of Guadaloupe, and 'which then were or after should be under our 'subjection and government, during our will 'and pleasure, as by the said recited letters patent, relation being thereunto had, may more 'fully and at large appear: now know you that 'we have revoked and determined, and by these 'presents do revoke and determine, such part 'and so much of the said recited letters patent, 'and every clause, article and thing, therein 'contained, as relates to, or mentions, the 'islands of St. Lucia, Dominica, St. Vincent, 'and Tobago. And further know you, that 'we, reposing especial trust and confidence in 'the prudence, courage and loyalty, of you 'the said Robert Melville, of our especial grace, 'certain knowledge, and mere motion, have 'thought fit to constitute and appoint, and by 'these presents do constitute and appoint, you 'the said Robert Melville to be our captain-general and governor in chief, in and over our 'islands of Grenada, the Grenadines, Dominica, St. Vincent, and Tobago, in America, 'and of all other islands and territories adjacent thereto, and which now are, or heretofore have been, dependent thereupon. And 'we do hereby require and command you to 'do and execute all things in due manner, that 'shall belong to your said command, and the

'trust we have reposed in you according to the 'several powers and directions granted or ap-'pointed you by this present commission, and 'the instructions and authorities herewith 'given to you, or by such further powers, in-'structions and authorities, as shall at any 'time hereafter be granted or appointed you, 'under our signet and sign manual, or by our 'order in our privy council, and according to 'such reasonable laws and statutes as shall 'hereafter be made and agreed upon by you, 'with the advice and consent of the council 'and assembly of the islands and plantations 'under your government, in such manner and 'form as is hereinafter expressed. And our 'will and pleasure is that you the said Robert 'Melville, do, after the publication of these our 'letters patent, and after the appointment of 'our council for our said islands, in such man-'ner and form as is prescribed in the instruc-'tions which you will herewith receive, in the 'first place, take the oaths appointed to be 'taken by an Act passed in the first year of the 'reign of king George the first, entitled, An 'Act for the further security of his majesty's 'person and government, and the succession 'of the crown in the heirs of the late princess 'Sophia, being Protestants; and for extin-'guishing the hopes of the pretended prince of 'Wales and his open and secret abettors: as 'also that you make and subscribe the declara-'tion mentioned in an act of parliament made 'in the 25th year of the reign of king Charles 'the second, intitled An Act for preventing 'dangers which may happen from Popish re-'cusants.—And likewise that you take the 'oath usually taken by governors in the other 'colonies for the due execution of the office 'and trust of our captain-general and governor 'in chief in and over our said islands, and for 'the due and impartial administration of jus-'tice.—And farther that you take the oath re-'quired to be taken by the governors of the plan-'tations to do their utmost, that the several laws 'relating to trade and the plantations be duly 'observed; which said oaths and declaration 'our council of our said islands, or any three 'of the members thereof, have hereby full 'power and authority, and are required to ten-'der and administer to you: and in your ab-'sence to our lieutenant governor of the said 'islands, and to our lieutenant-governors of 'each of our said islands respectively, the said 'oaths mentioned in the said act entitled, An 'Act for the further security of his majesty's 'person and government, and the succession of 'the crown in the heirs of the late princess 'Sophia, being Protestants, and for extinguish-'ing the hopes of the pretended prince of 'Wales, and his open and secret abettors: as 'also cause them to make and subscribe the 'aforesaid declaration, and to administer unto 'them the usual oaths for the due execution 'of their places and trusts.—And we do further 'give and grant unto you the said Robert Mel-'ville, full power and authority from time to 'time, and at any time hereafter, by yourself, 'or by any other to be authorized by you in 'this behalf, to administer and give the oaths 'mentioned in the said act, for the further se-'curity of his majesty's person and government, 'and the succession of the crown in the heirs 'of the late princess Sophia, being Protestants, 'and for extinguishing the hopes of the pre-'tended prince of Wales, and his open and 'secret abettors, to all and every such person 'and persons as you shall think fit, who shall 'at any time or times pass into any of our said 'islands, or shall be resident or abiding there.

"'And we do hereby authorize and impower 'you to keep and use the public seal, which 'will be herewith delivered to you, or shall 'hereafter be sent to you, for sealing all things 'whatsoever that shall pass the great seal of 'our said island.

"'And we do hereby give and grant unto 'you the said Robert Melville, full power and 'authority, with the advice and consent of our 'said council to be appointed as aforesaid, as 'soon as the situation and circumstances of our 'islands under your government will admit 'thereof, and when and as often as need shall 'require, to summon and call general assem-'blies of the freeholders and planters jointly or 'severally within any of the islands under your 'government, in such manner as you in your 'discretion shall judge most proper, or ac-'cording to such further powers, instructions 'or authorities, as shall be at any time here-'after granted or appointed you under our 'signet and sign manual, or by our order in 'our privy council.

"'And our will and pleasure is, that the per-'sons thereupon duly elected by the major 'part of the freeholders of the respective pa-'rishes or precincts, and so returned, shall be-'fore their sitting take the oaths mentioned in 'the said act entitled, An Act for the further 'security of his majesty's person and govern-'ment, and the succession of the crown in the 'heirs of the late princess Sophia, being Pro-'testants, and for extinguishing the hopes of the 'pretended prince of Wales, and his open and 'secret abettors: as also make and subscribe the 'aforementioned declaration, which oaths and 'declaration you shall commissionate fit persons 'under the public seal of those our islands to 'tender and administer unto them: and until 'the same shall be so taken and subscribed, no 'person shall be capable of sitting, though 'elected. And we do hereby declare, that the 'persons so elected and qualified shall be called 'and deemed the assembly of that island within 'which they shall be chosen, or the assembly 'of our said islands in general. And that you 'the said Robert Melville, by and with the 'advice and consent of our said council and 'assembly or assemblies, or the major part of 'them, shall have full power and authority to 'make, constitute, and ordain laws, statutes, and 'ordinances, for the public peace, welfare, and 'good government of our said islands, jointly 'or severally, and of the people and inha-'bitants thereof, and such others as shall resort

'thereunto, and for the benefit of us, our heirs 'and successors. Which said laws, statutes, 'and ordinances, are not to be repugnant, but, 'as near as may be, agreeable to the laws and 'statutes of this our kingdom of Great Britain. 'Provided, that all such laws, statutes, and or-'dinances, of what nature or duration soever, 'be within three months or sooner after the 'making thereof, transmitted to us, under our 'seal of our said islands, for our approbation or 'disallowance of the same; as also duplicates 'thereof by the next conveyance.

"'And in case any or all of the said laws, 'statutes, and ordinances, not before confirmed 'by us, shall at any time be disallowed, and 'not approved, and so signified by us, our 'heirs and successors, under their signet or 'sign manual, or by order of our or their privy 'council, unto you the said Robert Melville, or 'to the commander in chief of the said islands 'for the time being, then such and so many of 'the said laws, statutes, and ordinances, as 'shall be so disallowed and not approved, shall 'from thenceforth cease, determine, and be-'come utterly void and have no effect, any 'thing to the contrary thereof notwithstanding.

"'And to the end that nothing may be 'passed or done by our said council or assem-'blies to the prejudice of us, our heirs and suc-'cessors, we will and ordain that you, the said 'Robert Melville, shall have and enjoy a nega-'tive voice in the making and passing all laws, 'statutes, and ordinances, as aforesaid. And 'that you shall and may likewise, from time to 'time, as you shall judge necessary, adjourn, 'prorogue or dissolve, all general assemblies as 'aforesaid.'

"And the jurors aforesaid, on their oaths aforesaid, farther say, That his excellency Robert Melville, esq. arrived in Grenada on the 14th of December, 1764, and in consequence of the last mentioned letters patent, took upon him the government of the same, and the other islands therein named. And that, in consequence of the last mentioned letters patent, a meeting of the governor, council, and assembly of the said island of Grenada was held there in the latter end of the year 1765.

"And that his majesty, by his letters patent under the great seal of Great Britain, bearing date at Westminster the 20th day of July, in the fourth year of his reign, and in the year of our Lord 1764, did order, direct and appoint, that an impost or custom of four and a half per cent. in specie should, from and after the 29th day of September then next ensuing, be raised and paid to his heirs and successors, for and upon all dead commodities of the growth and produce of the said island of Grenada that should be shipped off from the same, in lieu of all customs and impost duties to that time collected upon goods imported and exported into and out of the said island, under the authority of his most Christian majesty. Which said letters patent are in the words following: 'George the third, by the grace of God, of 'Great Britain, France, and Ireland, king, de-'fender of the faith, &c. To all to whom these 'presents shall come, greeting: whereas a 'certain impost or custom of four pounds 'and a half in specie for every hundred weight 'of the commodities of the growth and produce 'of the island of Barbadoes, and of the Lee-'ward Carribbee islands in America, shipped 'off from the same, or any of them, is paid 'and payable to us, our heirs and successors; 'and whereas the island of Grenada was con-'quered by us during the late war, and has 'been ceded and secured to us by the late treaty 'of peace; and whereas it is reasonable and 'expedient, and of importance to our other 'sugar islands, that the like duty should take 'place in our said island of Grenada; we have 'thought fit, and our royal will and pleasure is, 'and we do hereby, by virtue of our preroga-'tive royal, order, direct and appoint, that an 'impost or custom of four and a half per 'cent. in specie shall, from and after the 29th 'day of September next ensuing the date of 'these presents, be raised and paid to us, our 'heirs and successors, for and upon all dead 'commodities of the growth or produce of our 'said island of Grenada that shall be shipped 'off from the same; in lieu of all customs and 'impost duties hitherto collected upon goods 'imported and exported into and out of the said 'island under the authority of his most Chris-'tian majesty: and that the same shall be col-'lected, paid, and levied in such manner and 'by such means, and under such penalties and 'forfeitures as the said impost or custom of 'four and a half per cent. is, and may now be 'collected, paid, and levied in our said island 'of Barbadoes, and our said Leeward islands.

"'And we do hereby require and command 'the present governor or commander in chief, 'and the governor or commander in chief for 'the time being, and the officers of our cus-'toms in the said island of Grenada, now and 'hereafter, for the time being, and all others 'whom it may concern, that they do respec-'tively take care to collect, levy, and to receive 'the said impost or custom, according to our 'royal will and pleasure, signified by these 'presents.

"'And whereas a poll-tax was levied and 'paid by the inhabitants of our said island of 'Grenada whilst it was under subjection to his 'most Christian majesty, it is our royal will 'and pleasure that such poll-tax as was levied, 'collected and paid by the inhabitants of the 'said island whilst it was under subjection to 'his most Christian majesty, shall be continued 'therein during our royal will and pleasure; 'and that the same shall be collected, levied, 'and paid to us, our heirs and successors, at 'such times and in such manner, and by such 'ways and means, and under such penalties 'and forfeitures, and upon such terms, and 'with such privileges and exemptions as the 'same was collected, levied, and paid whilst the 'said island was under such subjection to his 'most Christian majesty, inasmuch as the same 'are not contrary to the laws of Great Britain.

" ' And that the account and number of the ' inhabitants and slaves therein shall be, from ' time to time, kept and delivered in by such ' person and persons, and at such time and ' times, and under such regulations, sanctions, ' penalties and forfeitures respectively, as and ' under which the same were taken, kept and ' delivered in during the time the said island ' was subject to his most Christian majesty, as ' aforesaid, in as much as the same are not con- ' trary to the laws of Great Britain.

" ' And we do hereby require and command ' the present governor or commander in chief, ' for the time being, of our said island of ' Grenada, and the several officers of our re- ' venue, now, and for the time being, and all ' others whom it may concern, that they do ' respectively take care to collect, levy, and re- ' ceive the money arising and to arise by the ' said tax, and to pay and account for the same ' to the receiver general and collector of our ' casual revenue in our said island, for the time ' being, according to our royal will and plea- ' sure signified by these presents."

" Which said letters patent were afterwards duly registered in the said island, and were publicly announced by his excellency Robert Melville, esq. in the month of January 1765, immediately succeeding his arrival in the said island of Grenada.

" And the jurors aforesaid, upon their oaths aforesaid, farther say, that the said duty of four and a half per cent. before the making of the said last mentioned letters patent, was and yet is paid in the island of Barbadoes, and the Leeward Caribbee islands, in pursuance or by virtue of acts of assembly passed in the same islands hereinafter set forth.

" And the jurors aforesaid, upon their oaths aforesaid, farther say, that by an act of assembly of the island of Barbadoes, in the West-Indies, passed in the said island on the 19th day of September, 1663, intitled, ' An act for ' settling an impost on the commodities of the ' growth of that island,' it is amongst other things recited and enacted as follows:

' Whereas our late sovereign lord Charles ' the first, of blessed memory, did, by his let- ' ters patent under the great seal of England, ' grant and convey unto James, earl of Car- ' lisle, and his heirs for ever, the propriety of ' this island of Barbadoes; and his sacred ma- ' jesty that now is having by purchase in- ' vested himself in all the rights of the said earl ' of Carlisle, and in all other rights which any ' other person may claim from that patent, or any ' other, and thereby more immediately and par- ' ticularly hath [having] taken this island unto ' his royal protection: and his most excellent ' majesty having, by letters patent under the ' great seal of England, bearing date the 12th of ' June, in the 15th year of his reign, appointed ' his excellency Francis, lord Willoughby of ' Parham, captain general and chief governor ' of Barbadoes, and all the Carribbee islands, ' with full power and authority to grant, con- ' firm, and assure to the inhabitants of the same, ' and their heirs for ever, all lands, tenements, ' and hereditaments, under his majesty's great ' seal appointed for Barbadoes and the rest of ' the Carribbee islands, as, relation being there- ' unto had, may and doth more at large appear.

" ' And whereas, by virtue of the said earl of ' Carlisle's patent, divers governors and agents ' have been sent over hither with authority to ' lay out, set, grant, or convey in parcels the ' land within this island, to such persons as ' they should think fit, which was by them, in ' their respective times, as much as in them ' lay, accordingly performed. And whereas ' many have lost their grants, warrants, and ' other evidences for the said lands; and others, ' by reason of the ignorance of those times, ' want sufficient and legal words to create in- ' heritances to them and their heirs; and others ' that never recorded their grants and war- ' rants; and others that can make no proof of ' any grants or warrants they ever had for their ' lands, and yet have been long and quiet pos- ' sessors of the same, and bestowed great ' charges thereon. And whereas the acknow- ' ledgment of 40 pounds of cotton per head, ' and other taxes and compositions formerly ' raised to the earl of Carlisle was held very ' heavy. For a full remedy for all the defects ' afore related, and quieting the possessions, ' and settling the tenures of the inhabitants of ' this island, be it enacted by his excellency ' Francis, lord Willoughby of Parham, and ' his council, and gentlemen of the assembly, ' and by the authority of the same, that, not- ' withstanding the defects afore related, all the ' now rightful possessors of lands, tenements ' and hereditaments, within this island, accord- ' ing to the laws and customs thereof, may at ' all times repair unto his excellency for the ' full confirmation of their estates and tenures, ' and then and there shall and may receive ' such full confirmation and assurance, under ' his majesty's great seal for this island, as ' they can reasonably advise or desire, accord- ' ing to the true intent and meaning of this act.

" ' And be it farther enacted, by the authority ' aforesaid, that all and every the payments of ' 40 pounds of cotton per head, and all other ' duties, rents, and arrears of rents, which have ' or might have been levied, be from henceforth ' absolutely and fully released and made void; ' and that the inhabitants of this island have ' and hold their several plantations to them and ' their heirs for ever, in free and common soc- ' cage. Yielding and paying, therefore, at the ' feast of St. Michael every year, if the same ' shall be lawfully demanded, one ear of Indian ' corn, to his majesty, his heirs and successors ' for ever, in full and free discharge of all rents ' and services for the future, in consideration of ' the release of the said 40 pounds, and in con- ' sideration of the confirmation of all estates in ' this island, as aforesaid, and in acknowledg- ' ment of his majesty's grace and favour in ' sending to and appointing over us his said ' excellency, of whose prudence and moderate ' government we have heretofore had large

'experience, and do rest most assured thereof 'for the future.

"'And forasmuch as nothing conduceth more 'to the peace and prosperity of any place, and 'the protection of every single person therein, 'than that the public revenue thereof may be 'in some measure proportioned to the public 'charges and expences; and also well weigh-'ing the great charges that there must be of 'necessity in the maintaining the honour and 'dignity of his majesty's authority here; the 'public meeting of the sessions; the often at-'tendance of the council; the reparation of the 'forts; the building a sessions-house and a 'prison; and all other public charges incum-'bent on the government; do, in consideration 'thereof, give and grant unto his majesty, his 'heirs and successors for ever, and do most 'humbly desire your excellency to accept 'these our grants: and we humbly pray your 'excellency that it may be enacted, and be it 'enacted, by his excellency Francis, lord Wil-'loughby of Parham, captain general and 'chief governor of this island of Barbadoes, 'and all other the Carribbee islands, and by and 'with the consent of the council, and the gen-'demen of the assembly, representatives of this 'island, and by authority of the same, that an 'impost or custom be, from and after publica-'tion hereof, raised upon the native commodi-'ties of this island, after the proportions and in 'manner and form as is hereafter set down and 'appointed, that is to say, upon all dead com-'modities of the growth or produce of this 'island, that shall be shipped off the same, shall 'be paid to our sovereign lord the king, his 'heirs and successors for ever, four and a half 'in specie for every five score.'

"And the jurors aforesaid, upon their oaths aforesaid, farther say, that, by an act of assembly of the island of St. Christopher, in the West Indies, passed in the said island, in the year of our Lord 1727, intitled, 'An Act to 'subject all goods and commodities of the 'growth and produce of the late French part 'of the island of St. Christopher, which are or 'shall be shipped off from the said island, to 'the payment of the four and a half per cent. 'duty, and to ascertain at what places all the 'duties of four and a half per cent. shall be 'received.'

"It is, amongst other things, recited and enacted as follows: 'Whereas in and by an act 'or statute of the general council and general 'assembly of the Leeward Carribbee islands, 'in America, called or known by the names of 'the island of Nevis, St. Christopher, Antigua, 'and Montserrat, made in or about the year of 'our Lord 1663, and entitled, An Act for set-'ting an impost on the commodities of the 'growth of the said Leeward Carribbee islands, 'a certain duty or custom of four pounds and 'a half in specie for every hundred weight of 'the commodities of the growth and produce 'of the said Leeward islands then afterwards 'to be shipped off from the said islands, or any 'of them, was given and granted to our late 'sovereign lord Charles the 2d, then king of 'England, Scotland, France, and Ireland, and 'to his heirs and successors for ever, as in and 'by the same act or statute, relation being 'thereunto had, may more fully and at large 'appear.'

"'And whereas since the making of the said 'statute, to wit, in and by the late treaty of peace 'and friendship concluded at Utrecht between 'the two crowns of Great Britain and France, 'an entire cession was made by the most Chris-'tian king Lewis the 14th to our late sovereign 'lady Anne, queen of Great Britain, France, 'and Ireland, and to her crown for ever, of all 'that part of the island of St. Christopher for-'merly belonging to the crown of France; so 'that the same late French part of the said island 'of St. Christopher is now become parcel of the 'realm of Great Britain, and is under the sole 'dominion and government of the crown of the 'same.

"'And whereas some doubts have arisen, whe-'ther the said late French part, so yielded up as 'aforesaid to the said crown of Great Britain, be 'subject to the payment of the aforesaid duties 'of four and a half per cent. so as aforesaid, in 'and by the said recited act, given and granted 'to our said late sovereign lord king Charles 'the 2d, his heirs and successors; for avoid-'ing, therefore, all disputes and controversies 'which may for the future arise within the 'same island, touching or concerning the pay-'ment of the same duties, we, your majesty's 'most dutiful and loyal subjects John Hart, 'esq. your majesty's captain general, and go-'vernor in chief of all your majesty's Leeward 'Carribbee islands in America, and the council 'and assembly of the said island of St. Chris-'topher, do humbly beseech your majesty that 'it may be enacted and declared, and it is here-'by enacted and declared, by the king's most 'excellent majesty, by and with the advice and 'consent of the captain general and governor 'in chief of the said Leeward Carribbee islands, 'in America, and the council and assembly of 'the said island of St. Christopher, and by the 'authority of the same, that all and singular 'the goods and commodities of the growth and 'produce of the said late French part of the 'said island of St. Christopher, and which at 'this time are, or hereafter shall be, shipped 'off from thence, in order to be carried to any 'other port or place whatsoever, are, and for 'ever after shall be, subject and liable, and the 'same goods and commodities, and every of 'them, are hereby made subject and liable, to 'the payment of the aforesaid duties and cus-'toms of four pounds and half a pound per 'cent. in specie, to your most sacred majesty, 'your heirs and successors, in such manner 'and sort as the goods and commodities of the 'growth and produce of that part of the said 'island known and called by the name of the 'English part thereof, have heretofore and 'hitherto been subjected and liable unto by 'force and virtue of the above recited act or 'statute.'

" And the jurors aforesaid, upon their oaths aforesaid, farther say, that by an act of assembly of the island of Nevis, in the West Indies, passed in the said island in the year of our Lord 1664, entitled, 'An Act for settling an 'impost on the commodities of the growth of 'this island,' it is, amongst other things, recited and enacted as follows:

" 'Whereas our late sovereign lord Charles 'the 1st, of blessed memory, did, by his letters 'patent under the great seal of England, grant 'and convey unto James, earl of Carlisle, and 'his heirs for ever, the propriety of this island 'of Nevis; and his sacred majesty that now is 'having by purchase invested himself in all 'the rights of the said earl of Carlisle, and in 'all other rights which any other person may 'claim from that patent, or any other, and 'thereby more immediately hath [having] 'taken this island and the rest of the Carribbee 'islands into his royal protection: and his most 'excellent majesty having, by letters patent 'under the great seal of England, bearing date 'the 12th day of June, in the 15th year of his 'reign, appointed his excellency Francis, lord 'Willoughby of Parham, captain general and 'chief governor of Barbadoes, and the rest of 'the Carribbee islands, with full power and 'authority to grant, confirm, and assure to the 'inhabitants of the same, and their heirs for 'ever, all lands, tenements, and hereditaments, 'under his majesty's seal appointed for Barba- 'does, and the rest of the Carribbee islands, as, 'relation being thereunto had, may and doth 'more at large appear.

" 'And whereas, by virtue of the said earl 'of Carlisle's patent, divers governors and 'agents have been sent over hither with au- 'thority to lay out, set, grant, or convey in 'parcels the land within this island, to such 'persons as they should think fit, which was 'by them, in their respective times, as much 'as in them lay, accordingly performed. And 'whereas many have lost their grants, war- 'rants, or other evidences for their said lands; 'and others, by reason of the ignorance of 'those times, want sufficient and lawful words 'to create inheritances in them and their heirs; 'and others that never recorded their grants 'and warrants; and others that can make no 'proof of any grants or warrants they ever 'had for their lands, and yet have been long 'and quiet possessors of the same, and be- 'stowed great charges thereon. And we do 'humbly pray your excellency that it might 'be enacted, and be it enacted, by his excel- 'lency Francis, lord Willoughby of Parham, 'captain general and chief governor of the 'island of Barbadoes, and the rest of the Car- 'ribbee islands, and by and with the advice and 'consent of the council and gentlemen of the 'assembly, representatives of this island, and 'by the authority of the same, that an impost 'or custom be, from and after the publication 'hereof, raised upon the native commodities of 'this island, after the proportion and in manner 'and form as is hereafter set down and ap- 'pointed: that is to say, upon all commodities 'of the growth or production of this island that 'shall be shipped off the same, shall be paid to 'our sovereign lord the king, his heirs and 'successors for ever, four and a half in specie 'for every [five] score.'

" And the jurors aforesaid, upon their oaths aforesaid, farther say, that by an act of assembly of the island of Antigua, in the West Indies, passed in the said island on the 19th of May, in the year of our Lord 1668, entitled, 'An Act for the settlement of the cus- 'tom or duty of four and a half per cent,' it is, amongst other things, recited and enacted as follows: 'Whereas by reason of the late 'unhappy war which arose betwixt his royal 'majesty Charles the second, king of Great 'Britain, France, and Ireland, &c. and the 'most Christian king, in France, as well as 'the states general of the United Netherlands, 'several of his majesty of Great Britain his 'territories on this side the tropic, became sub- 'ject (through conquest) unto the said French 'king and his subjects; and, amongst others, 'this island of Antigua also was so subdued 'by Monsieur de Labarr, lieutenant general by 'sea and land to the said French king, being as- 'sisted by the Cannibal Indians; by means 'whereof all the lands within this island be- 'came forfeited unto his majesty, &c. as by an 'act of this country, bearing date the 10th 'day of April last past (reference being there- 'unto had) may more at large appear. Know 'ye, that for and in consideration of new grants 'and confirmation of our said lands, under the 'great seal appointed for Barbadoes, and the 'rest of the Carribbee islands by his excellency 'lord Willoughby of Parham, &c. we do give 'and grant to his said majesty, his heirs and 'successors for ever, and most humbly desire 'your excellency to accept these our grants: 'and we do humbly pray your excellency 'that it may be enacted, and be it enacted, by 'his excellency lord Willoughby of Parham, 'captain general and chief governor of Bar- 'badoes, and the rest of the Carribbee islands, 'and by and with the advice and consent of the 'council, and gentlemen of the assembly, re- 'presentatives of this island, and by the au- 'thority of the same, that an impost or custom 'be, from and after the publication hereof, 'raised upon the native commodities of this 'island, after the proportion and in manner 'and form as above set down, that is to say, 'upon all commodities of the growth or pro- 'duction of this island, that shall be shipped 'off the same, shall be paid to our sovereign 'lord the king his heirs and successors for 'ever, four and a half in specie for every five 'score.'

" And the jurors aforesaid, upon their oaths aforesaid, farther say, that a custom-house was established in the said island of Grenada, and proper officers appointed thereto.

" And the jurors aforesaid, upon their oaths aforesaid, farther say, that the plaintiff, being a natural born subject of the king of Great

Britain, on the third day of March, 1763, purchased a certain plantation in the said island of Grenada, of the French inhabitants, in pursuance of the said articles of capitulation, and of the said treaty of peace, as many other British subjects had then, and since have, done.

"And the jurors aforesaid, upon their oaths aforesaid, farther say, that certain sugars of the plaintiff's, and of the growth and produce of the said island of Grenada, and made from off the plaintiff's said plantation there, subsequent to the granting and registering of the said letters patent of the 20th of July, 1764, were exported from thence. And that the monies in the declaration mentioned to be had and received by the defendant to the plaintiff's use, were paid to and received by the said William Hall, in the said island of Grenada, as aforesaid, as and for the duty of four and a half per cent. imposed by the said letters patent of the 20th of July, 1764, he, the said William Hall, being then and there the collector of the said duty, for the use of his majesty. And that the said William Hall hath not paid the same over to the use of his majesty; but, on notice of this action intended to be brought, hath, by and with the consent of his majesty's attorney general, kept the same in his hands, for the purpose of trying the question arising upon the facts; and for which this action is brought.

"But whether upon the whole matter aforesaid, found by the said jurors, in manner aforesaid, the said impost or custom of four and one half per cent. in specie, for and upon all dead commodities of the growth or produce of the said island of Grenada shipped off for the same, was lawfully imposed or not, the said jurors are altogether ignorant, and pray the advice of the Court in the premisses.

"And if, upon the whole matter aforesaid, found by the said jurors, in manner aforesaid, it shall appear to the Court here that the said impost or custom of four and a half per cent. in specie of and upon all dead commodities of the growth or produce of the said island of Grenada shipped off from the same, was not lawfully imposed, then the said jurors, upon their oaths say, that the said William Hall did undertake and promise, in manner and form as the said Alexander Campbell, by his said declaration, hath declared against him; and they assess the damages of the said Alexander on that occasion, besides his costs and charges laid out by him about his suit in this behalf, to 5*l.* and for such costs and charges 40*s.*

"But if, upon the whole matter found by the said jurors, it appear to the Court here, that the said impost or custom of four and a half per cent. in specie of and upon all dead commodities of the growth or produce of the said island of Grenada, shipped off from the same, was lawfully imposed, then the said jurors, upon their oaths, say, that the said William Hall did not promise and undertake in manner and form as in his plea alledged."

This cause was first argued for the plaintiff by Mr. Alleyne, upon the above special verdict, in Easter term, 1774, in substance nearly to the effect following.

Mr. *Alleyne*.—My lords, if the wishes of government, or professional rank, could influence the decisions of this tribunal, I should now, considering the cause, and the dignity of those advocates who support it against me, adopt the example of the Roman orator, and begin with recommending my client to the grace and protection of his judges; but experience having taught me that here the genuine merits of a cause are the judicial guide, I gladly follow the practice of an English court, where the laws are heard by their own recommendation, and rise in humble confidence, of counsel with the plaintiff, who, through me, solicits your lordships' justice in his behalf.

This long expected and truly interesting cause now comes before the Court upon a special verdict, found at the trial of the general issue before your lordship, on an action of 'indebitatus assumpsit;' nominally, indeed, brought for the recovery of an inconsiderable sum of money; but substantially, to take the opinion of your lordships upon a question of the first magnitude. The verdict, when relieved from the embarrassment of form, resolves itself into the following case.

The conquest of the island of Grenada, in the West Indies, was one among the many glorious achievements of the last war. It was surrendered to the troops of his Britannic majesty, under general Monckton, on the 7th of February, 1762.

The articles under which it capitulated acknowledge the inhabitants from thenceforth as British subjects; require them to take the oath of allegiance, as a reciprocal duty resulting from their adoption as such; secure to them the enjoyment of their religion; assure them of protection, in the same manner as the colonies receive it; with whom, by this surrender, and the consequent reception into the privileges of British subjects, they are placed upon an equal foot in the possession of the common liberty; and permit them to dispose of their own lands, provided it be to British subjects.

On the general treaty of peace, signed at Paris, February the 10th, 1763, this island was ceded by his Christian majesty, in full right, to the crown of England, under stipulations similar to those on which the province of Canada was ceded; and in general confirmatory of the articles of capitulation. And in this treaty his majesty engages, in the most ample manner, for the free exercise of the Roman Catholic religion; and gives his French subjects liberty to sell their goods and retire.

On the 7th of October following his majesty, to make good, in the fullest manner, those engagements, upon the faith of which the island had surrendered, and to perform at the same time the conditions of the treaty of peace, and farther, with a view to the better peopling and

cultivating of his said island, was pleased to issue his royal proclamation, inviting his British subjects to colonize in his new acquired dominions, and, as an encouragement, assuring them and the inhabitants in general already there, of the benefit of the English laws and constitution: and, for that purpose, declares to this effect; reciting that it will greatly contribute to the speedy settling of his said new governments, that his loving subjects should be informed of his paternal care for the security of those in their liberties and properties who were or should become inhabitants thereof; and farther, for the effectuating of such intent, "We have thought fit to publish and declare by this our proclamation, that we have, in our letters patent under our great seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of our said colonies respectively, that so soon as the state and circumstances of the said colonies will admit, they shall, with the advice and consent of the members of our council, summon and call general assemblies within the said governments respectively, in such manner and form as in those colonies and provinces in America which are under our immediate government."

Having thus declared his resolution to execute the engagement in their favour by this first step, as early as possible, of calling assemblies as in the colonies and provinces in America, under his particular protection, and his inclination and desire to manifest his paternal care of his subjects; he proceeds to shew the extent and justness of the accomplishment of his design, by a full and particular declaration of the nature, powers and design of these assemblies when called, by adding: "and we have also given power to the said governors, with the consent of our said councils and the representatives of the people so to be summoned as aforesaid, to make, constitute and appoint laws, statutes and ordinances, for the public peace, welfare and good government of our said colonies, and of the people and inhabitants thereof, as near as may be agreeable to the laws of England." Here then they saw the full idea of their becoming British subjects (which they became at the surrender) by this clear and perfect image of the beauty, order, and freedom of the British constitution, imparted to them, and declared to be the model and foundation of their own.

But as it might happen that this benefit, thus pledged and confirmed to them, could not be immediately communicated in its full extent; his majesty provides thus; "in the mean time, and until such assemblies can be called, all persons inhabiting, or resorting to, our said colonies, may confide in our royal protection, for the enjoyment of the benefit of the laws of our realm of England." So that the enjoyment of these laws was to anticipate even the calling of the assemblies; which was not to be a commencement of their freedom, nor of their exercise of the rights of British subjects, nor of their participation in the British constitution; but one act, most important and illustrious indeed, of that freedom, those rights, and that constitution already in their possession.

And it is material to consider what is the first step which the governor is to take upon his arrival in the island, for the purpose before expressed, of giving the inhabitants the benefit of the laws of England. It follows immediately, "We have given power under our great seal to our governors of our said colonies respectively, to erect and constitute, with the advice of our said councils respectively, courts of judicature, and public justice within our said colonies, for the hearing and determining all causes, as well criminal and civil, according to law and equity; and as near as may be agreeable to the laws of England."

Here then the laws of liberty and of England are enthroned in the island as soon as ever the delegate of the executive powers arrives there, and he is sent to give them effect amongst those who were already entitled to them as British subjects, and both in criminal and civil causes, both in strict law and liberal equity; in the whole, and in the great members and distinguishing distributions, both in the objects and the manner of applying them, the laws of our constitution, the laws of England are to prevail, and, as near as may be consistent with local circumstances, are to be enjoyed as the general privilege of British subjects, there as here.

Conformably to these repeated acts, and in prosecution of the same intention, on the 26th of March 1764, a second proclamation was issued; having the same object, the establishment of the colonies, and declaring the same views already wisely adopted, and firmly engaged as to the means of attaining and perpetuating that establishment; and reciting the great benefit which will arise to the commerce of the kingdom, and to his majesty's subjects in general, from a speedy settlement of the new acquired islands, of which this of Grenada is named the first. It gives directions for the survey of the lands, the distribution into districts and parishes, analogous to the English divisions, the culture of the various produce of the country, the apportionment of the ground into due lots for that purpose; and in general recognizes the inhabitants as his majesty's loving subjects, and provides such means as were judged expedient for their necessary support and defence, their internal order, plenty and happiness, previous to the completion of these by the enjoyment of the laws of England, which, as they had in right, they were to have speedily in possession.

In further prosecution of this design on the 9th of April 1764, his majesty was pleased to grant his royal letters patent to general Melville, constituting him captain-general and governor of the new islands, Grenada, the Grenadines, Dominica, St. Vincent, and Tobago.

This patent is set forth verbatim in the re-

cord. In substance it provides for the good government of the ceded islands, gives directions to take and administer the oaths of allegiance and supremacy; gives authority to the governor, and requires and commands him to summon an assembly, describes the manner of election by the freeholders, and thus called they are to sit as representatives; and together with the governor and council to be the legislature of the country, and to make laws as near as possible to the laws of England, with the usual provision that they shall be void if not allowed by his majesty within a limited time; and hereby is finally established in Grenada a constitution, in principle and form, in the design of the whole, in the disposition of the parts, in their respective functions and joint operations, an exact epitome of the British form of government: yet a constitution not given by the patent, but only to be put in full exercise.

With these powers his excellency arrived in Grenada, and instantly took upon himself the administration of the government; and in obedience to his commission called an assembly and opened the scene of legislation in the year 1765.

On the 20th of July 1764, posterior in point of date to these proclamations and this patent, his majesty by his letters patent under the great seal, reciting an impost of four pounds and a half in specie for every hundred weight of the commodities of the growth of the island of Barbadoes, and of the Leeward Carribbee islands, paid and payable to his majesty and his successors; reciting the cession of the island of Grenada, and that it is reasonable and expedient that the like duties should take place there as in the other sugar islands, therefore in lieu of all customs and duties before paid by the inhabitants of the said island to the French, on goods exported and imported, imposes the above duty of four and a half per cent. and requires the governor and officers of the customs to raise, collect, and receive it to his majesty's use.

These letters patent were duly registered and publicly announced by his excellency the governor in Jan. 1765. A custom-house was erected, officers appointed to act as collectors of the customs, amongst whom the defendant was one.

During these transactions several of his majesty's subjects, induced by the royal promises so frequently made, resorted to Grenada and became purchasers of lands therein. Amongst the first of whom was Alexander Campbell, esq. the present plaintiff; whose plantations succeeded, and he was about to ship off his sugars from the island of Grenada to the London market, when he was interrupted by the defendant demanding this payment of the impost already stated: the jury find he paid it, and that the same is the money on which the action is brought: the verdict concludes in the proper form, and leaves to the Court whether on the whole of the case the impost be legal.

[Lord *Mansfield* here reminded Mr. Alleyne, that he had omitted that part of the verdict which finds that the money is retained in the hands of the defendant, by consent of the Attorney-General, in order to try the right. I only mention this, because otherwise you could not have had your action against a custom officer in this form.]

And my professional duty now leads me to contend, that it was not competent to the crown on the 20th of July 1764, the day on which the patent for raising this impost is dated, to impose a permanent tax, as this, on the island of Grenada—of course that the present sum in question was improperly exacted; the money erroneously paid, or at least without any legal obligation to pay it; and the plaintiff therefore entitled to your lordship's judgment.

As this claim is founded upon a supposition of royal prerogative, which ought to be treated with deference and respect, it will be perhaps convenient (before I make an essay which the importance of the point renders an anxious one to me of discharging that duty) to define what prerogative is, that I may be understood not to make any exceptions to it in general; nor to argue against a high and beneficial privilege of the crown, and as I apprehend beneficial to the people in what I conceive to be its true and proper sense. The term is too often received with indignant jealousy by an English audience from mistaken notions of it, which were formerly entertained, and which have excited prejudices surviving, as is common, the particular causes which gave them rise. To anticipate any such misapprehensions, I beg leave to offer this definition of prerogative, in which, I trust, I shall have your lordship's support: Prerogative is that portion of political power, which the constitution has intrusted with the crown for its own and the public honour and security.*

There are a few facts in this case which are introductory to the direct point in argument, and those therefore will merit a particular notice and comment.

First, the effect of the proclamation of the 7th of October 1763. The substance of it is, a recital of the benefit naturally resulting to the British empire from a system of colonization in Grenada; and in order to invite the natural subjects of that country, on whom naturally would be the first dependance, and by whom there was the fairest prospect of answering this desirable end;—to invite them to settle there, it repeatedly assures them that a constitution as soon as possible shall be formed in exact conformity and representation of the English government; whereby all powers of state should be duly distributed, and lodged in hands competent to execute it to the freedom of the subject and the security of the infant

* Prærogativa est jus regis bonum et antiquum, in decus et tutamen regni, secundum bonas et antiquas populi libertates, et juris Anglicani leges et consuetudines.

colony, by a full participation of our wise and admirable constitution. Then follows the proclamation of the 26th of March 1764, putting the country in order, and preparing the face of it to rejoice as it were in the laws it was to receive: then follows the patent to governor Melville, with an immediate execution of these engagements, in part, by directing him to constitute courts of judicature, for the administration of the whole internal policy of the country, as near as possible to the laws of England; and to call assemblies as soon after as was possible, in the very effigies of the English constitution, with the same powers, and to the same ends of public freedom, order and happiness, and of maintaining a similitude between the parent state and the colony.

How wise, how politic the measure! for the crown at that time conqueror of Grenada, the old inhabitants subjected to the laws of conquest, it might naturally be presumed that British subjects would be jealous of such a power, and disinclined to settle where, under the circumstances, not only a change of place, but a change of political relation might ensue. To remove these suspicions, if any yet remained—for his majesty, both by the terms under which his general had received the surrender, and by the stipulations of the treaty of peace, had given assurances of better things to the old inhabitants themselves, with whom he had been at war; and had wisely, and as became the honour of a king of Great Britain, disclaimed to govern in the spirit of conquest when he had sheathed the sword.—But to give the fullest satisfaction to the inhabitants in general, and to those particularly of his own subjects who should be inclined to settle, the proclamation declares that all the inhabitants there, or who should in future resort thither, should have the full enjoyment of the laws of England. This construction arises from the true meaning of the words, if any words of our language admit a definite sense; it appears forwarded and enforced by the subsequent acts just now stated. And the necessary effect of this great and solemn instrument is a waiver of the rights of conquest, whatever they were before. By the proclamation of 1763, in the most explicit terms a recognition is made, of the practicability of governing this island of Grenada by the laws of England, and a receiving of this sometime conquest as an English colony; and, until I hear the contrary, a short argument shall evince it.

A constitution is promised; but that might be a work of time to complete and execute in actual operation. In the mean time however, courts of judicature are erected; they shall administer justice, and the measure of this judicial conduct shall be the laws of England. Can this be compatible with any principle of conquest? Can the benefit of the laws of England be enjoyed, without laying aside the government of a conqueror! Certainly not. The strong hand of power enforces the laws of arms; the peaceful voice of law, secures the enjoyment of the rights of British subjects.

The same observations will shew that the crown held it neither impracticable nor dangerous to introduce the laws of England, and establish freedom in this conquered country.

From the whole I argue, that the inhabitants of Grenada were considered as a colony annexed to the crown of England, and not to be governed by the laws of conquest; but on a plan similar to that which issues from the common centre, and pervades the whole system of our American settlements.

If this be granted, and I see not how it can be questioned, consistently with facts, I then conclude by direct and necessary inferences from premisses which I think clear and uncontrovertible, that every constitutional right of the British subject necessarily belonged to them; they were entitled to call upon the crown to secure those rights, and were competent by every legal means to defend those rights.

Of course the crown could assume no legislative power over them; could impose no permanent tax; for taxation at least requires an act of legislation. These observations, which would all result, and I should think irresistibly, from the single proclamation of the 7th of October 1763, receive additional force from the second proclamation, and from the patent to Mr. Melville, which shew the same opinion in the royal mind, the same purpose, the same idea, and repeat the same assurances to the subject; and, if it were possible to make them clearer or more certain, they would have that effect: however, at least they cannot weaken what was clear and certain before; they would strengthen it, if it had need of strength.

From them we get to the exact point of the argument, "Whether the crown, on the 20th of July 1764, possessed a legislative authority over the island of Grenada?"

The technical learning of Westminster-hall can give but little assistance in the investigation of this question. The great principles of the law of empire must determine it; to which the political history of England affords particular illustrations.

This course I shall pursue, and, as I proceed, shall glean up the learning to be found in the books; from which progress, I trust, I shall safely draw that conclusion, which forms the ground whereon my client now stands hoping success, and I trust, not hoping it in vain; since I hope to prove he has on his behalf the most powerful advocate, and most prevailing in this court, justice and right.

The principles of the law of empire are founded in the social nature of man.—As natural law is derived from natural connections; so political law is derived from social connections. That considers him as a creature as he came from his mother's hand; this as a member of society paying obedience to the laws of his community, and reciprocally deriving protection from them.

From hence arises one incontestable principle—so long as he pays due obedience to the law, so long he is entitled to its security; pro-

vided he continue in a place where the exercise of that law is practicable; if he quit his native soil and resort to a foreign state, the municipal constitutions of his country being not the measure of his civil conduct there, protection for a while is suspended, it intermits until his return.

If he resort to a country newly acquired by arms, though by his own state; there, if the necessity of the state requires that such country be governed by more rigorous means, he must submit to them; but if he resort to a newly discovered country or colony; and settle there under the auspices of the mother state, there the laws of his original country still afford their protection, as far as may be agreeable to the local circumstances of that country to which he has arrived; and still are the measure of his civil conduct: the executive magistrate shall frame a constitution for him to secure his birth-right, with every appendage of his ancient government.

This necessarily follows from the principle I first proposed;—and it is hardly necessary to resort to an authority where reason is so clear: yet, I am happy to refer to the illustrious name of Vattell, and found of this occasion of mentioning it with deserved veneration, and I hope to be excused, if I indulge the pleasure of quoting him, with some vanity perhaps, when I find my notions graced by his authority. In Q. 10, sec. B. 1. Your lordship will find him expressing himself in these words, "When a nation takes possession of a distant country and settles a colony there, that country, though separated from the principal establishment or mother country, naturally becomes a part of the state, equally with its ancient possessions. Whenever therefore the political laws, or treaties, make no distinction between them, every thing said of the territory of a nation ought also to extend to its colonies."

If therefore the political laws are co-extensive with the territory of the state, however disjoined in space, as this excellent author decides they are, then every constitutional right of the subjects of that state is co-extensive with its territory; the fundamental laws of the state are equally so, and personal liberty and private property alike universally protected.

This necessarily follows from his general position; but, though I illustrate my argument by this quotation, I do not shelter myself under any foreign authority; nor merely under authority of whatever growth: I appeal to the light of reason, that a change of place can never merely as such operate a forfeiture of original social rights. True, as I have before said, it may sometimes suspend the enjoyment of these rights under peculiar circumstances of policy; or make some of the laws of the parent state inapplicable from difference of situation: but the mere act of colonization never can suspend, whilst the operation of the law continues practicable, far less can it annihilate these rights.

Let us now, to close this part of the argument, hear the legal authorities of our own country. We shall find the general learning of Westminster-hall coincide with this theory.

In Blankard and Galdy, 2 Salk. 411, lord Holt, chief justice (says the reporter,) and the whole court with him, held thus:

1st, In case of an uninhabited country newly found out by English subjects; all laws in force in England are in force there.

2d, Jamaica being conquered, and not pleaded to be parcel of the kingdom of England; the laws of England did not take place there, until declared so by the conqueror or his successors.

The first point expressly maintains the proposition of Vattell, and his majesty has put Grenada in express terms upon the same footing with "the other colonies;" therefore all the laws of England (so far as is agreeable to that island) are in force there.

But further as a conquered country, the conqueror has declared that the inhabitants of Grenada shall enjoy the laws and constitution of England, which brings it within the second point.

Agreeable to this is what is reported by the master of the rolls in 2 P. W. 75, of a determination before the king in council, upon an appeal from the foreign plantations, that if there be a new and uninhabited country found out by English subjects, as the law is the birth-right of every subject, so wherever they go they carry their laws with them; and therefore such new formed country is to be governed by the laws of England, then in being when they first settled.

As to the second point, it goes to be sure on too large a ground, in supposing conquest gives a property to the conqueror in the people conquered.

This principle is taken up by Mr. Justice Blackstone in his Commentaries, who allows the doctrine, and the exceptions to it which he makes in general are such as result from the inconveniences which would fall on the colony, from a general adoption of the laws of the parent state.

Every day's experience before the council warrants this principle: the laws of descent and of all real property are current in Ireland, and in every plantation; in every part of the empire. By what law? By none positive there; but as a necessary consequence of the country being a part of the British empire.

If this be so, what was the situation of Mr. Campbell and his countrymen at and prior to the 20th of July 1764? They were British subjects: they were settled in a new acquisition: the laws of England were practicable amongst them: no peculiar circumstances of policy required the suspension of them. His majesty, the supreme executive magistrate of the state, competent to decide on the propriety of introducing the laws of England into Grenada, has declared such propriety; has introduced them. Then, by necessary consequence,

they were entitled to them; they wanted no other act to give it to them; and Mr. Melville was only to hasten in the performance of this duty, to put their constitution in act, and secure their rights.

By what mode of reasoning then am I to learn that his majesty had at this time a legislative authority over the island of Grenada? To make temporary regulations on a sudden until all was finished, was the extent of his prerogative; to impose a permanent tax was, as I submit, illegal.

This argument, founded on the evidence of facts, anticipates, I think, every objection that the patent to Mr. Melville was executory. It is against the words, against the spirit, against the great end of the proclamations to suppose it was. The Court will not give such a narrow and forced construction to a public grant,* founded on the most liberal and wisest principles of policy, and upon which numbers of British subjects have fixed their settlement, in confidence of all the rights of freedom in a country so remote; a construction ill adapted to its terms, to its plain scope, and to the manifest reason of the thing, if it had been a grant not to a nation at large, not to British subjects, to Englishmen, invited to settle for the encrease of commerce, but to a single private individual under any circumstances. Will the Court intend that it was the design of the crown that British subjects, Englishmen, should be called to cross the Atlantic by the royal voice itself under such assurances, and when they arrive find their hopes dependant on a future discretionary possible grant? It is sufficient for me to say, by the patent, and by the proclamation of the 26th of October, nay, by the very terms of surrender and the general treaty of peace, the inhabitants are recognized as British subjects: the laws of England are recognized as practicable and beneficial to the island, those who were there and those who should afterwards resort there are promised the enjoyment of them. From that admission, this mutual contract, and these acts of the crown, I draw my argument, and thence derive the rights of the colony to the full benefit of the English laws and constitution.

And now, my lords, from the consideration of the case in the general view of political theory, and from such authority as eminent writers and the decisions of our courts of law furnish more directly to the point, I proceed to the review of the history of this country; and I trust, that the account I shall give your lordship of our several acquisitions by conquest or colonization (in which latter conquest with us, as with antient Rome, hath always terminated) will abundantly prove the antiquity and uniformity of my general argument.

I have spared no pains to inform myself of the history of these transactions; and, after a diligent research through the writings of Dr. Leland in his history of Ireland; of sir John Davies in his discoveries, and the case of Tanistry in his reports; of Dr. Harris in his Hibernia; and of Mr. Molyneux in his contest with Mr. Carey; and lastly of the noble historian of the age of H. 2; I trust I am warranted in the principal facts and conclusions I have to offer concerning the history of the acquisition of Ireland.

I shall not refer to the books by pages, except that in sir John Davies's reports, I would wish particularly to submit to your lordship's notice the 37th page B.

Ireland, when Henry 2 first ascended the throne of this kingdom, (1154) was divided into many small states, and was subject to all those evils and convulsions which distract savage, unpolicied, and divided, countries.

Dermot king of Leinster, being driven from the throne by his rebellious subjects, solicited the assistance of H. 2, who, covering his ambition under the supposed sanction of the papal authority,* and taking the conquest of Ireland to be a desirable object, readily permitted certain of his subjects, with earl Strongbow at their head, to land in Ireland, and to engage in the enterprize on behalf of Dermot.

The stipulations were—in case of victory Dermot was to be restored; and in return a grant of lands was to be made to the English subjects.

The event was prosperous; the terms on the part of Dermot were fulfilled.

King Henry went over, and extending the conquest became possessed of a great part of the south-east of Ireland.

The natives whom he subdued he ruled with the rod of empire, communicating, as he thought fit, certain privileges, and withholding others; and making, as he judged necessary, certain regulations: but those of his subjects whom he found settled there, he recognised as such; of these he demands the performance of the feodal services; and, as a necessary consequence of their being subject to the obligations of those laws of England which were in force at their becoming a colony, the laws of England diffused their protection over the colonists: and he proceeds to secure the benefits of those laws by perfecting their constitution, and forming their government with every appendage of English policy. We see him dividing the country into counties, establishing sheriffs, erecting courts of judicature, corporations and general assemblies.

This account surely furnishes an antient

* It seems that in public grants, the rule of the civil law holds, which says—"Beneficium imperatoris quàm plenissimè interpretari debemus," though our law adopts the contrary in private grants.

* From Pope Adrian the 4th, whose name before his accession to the see was Nicholas Breakspear, and he himself was an Englishman. The letter authorizing H. 2 to conquer Ireland, and bring it to the obedience of St. Peter, is a very curious one; it is dated 1154, and may be seen in lord Lyttelton's history.

and illustrious instance to my general argument.

"The laws of England are communicated at pleasure to the conquered natives; but result to the English colonists as a necessary consequent:" this point is most elaborately discussed by Dr. Leland, decided by sir John Davies in page 37; and adopted in the manner I state it by lord Hale, who remarks that the colonies of the Romans, planted in conquered countries, observed the Roman law; and takes it as of course, not assigning any reason for it or explaining the manner; the reason being indeed the necessary nature of the thing. But he gives large explanations how conquered countries may have their laws changed.

I own the great authority of lord Hale does not seem to agree with me on the whole in this account of the establishment of the English law in Ireland, in the book just quoted: and I am aware too that this account is materially different from what lord Coke lays down in his 1st Institutes 141, b. and in Calvin's case 7 Rep. as if they were established by king John, and his son Henry 3, and, farther, were not the effect of colonization.

This striking difference engaged me to trace the subject minutely; and as the learned writers whom I have followed, had access to the archives of the city of Dublin, and spent much time in every means of information, I chose to follow them, as my leaders, in a point of history which they had made the subject of their particular attention, rather than the great oracle of the law.

The subsequent history is as follows—and will, by stating, shew how lord Coke fell into his mistake; for such with deference I must call it; and such the facts, I think, prove it to have been.

The laws of H. 2, being too much neglected from the intercourse between the English colony and the native Irish, the latter obstinately fond of that lewd custom, as it is called, the Brehon law, of which there is much said in the case of Tanistry already cited: and this law getting ground in the English establishment, it was found necessary in the reign of king John to issue a proclamation, commanding the due observance of the laws of England to his English subjects; and king John himself went over to Ireland to inforce obedience to them. And king H. the 3d, his son, speaking of his father as having "ordained and commanded" as lord Coke takes it, but I think more consistently with history "settled and required the observance" of the laws of England, which had been already established. The letter cited by lord Coke, from whence too this is quoted, says king John reduced them into writing, and at the instance of the Irish. It is very natural to admit this, without supposing either that king John was the original founder of those laws in Ireland, or that they were not first there in consequence of colonization. There was very little statute law at that time; and it might be thought advisable by the administration here at that time to digest the common law of England into writing, the better to avoid confounding it with the Brehon law; and probably at the request not only of the English colonists, but of the wiser and more moderate part of the Irish who had perceived its excellence. But however fond king John or his son might be, to suppose, that king John himself was the founder of these laws, (though I think it does not appear that either have asserted so much) there is no ground from facts to deny this honour to king Henry the second; but, I think, abundant to the contrary: and at the same time I think there is the strongest evidence from facts and reason, not without support from the express declaration of great authorities, to prove that they were originally introduced not by conquest, but as rights attendant on British subjects settling there as a colony.

What is stated to have been done by king John, and is taken by lord Coke as the indulgent act of that king, communicating the laws of England to the Irish, I take it was no more than a proclamation enforcing obedience to the laws already established: a prerogative the crown may exercise this day at London.

Indeed the settlement which he restored was farther improved under king John's reign, and enlarged in point of territory.

The same policy prevailed in the subsequent reigns, and we find king Edward the first summoning members to the British parliament in the third year of his reign, for the purpose of taxing the colony. We find writs returnable into this court, the Aula Regis, and in every instance similar protection and laws to the English and Irish subjects.

No instance more similar to the present case of Grenada can be conceived: and, surely, the politics of a crown infinitely more ardent to extend its prerogative than the present times will allow, shall not surpass, in affording protection to the subjects, the laws of this day.

The next instance we find in our political history is that of Wales: from it I shall derive strong argument in support of my general proposition: and in this I am yet farther satisfied that I proceed upon solid ground, as I find the result of my enquiries to quadrate with the opinion of the Court, delivered in the case of the king and Cowle.

King Edward the first laid claim to Wales, as his feodal principality. The prince refusing to acknowledge him, he treated him as his rebellious vassal, reduced the country by arms, caused the prince to be punished as a traitor, and took upon himself the immediate sovereignty.

He subjects them by arms; but, whatever was the real right, having subdued them, he recognizes them as his subjects (he could not, indeed, do otherwise upon the principle which he professed, of reclaiming Wales as a feodatory state, and declaring it, as he does in the 12th year of his reign, to have been before subject to him of feodal right); he communi-

cates to them the laws of England, and takes every measure to secure to them the benefit of the enjoyment of those laws.

The history itself of those times (many valuable collections of which are to be found in Rymer's Fœdera) proves his conduct towards Wales not to have been as in right of a conqueror indulgently benefiting his subjects, but as the act of the feodal sovereign, and at the same time supreme executive magistrate of this country, securing to his subjects that protection which was their due, in return for their feodal homage and services, and securing it by a communication of the laws and constitution of England, considering Wales as under the general comprehension of the British empire.

Pursuing his magnanimous design, of uniting all the adjacent countries to the realm of England, he next turned his thoughts to Scotland: and the history of the town of Berwick, so fully developed by your lordship in the case already cited, warrants the like observation as on Wales. He claimed Scotland expressly as sovereign lord of the fief, and governed it as a part of the great general fief, the British empire.

The reign of Edward the third next furnishes matter of a similar nature; and the ever memorable treaty of Bretigny gave that prince an opportunity of extending his empire upon principles which had animated and directed his fore-runners.

I have not been less assiduous in examining the springs of his government over those countries which were thus ceded to him.

I have pursued this enquiry chiefly through Rymer's Fœdera, in which are preserved all the state papers from the treaty of Bretigny, respecting the conduct of king Edward towards his dominions acquired from the crown of France; and from them it appears most strikingly how uniform he was in following those principles of government, which had been pursued by his predecessors Henry the second and Edward the first.

Permit me, however, in this place, to mention the sources from whence I extract the history I am about to give. Besides Rymer, D'Ewes Journals; Notitia Parliamentaria, Co. 4 Inst. title Calais, the year book, 20 H. 6, 1 R. 3, and Rot. Parl. 50 E. 3.

As a preliminary observation, I would beg of your lordship to remember, that by much the greater part of the country, thus ceded to king Edward, was claimed by him under a very different title from that of an appendage to the crown of England.

So much as he claimed as in foreign right, this he erected into a principality, and conferred it upon his illustrious son Edward the black prince, by the title of prince of Aquitaine. To this, which was much the greater part, he communicated a constitution totally different in form and principle from the English government, allowing unbounded powers of sovereignty to his son, and such as the English nation could not have borne: but as these countries were claimed by the king, as duke of Normandy, heir to the house of Anjou, and to the crown of France, through his mother,* this nation did not concern itself what powers he assumed, with regard to the countries which he did not hold or claim to hold as part of the realm of England; as the feodal sovereign of those he acted agreeably to their laws, and to the powers which they allowed their prince; the subjects of this country had no right to interfere.

But with regard to Calais the case was different: Calais he had conquered as king of England; and, having turned the former inhabitants out of their possession, he invites his own subjects of England to colonize therein.

Herein we find every principle of law adopted; the inhabitants participating in every security the English constitution affords: writs of error returnable into this court; members representing the people of Calais in the English parliament.

How striking is this distinction! Over countries obtained by conquest, and claimed by a different title from that of king of England, he exercises an authority according to the title he claimed, very different from the authority of a king of England: over the countries acquired to the crown of England, and inhabited by English subjects, he claims to himself no other power than the lawful prerogative of a king of England.

This lively distinction, first adopted by H. 2, and continued by H. 3, at this time prevails between any American plantation and the electorate of Hanover. To the former all prerogative writs will run, as to the counties palatine of Chester and Durham; over the latter what power has your lordship, the great seal, or the parliament?

The history of this country, then, as to the political government of the lands ceded by the treaty of Bretigny, joined with the last observation respecting Hanover, furnishes additional proof to those of Ireland, Wales, and Scotland, already mentioned, and encreases the weight of evidence from the experience of the nation corroborating this argument in a series of ages.

Hitherto, my lord, I have endeavoured to penetrate pretty far into the ancient history of England, to which the nature of the question directed me, as it depends on the law of empire, evidenced by historical facts; and as no evidence of this occurred to me so proper and unexceptionable on this occasion as the history of our nation, in which I purpose to advance a step farther yet: and here a modern edifice presents itself to view, much worthy of observation, not only for the beauty and order of its

* Who was sister to Charles le Beau, and upon Edward's construction of the Salique law, as excluding females, but not the descendants of females, he was entitled by descent through his mother Isabel to the crown of France.

structure, and the analogy of its frame to the majestic fabric of our own ancient constitution, but particularly upon this occasion; because in all these respects an examination of it will contribute much, if I am not deceived, to a clear discernment of the merits of the present cause: the object to which I am alluding is the American colonies.

America has been called, in a sense totally different from what is meant by the same words when applied to England, the dominion of the crown. The Americans have been considered as a people of a different political species from the English; and have been called creatures of the king. Their rights have been said to have been derived from their charters; and it is probable the misapprehension of this particular has produced this very cause. Since it is the first in which the principles of colony law have been investigated, it is my duty to state those principles very minutely, and endeavour to rescue them from misrepresentation and mistake.

To do this I must beg leave to draw your lordships' attention to one great leading constitutional principle. The crown by its prerogative may execute any plan whereby the laws of the country may be promulgated or enforced, communicated or secured to the subjects of the empire.

And the crown not only may, but it is a branch of the executive trust.

Founded on this principle, the right of issuing proclamations, of incorporating bodies politic, for the purposes of municipal jurisdiction, erecting tribunals, and constituting counties palatine, may strike your lordships; and certainly, on this principle, the American constitutions have been settled.

There is not a single clause in any charter which can impugn this idea; but every part of them holds out the most conclusive evidence of their being legal acts of prerogative, for the purpose of securing constitutional rights to our fellow subjects in distant parts of the empire.

The charters do not define rights, nor establish laws, nor give any other directions than merely for the formal establishment of an internal legislature and government.

Why, then, shall it be argued that the rights of the colonies are emanations of the royal bounty? Not a single constitutional right is granted by charter; and yet every constitutional right is admitted to be the birth-right of the Americans. The idea of the contrary is too frivolous to be argued in this place; and perhaps my contending against it was therefore unnecessary.

In general I conclude, and propose it as a great constitutional truth, that the American charters and patents are accommodated to protect the anterior rights of the colonists, and not to convey those rights, as dependent on those charters, and derivative from them.

The colonies in America, it is well known, fall under a threefold description; first, proprietary grants, as Pennsylvania and Maryland; second, charter governments, as the Massachuset's bay; third, provincial establishments, as Carolina and most others. In original principle the government is in all the same, though somewhat different in external form.

The first sort may be assimilated to counties palatine, the second to municipal corporations, the third sort are a species by themselves, as to their external constitution; all, however, flow from the principle I stated; all tend to secure to the subject the enjoyment of the laws of England; all, in the very nature of their establishments, shew that the rights of the colonies are inherent and innate, not derivative, or communicated by charter.

But here I expect I shall be told that the clearest argument possible will rebut me. The objection, if it shall be made, has the sound of something material, and therefore, rather than to be thought either to have overlooked it, or to have feared it more than I can persuade myself I ought, I will now offer to meet it.

It is certain that in the early charters granted to America the king reserves to himself an appeal to him in council, in the last resort; and from hence the ultimate judicature has been usually understood to be in the king personally, and not as in right of the crown of England, nor through his courts, as to British subjects. From this circumstance, I suppose, it will be contended that the king is sovereign of America, not as king of England, but personally; and the colonies are not governed by laws like Ireland, Wales, and Berwick, derived to the inhabitants in consequence of their being subjects of the British empire; but are like to Jersey and Guernsey, which belong to the king, and not to the crown. Hence the argument would be, that all the colonies of America are dependent on the king, not as head of the general constitution, but in a very different relation, and my general principle would be much affected.

To obviate all this, I need only desire it to be remembered that such a circumstance cannot alter constitutional law, or the principles of the law of empire; not even if it stood clear and unimpeached by that which I conceive will most completely reprobate it, the extreme art with which it was introduced into the charters, and the prevailing policy of the times when it was first conceived; I mean the policy of king James the first.

The first charter was granted to the Virginian adventurers, in which this reservation does not appear. In all the other charters it certainly does; and this is owing, I apprehend, to the extreme anxiety of James, whose favourite idea it was, from the first moment in which he ascended the throne, to consider every part of the British empire, not immediately within the actual limits of England in respect of local situation, as holden of himself, and not as component members of one great empire, at the head of which he stood as sovereign, in right of the crown of England, therein directly

Inverting the principles and practice of H. 2, Ed. 1, Ed. 3, and other princes, his predecessors.

To prove this there are many remarkable passages in the history of those times. The first is mentioned by lord Vaughan, as being communicated to him by the great Mr. Selden.

King James asked Mr. Selden, whether Ireland (at that time, as your lordships know, the subject of much political speculation) might not be considered as belonging to him personally, as the heir of the conqueror thereof; that the lands therein might be taken to be his own, and the Irish themselves as subjugated to the laws of conquest, and of course not entitled to the rights of Englishmen, nor to be considered as members of the same community, but dependent on his will, and beholden to his indulgence?

Mr. Selden's opinion will be mentioned by-and-by: it is not reported in Vaughan, but that learned judge himself there decides against the king; "That it cannot be reasonable to make the superiority only of the king and not of the crown of England." In the case of process into Wales my lord Vaughan uses this expression; and adds, the practice has always been accordingly, as, says he, is familiarly known by reversal or affirmance of judgments given in the King's-bench in Ireland in the King's bench here; which, he continues, is enough to prove the law to be so in other subordinate dominions.

And in the case of Craw and Ramsay, it is decided that Ireland and the plantations are holden of the crown as the sovereign of the British empire; and the like distinction which I took before between Anjou and Calais is made by the lord chief justice. The same case is reported in Ventris.

But, to return to king James: another remarkable anecdote of his notions of government, to the same point, is to be found in the Journals of the House of Commons. It occurs in many places, but particularly in the Journal of the 25th of April 1621.

A bill was brought into parliament for the liberty of a free fishery on the banks of America, at that time in general called Newfoundland.

Government seemed extremely unwilling to suffer parliament to meddle. Says Mr. Secretary—I take it from the Journals—"What have we to do with America? They are plantations; they belong to the king." But good old sir Edward Coke, Mr. Selden, Mr. Brooke, and other great men, reply indignantly, What! when the king grants letters patent to them under the great seal, are they not part of the empire, and shall not we interfere?

These observations shew the prevailing policy of those times. And are we, then, to wonder that the right of ultimate judicature should be claimed by the king, and that he should artfully introduce into charters a reservation of it. A reservation indeed superfluous, if there had been such a right in the king personally; and of no effect, if there was no such right; for then the reservation could not create it, contrary to the principles of the constitution. 'Reservatio, ut et protestatio, non facit 'jus sed tuetur.' We see what Mr. Selden, what the parliament at that time thought of it; what lord Vaughan afterwards; what the practice of some of the greatest antecedent kings; what the doctrine of the books; what the experience of nations; what the testimony of ages; what reason itself speaks; all concurring that all the parts of the British empire are under one constitution, and have all the rights and immunities which result from that constitution. The intrigues, therefore, of king James must not weigh against natural reason, political theory, legal authority, and the principles of the constitution. 'Nemini licet quod 'non per leges licet.' The gentlemen who first went to the American settlements, in ages when the principles of political theory were scarcely known to the most refined, might not foresee the tendency of, and therefore might unwittingly submit to, this claim of king James. But on any consideration, knowingly or unknowingly, they could make no concession to the prejudice not only of their own constitution, but with it of ours.

If ever that question, of the relevancy of a writ of error from any settlement of the western world, shall come into litigation in this court, and it should fall to my lot to argue it, I hope I shall then know my duty, and what to say upon it. I hope I shall prove that the jurisdiction of the king in council, as the ultimate judicature, is unconstitutional and void; but if the experience of a century and a half shall be then held to outweigh arguments founded in principle, your lordships will say, "The experience supports though the principle denies it," and will take care that neither then nor now it shall be carried farther, and argue from a peculiar judicial authority, upon whatever ground, supported however by precedent if supported, to a legislative authority supported by no precedents; and, I beg leave to submit, not warranted by the principles of the constitution. To meet, however, the conclusion which might be attempted to be drawn from this claim of ultimate judicature in council, I have been drawn insensibly into this length of discussion—The occasion must be my apology.

I return now to conclude with the immediate point before the Court. And in this, on whatever ground I consider this cause, whether in the general view of reason and experience, the opinion of eminent writers of foreign nations; the learning of our books; the principles of the law of empire; the history and experience of this country for ages; whether as to this particular island of Grenada, on the terms of the surrender, the treaty of peace, or more especially the proclamations and patents; whether on the great principles of our constitution, or the principles of natural justice and equity; on all, on any, on every ground I draw this conclusion, that on the 20th of July, 1764, his

majesty was in no wise entitled, by the prerogative of the crown of England, to impose the duty of four and a half per cent. in manner and form as is laid in the declaration, admitted by the defendant's plea, and found by the verdict: such being an act of legislation, and repugnant to the principles of that government to which the inhabitants of that island were at that time entitled, and which belonged particularly to Mr. Campbell, the plaintiff, a natural born subject of the crown of Great Britain, found so and declared by the verdict, and was his by every right, secured to him by every sanction.

And while I have thus contended for, and, I hope, established my client's interest, I further trust that this general review of our constitution, and of the history of our country, crowned by the decision of this court, will warrant me in saying of Britain what the Roman orator boasts of Rome: 'Alias nationes servitutem 'pati possunt; populi Romani propria libertas.' Ciceronis Philip, 6ta.

Mr. Wallace, for the defendant.—The question upon the special verdict is, whether the impost or custom of four and a half upon the exports of the island, in the manner found by the verdict, was, under the circumstances in which that island then stood, at the time of the impost, duly and legally imposed by the crown, or not?

Mr. Alleyne not having gone into the dispute of the authority and prerogative of the crown at any time to make proclamations, but examining the nature of this, and contending that, whatever might be the state of the island before that period, it was incompetent to the king from that time to give any laws whatever to the island of Grenada, (for if any, there is no doubt of taxation) this has relieved me from laying before your lordships the rights of a king of this country over a conquered country.

What those rights are is a principle not only of the law of nations, but has been recognized wherever it came under consideration, even by the judges of this country; by acts of state, and historians; and, in one great instance, declared by all the judges. In Calvin's case it is recognized that the rights of conquest do belong to the king: and the rights of conquest are in that case extended farther than I wish they should be understood; but thus much, I take it, they necessarily give, a legislative authority. It is not now as formerly, that the conquerors gain captives and slaves, and absolute dominion, but now the conqueror obtains a just dominion, under due restrictions, and instead of slaves he acquires subjects. Not a propriety, as in goods, but an authority, as over men, reasonable and still free.

The effect of the letters patent is not to alter the condition of the island: it is only to raise certain duties raised there by the French king, and paid to the king of England by the island of Barbadoes and the other Leeward islands; but the only thing is, this is done July, 1764, when it should have been October, 1763, or thereabouts.

Lord *Mansfield*. It was after the proclamation and commission; for, I think, the proclamation was in October, 1763; the commission in April, 1764; and this is in July: so it is after both.

Mr. *Wallace* continued—The patent is carried out by the governor. At the time he takes upon him the office of governor he promulges this tax: his first office as governor is to promulge it. Now the question is, whether the king, by this proclamation, meant immediately to waive the rights he had as conqueror of the island, or at a future period, when the state and circumstances of the island would admit of a legislature: when that would be was very uncertain. In fact, it does not appear that the first assembly met earlier than the latter end of the year 1765, (about a year and a half from the date of the letters patent) nor does the verdict find that an assembly could have met sooner.

The proclamation begins with a general direction to his majesty's four governments, by name of Quebec, East Florida, West Florida, and Grenada. Then the assembly of Grenada, as to that part of the proclamation upon which this case turns, is to meet "as soon as the state and circumstances of the island will admit." Is it conceivable that in the mean while the king meant to divest himself of his right of legislation? There is no such declaration; it is impossible there can be such a construction.

If the king had not continued a right of making laws before the period of their having a legislature of their own, who was the legislator? Here is no relinquishment on the part of the crown in the mean while; but when an assembly meets, the crown will hand over the powers of legislation to that assembly.

It is necessary in these distinct countries to provide legislative constitutions within themselves, when circumstances will admit; they cannot be governed by ordinances or acts of parliament made for all cases and instances whatever. The best judges what laws are necessary and proper for the peace, tranquility, and good order of the island, are the persons locally resident; therefore it is necessary some legislature of this kind should be established: but till it be, of necessity, every order of the king must be observed by the governor and the people.

But Mr. Alleyne has said the king has waived the right of conquest, by introducing courts of judicature; and that it is a part of the benefit of the introduction of the laws of England, that all the laws of the country not agreeable to these must be abrogated.

It is not usual in these times to take conquered nations under protection upon these terms: and as it is unusual, so I find, in the opinion of Grotius, it would rather be harsh and rigorous than indulgent. Your lordship will remember that he says it is usual to suffer

the inhabitants of a country conquered to possess their own laws, unless they are absolutely necessary to be abrogated, for the security of the conquering state. And similar is the opinion of Puffendorff.

Would it be for the security of the conquering state to introduce so dangerous, so total, so unnecessary a change; to alter the whole course of their law of property, by introducing the law of England to them, a peculiar law of descent, differing from all other; intricate and complex modes of conveyance; a new foreign unknown law; its very language unknown to them; by which those rights which have been the subject of contract must be devested; owners under a fair title dispossessed of their estates; settlements in consideration of marriage overthrown, for want of the forms essentially required in our law.

I conceive nothing more can be meant than that civil and criminal justice according to the laws of England were to be introduced, for the punishment of public offences, and the redress of private wrongs; and as far as might be for the prevention of both, in which the mode of trial, of conviction, and the whole legal process, is the common benefit to all. 'Lex Angliæ est lex misericordiæ.'

The lenity and excellence of our criminal laws is known throughout the world: more had been burthensome; these were expedient and necessary.

Mr. Alleyne has compared the situation of this country with the other dependencies of the crown, particularly with Ireland.

It is true my lord Coke held an idea of the laws of Ireland being established there by an Irish parliament; but in this he was singular; nor do I think the idea of their having been established there through the medium of an English colony is less uncommon, or promises more success.

In Calvin's case, before the chancellor, and all the judges, the case of Ireland is put as one of the conquered countries, and the title of Henry the second was accordingly king of England, and lord of Ireland, &c. distinguishing between the title by right of conquest and his title as king of England. And king John gave them laws as a conqueror, and not by act of parliament, and this plainly appears in Ventris, in the case cited by Mr. Alleyne, where it is expressly laid down, on the authority of three of the judges, that Ireland was a conquered country, and in king Henry's time remained governed by its own laws, and so continued till his successor, king John, in the 12th year of his reign, by charter, and not by act of parliament, introduced the English laws.

But, if your lordship had found that even by act of parliament the laws of England had been introduced into Ireland, would the least inference have followed that the king alone, by his legislative authority over a conquered country, could not have introduced them, or others, if he had seen expedient?

Neither Wales nor Berwick-upon-Tweed do, as I conceive, apply to the present question. They were not pretended to be holden in right of conquest, but as immediate fiefs under the crown of England, on the terms of the same feodal protection and obedience by which England itself was then held, and as members reunited to the entire original fief; for that was the claim, whatever was the fact. Nothing like this can be dreamed concerning Grenada; no dependance on England or Great-Britain till the late conquest. And by all the difference between what is claimed as a re-union and what can only be claimed as a new acquisition, by right of arms, the cases differ.

Indeed, not relying on this, it has been thought necessary to endeavour a comparison between the case of this island of Grenada and the American colonies, of which, in general, the rise is known to have been from new discoveries of uninhabited countries, in which the discoverers were encouraged to settle by charter from the crown. No pretence of conquest: they could not live without laws; they could find no laws in an uninhabited country; what laws should they have then, but the laws of England?

But is this the case of a country already settled, where they find a people and laws? Will the laws of England expel those laws already established, fitted to the circumstances of the place, known and familiar to the inhabitants, to pass themselves into a country where they will be strangers, and for which they are not locally adapted?

Is it possible that British subjects, coming into a country where there are other laws, should carry the British laws with them thither, and not be governed by the laws of the country to which they are gone? Can it be supposed of a British subject going to Hanover, for instance?

As to the circumstance of an appeal to the king in council, as I do not think it necessary to lay any particular stress upon it, it may suffice to say, when the crown granted the charters under which the settlements were made, it was competent to the crown to prescribe the mode of appeal, which, in some form or other, by the royal prerogative, and for the benefit of the subject, necessarily lay in all the variety of disputes concerning the rights of the colonies. Narrowly as prerogative has been looked into, never has this branch been questioned, as not legal and constitutional.

When a writ of error shall be brought before this Court, to reverse a judgment given in the colonies, or a re-hearing moved, or, by what name shall I call it, to examine in this court a decree in council, then will be the proper time for this question; but I believe that time will never arrive. They will look to that jurisdiction as they always have done: they will find that redress which never yet has failed them. It would be a considerable acquisition to the business of this court if your lordship were to sit here to exercise that appellant jurisdiction upon writ of error from the plantations,

or in whatever form; for the practice is unknown to our books as much as the theory was to me till this day, in which so much ingenuity and argument has been employed to raise it.

And here I cannot help observing, that it is a great change in the language of America to insist as they have done, and do, that the parliament of England has no right to tax them, but that they derive their constitution from the king only; and now to say, in this cause, that the king has no power over them but as the head of the British constitution.

But in this case, if the king by conquest had a legislative authority over Grenada till the assembly could be called, he has waived it. It is not said he has parted with it, (for how could it, when there was nobody to take it) but he has waived the right.

I own, by what I can understand of the books, I have no idea of the possibility of the crown's waiving a right. It must be more or nothing; it must be transferred to somebody else, or it remains in the crown; for in the crown there is no laches, no negligent abandonment, least of all in such a point as this, so essential to order and good government.

But, not excepting to the mere term, at what period, to whom? To the assembly, if to any body; for that is the condition of the grant. That, when the state and circumstances of the island shall admit the calling of an assembly, they shall be called, and shall meet and make laws; in consequence of which legislative power transmitted to them by the crown, and to be exercised by them, the king will then depart from his right of taxing them by his sole prerogative without an assembly. But this assembly did not meet till after the patent to the governor for raising this impost; they were, therefore, liable to the impost; and it was established by the proper and only authority then in the island, long before the assembly did, or could, meet.

I trust, therefore, the Court will think, from the principles of reason and justice, that the proclamation for calling an assembly was, both in the words and intent of it, and in the necessity of the thing, executory; that the duty of four and a half per cent. was not executory, but immediate, and by legal authority, by virtue of the patent. And that it could not be meant that the calling of the assembly, under the authority and by the voluntary grant of the crown, should defeat the duty first legally imposed by the same authority, and therefore that the plaintiff is not entitled.

Mr. *Alleyne*, in reply.—It is not to be wondered that I should have expressed myself inaccurately; but so I certainly must, since I appear to be so much misunderstood by Mr. Wallace; the whole tenor of whose argument has been calculated to meet a supposed idea of mine, that the laws of England were introduced into Grenada solely by the proclamation of 1763. This was by no means the object of my argument.

I contended that the proclamation was a recognition of the right of the inhabitants of Grenada, as British subjects, to be governed by the laws and constitution of England; of the practicability of reducing that right to practice, and the resolution of bringing in all its parts into actual execution as soon as possible: therefore I cited the case of Ireland, and upon authorities, I hope, of more weight at this day, than Calvin's case: and I did infer that British subjects, settling in a conquered country, conquered by the arms of a king of Great Britain, carried with them their own laws and privileges; and that the moment the crown recognizes a colony of British subjects to have been settled, from that instant it engages its authority for securing to them all the rights and exemptions belonging to that character. And I thought I had proved that the practice of the crown had been conformable to this principle.

But, to meet Mr. Wallace upon his own ground, who asked, supposing the crown entitled to exercise taxation over the inhabitants of Grenada, who were there, or should resort thither, indiscriminately, by right of conquest, how the crown had parted with this right, I acknowledge not properly waived it? I answer, let us suppose for a moment that, anterior to the proclamation, the crown, as conqueror, had a power to raise a permanent tax on the then and future inhabitants of Grenada; and had the *vitæ necisque potestas*, the legislative authority in the fullest sense, when the crown declares they shall have a legislation of their own, and in the mean while be governed by the laws of England, I contend from that moment the king had parted with the right, supposing he had that right till then of imposing upon them himself, by his sole authority, a permanent tax. And I contend that the patent to governor Melville repeated and enforced the grant, taking it as such for the present, in the most solemn manner.

In vain would it be argued that these grants of the laws of England were executory, and therefore might be suspended: proclamations and patents such as these are not of such a flimsy nature, to be suspended, that is, virtually repealed, to be granted to-day, and resumed to-morrow. And if this cannot be denied, then the English laws were the laws of Grenada, either by prior right, or, as I have been willing to argue, since Mr. Wallace has laid so much stress upon the executory nature of the proclamation, by actual immediate grant. And there is no one principle of English law more decidedly clear than that the crown cannot, by its sole prerogative, enact a law.

It was next argued, that principles of equity require this duty to be imposed; because it is recited in the patent of the 20th of July that the Leeward Carribbee islands pay it.

To this there is first one general and conclusive answer—whatever equity, wisdom, or expedience there may be in the measure, it must be executed by legal means. The propriety of

the object can never, in a legal view, sanctify the means taken. 'Nil cuiquam expedit quod 'non per leges licet. Nil utile aut honestum 'quod legibus contrarium.' But a particular answer is likewise ready.

The first place in which this tax was ever thought of was the island of Barbadoes; but there it was not imposed under claim of prerogative, but by a national act of their own internal legislature: and it was a grant for special purposes expressed, of building their prison, their courts of justice, their fortresses, and keeping them for the future in repair. And farther, in consideration of the confirmation of their titles which had been lost, or were become obscure in consequence of the confusion of the island during the troubles of the preceding reign of Charles the first.

I must be particular in stating this. The first grant of Barbadoes was to the earl of Carlisle from Charles the first: he divided the lands by subinfeudation amongst various purchasers.

During the troubles lord Carlisle abandoned the island; the protector, Cromwell, took possession, and made several grants of different parts of it; on the restoration the king made a new grant to lord Willoughby of Parham. In consequence of these several changes of property, and the violent and sudden revolution of affairs in the island, much confusion arose. The creditors of lord Carlisle asserted their claim; the grantees of Cromwell held by very uncertain claims; and lord Carlisle's creditors succeeding would necessarily have defeated the grantees of lord Willoughby. To settle these disputes the crown agreed to purchase the whole; and for the purpose of raising a fund to discharge lord Carlisle's debts, and the other purposes already mentioned, this duty was granted by the assembly of Barbadoes.

Your lordship will find these particulars in the act set forth on the record, but more fully in lord Clarendon's answer to the seventh article of his impeachment, which is in the continuation of his history, lately published.

I dare say Mr. Wallace will find the principles of equity not very cogent on Grenada, in a comparison with Barbadoes in this particular.

As to Nevis, Montserrat, and Antigua, with the English part of St. Christopher's, the same observations, in great measure, will occur. The grants of four and a half per cent. in these islands were likewise on special purposes, and were granted by their own assemblies.

As to the part of St. Christopher's conquered from the French, and ceded by the treaty of Utrecht, the very same claim was made in the reign of queen Anne, asserted by an act of privy council, and exemplified under the great seal, the same which is now made upon Grenada, of imposing this duty by prerogative. The act was withdrawn; the duty never collected; the people warmly opposed; administration yielded, and consented to take it by act of assembly; a circumstance incredible, if they had not been convinced that the measure was unwarranted by law, and the opposition just. And when the duty was finally granted to the crown it was not only by assembly, but under terms.

So much, therefore, for an argument built on the principles of equity, comparing the imposition of this duty by act of prerogative in Grenada with the same duty in the other Leeward islands, by act of their own assemblies.

Mr. *Wallace* observed the duty was imposed in 1703.

Lord *Mansfield* said it could not vary this question an *iota*: that the cause was put on its proper footing; that he took it as admitted the duty was laid on in 1703, and added, it was raised long before the act, which was in 1727.

Mr. *Wallace* said the whole duty in that time amounted to but 30*l.* Mr. Alleyne observed on this that 30*l.* raised in 24 years was a strong argument that hardly any planter, at least any considerable planter, had submitted to pay.

Mr. *Alleyne* continued.—But farther, as to equality, besides the reasons given, common observation will shew in what manner these new settlements in the island have been made. Large interest on loans payable yearly out of their estates. So far from additional burthen, it might have been hoped from government that they would have assisted this infant colony, always much below the other settlements when in the hands of its former possessors; and now, if this impost should prevail, miserably below indeed.

But, not to want an argument, which cannot readily happen to the ingenuity of the learned counsel who supports the defendant's cause, if it be true that the proclamation in words appears fully either a conveyance or recognition of all the rights of British subjects to the inhabitants who were in Grenada, or should resort thither; and that the island is not under circumstances which should make a construction to support the impost favourable in equity, independent of higher considerations still against such a construction; yet Mr. Wallace argues that it must mean this, that there should be such an impost; because if there is not, the enjoyment of the laws of England is secured to the inhabitants, which will be an unwise and cruel construction. I believe Mr. Wallace is the first politician who ever thought that waiving the claim of conquest, and insuring to the conquered the blessings of a free government, was cruel. And how would it have astonished the wisdom of imperial Rome to hear that it was unwise!

Nor do our own writers omit to admire the policy of king Edward the third, in planting a colony in Calais, and of course communicating to that place the wise and beneficial laws of England, so firm a support of public order; so productive of security and happiness to every individual living under them.

I have the authority of the great and excellent sir Matthew Hale, affirming this to have

been his practice in his other conquests, as I have already observed, both in Scotland and Wales, and applauding it highly. At least this objection may be reserved till the inhabitants of Grenada think this benefit a burthen, and complain of it as such. Mr. Campbell, certainly, for his part, does not complain, for he comes to claim the benefit of those laws, as his dearest birth-right: and it will be singular if it shall happen that any eloquence shall persuade any individual of Grenada that it is a reproach to the conquered to partake equally in those laws and constitution which are the glory and happiness of the conquerors, and the admiration of mankind; the English laws: and if they should rather choose to sink again into the state of a people under the hand of conquest than enjoy that equal liberty which abolishes all invidious distinctions between the conquerors and conquered.

The particular cruelty, however, which Mr. Wallace suggests is this; estates have been settled, contracts made, and things done with a view to the regulations of the law then prevailing; to alter this by the proclamation would harass and disappoint the parties, and annul their deeds.

Nothing can be more fallacious than this; for if at any time posterior to the proclamation any deed, contract, settlement, or any other matter of law had been brought into litigation, and appeared to have been transacted in conformity to the French laws, previous to the proclamation, and while the laws of France were yet in the island, those laws would have been adopted, and the instrument would have had its intended effect according to them; and the law of England would have taken notice of them, as it does of all foreign laws, where contracts are made under the authority of those laws; exactly as in cases which have happened in Chancery and in this court.—All mercantile contracts have this effect: and so it is allowed, as a settled rule of law, in the case of Freemoult and Dedire. The line, therefore, is sufficiently broad, and, at the same time sufficiently clear and defined: from the proclamation the English shall prevail as to all subsequent transactions; till the proclamation the French laws.

But in support of his general proposition, concerning the nature of the rights of a conquered people, Mr. Wallace has cited two illustrious names, (Grotius and Puffendorff) names which I shall ever mention with the greatest reverence. Yet I have ever wished to argue from the sentiments of writers who have surmounted prejudices, and reasoned liberally, not devoting myself to the greatest name with an unlimited attachment. Great and extensive as their genius, their learning, their application was, it is well known to those who are conversant in their writings, that they have adopted in most places the positive constitutions of the imperial law, as abstract general truths of nature; hence in most places their reasoning is somewhat too confined for the universality of the subject, and in many liable to exceptions. Far be it from me, however, to speak irreverently of them; they have broken the ground, though they discovered not all the treasures of the soil; and though they might in some instances be mistaken in the true quality of the soil itself. And to their great labours the refinement of public law is originally owing.

With respect to the instances of prerogative intended to have been adduced to justify this, I find only one mentioned, which, surely, cannot be supposed to support it by the comparison; the seizure of the Massachuset's charter in 1683, in the reign of James the second. No man will wonder at the violence: the imprisonment of the bishops; the campaign of Jefferies; the seizure of every charter left by his brother; were then as acts of ordinary justice at home. And, when the city itself was not safe, we shall not wonder the Massachuset's bay was invaded.

Mr. Wallace has not chosen to argue the right of ultimate judicature in this court and in the House of Lords. He leaves me, therefore, at large, with the observations I made on that point; and with a concession thus far at least, that there is no argument from experience to the contrary.

The last stress, on the close of the argument, was placed on the expedience and necessity of the power of legislation continuing in the crown till the legislature of the island actually sat.

This argument would go far indeed; it would ultimately prove that in the recess of parliament the crown is arbitrary legislator of this empire, and may impose a permanent tax on Great Britain itself.

But the constitution has happily provided a power in the crown, by which it is enabled to obviate sudden emergencies; or in cases not provided, bills of indemnity have always confirmed by an act of state, what was required as an exertion of extraordinary power. 'Salus populi suprema lex esto. Ne quid detrimenti caperet respublica;' affirming and strengthening the general rule by the very means used to protect the necessary deviation, and which nothing less than such a solemn judgment of the collective body of the state allowing its necessity can protect.

So in Grenada, from the first proclamation in October, 1763, to the session of the assembly in 1765, the crown had similar powers for obviating sudden emergencies, amongst the number of which powers a permanent tax cannot be esteemed.

I have now had the honour of submitting to your lordships what considerations occurred to me in reply to Mr. Wallace's argument, of which it would ill become me to speak with disrespect; I shall only say that it appears fairly answerable in the manner I have submitted.

And now I trust, I may take leave of this subject by congratulating my client (for if better arguments were to have been found, Mr. Wal-

lace would have discovered them) with being secure, and standing on a ground which will warrant my application to the Court for judgment for the plaintiff.

Curia ulterius advisare vult.

[Note, After the argument lord Mansfield said; The cause has been very well argued. There is one thing, however, which neither of you have defined precisely. Have you any idea a colony can be settled by British subjects without the intervention of the crown?

Mr. *Alleyne.* If subjects settle on an island uninhabited, for instance a shipwrecked crew, they cultivate, they inhabit. If the crown claims this island as a settlement by its own subjects, they have a right to say give us a constitution, govern us by the laws of England or not at all. If it demands a tax they have a right to say, No: till it be demanded legally in a constitutional mode.

Lord *Mansfield.* All colonies have been established by grants from the crown. I do not mean it as material to this question, but that it should be understood no colony can be settled without authority from the crown. As to the doctrine of those cases in Salkeld, I do not think much of it; it is very loose.

Mr. *Alleyne.* To meet the whole argument in the cause, I at first stated, that this colony was settled by authority of the crown.

Lord *Mansfield.* I understood you so; let it stand for another argument.]

Afterwards in the same term on the 5th of May 1775, it was argued by Mr. Macdonald for the plaintiff, and Mr. Hargrave for the defendant, nearly to the effect following:

Mr. *Macdonald.* This is an action brought against a custom-house officer in the island of Grenada for money had and received. The object is to recover a sum of money levied, by the defendant as a duty, and paid by the plaintiff; but paid, he contends, without legal consideration.

There is a special verdict, which, after what has been argued so fully and with so much perspicuity, it will be only necessary for me in point of form to state very shortly.

The jury find the island of Grenada in the West Indies, was in the possession of the French king, and conquered by the British arms; that there were several customs paid and payable to the French monarch, upon goods exported and imported from and into the island. They find the surrender of the island to the king of Great Britain, in February 1762; in the articles of which the inhabitants are recognized as British subjects, and the same protection and privileges granted as to the other colonies of America. And that they should not be obliged to bear arms against his most Christian majesty, while the then war continued, and the fate of the island remained undetermined; that they should take the oath of allegiance; that they should be governed by their own laws, until his majesty's pleasure should be further known.

They find the treaty of the 10th of February 1763, by which the French king renounces Nova Scotia, Canada, and other countries to the king of Great Britain; and in October 1763, the king of Great Britain, by his proclamation, assuring the inhabitants of his new conquests, and amongst them Grenada, of his paternal care; and that he has given order to his governors that, so soon as may be, they shall call assemblies, with power to the governor, with consent of the council and representatives so assembled, to make laws as near as may be conformable to the laws of Great Britain: in the mean time all persons may confide in his majesty's royal protection, and the benefit and enjoyment of the laws of England. Then the proclamation proceeds, and constitutes a council to determine all civil and criminal causes according to the laws of Great Britain; the jury find a second proclamation in March 1764, reciting the benefit of a speedy settlement of the island of Grenada and the other islands; directing a survey of lands, and a certain number of men and women to be maintained on the lands under penalties; they further find that his majesty, by his letters patent in April 1764, made Robert Melville, esq. his governor in the island, in the room of governor Pinfold, to act under instructions given and to be after given, ordering him, as soon as situation and circumstances will admit, to call assemblies, with full power to make and ordain laws, statutes and ordinances, for the welfare and good government of the people of the island of Grenada.

Afterwards by letters patent the 20th of July, 1764, they find a tax imposed by claim of prerogative in the same manner as in the island of Barbadoes the 20th of July 1764, of four and a half per cent. on commodities exported; they find the defendant levied the tax, and plaintiff paid it.

The verdict farther finds the action brought by consent of the attorney-general.

I am humbly to contend before your lordships, first, that no such tax could be imposed by prerogative.

And secondly, that, admitting the crown by prerogative was entitled to have imposed such a tax, his majesty by his proclamation of October 1763, prior to the instrument for raising such tax, has waived that right.

Your lordship finds by the special verdict that the island of Grenada was conquered by the British arms in February 1763, and by treaty surrendered.

I take it to be clear that the sovereign of the state conquers not for himself personally, but for the state: and according to this I have a great authority, which I shall beg leave to cite to your lordship.

Vattel—He says, it is asked to whom the conquest belongs, the prince or state? This question ought never to have been asked. Whose are the arms; whose the expence? If

he conquered at his own, yet whose blood is shed? If he used mercenary troops, does not he expose his state to the resentment of the enemy?

I collect from the same author, who lays it down as a principle of the law of nations, that if an uninhabited country be planted by British subjects, all the English laws (which are the birth right of every subject) are there immediately; but, if it be a conquered state which has laws of its own, those laws remain there until others are provided.

Lord Mansfield. Does he quote any authorities?

Mr. Macdonald continued. After a country is become part of the state, he seems to take it, as a principle, that it partakes of its constitution; and therefore not to think authorities necessary.

Lord Coke's Reports—Calvin's case—that the king may alter or change the laws of a conquered country, but till he doth, the former laws remain. This can only mean *flagrante bello* that he may do it; or in countries wherein the whole legislation is in the king.

Salk. 411, the difference of the facts in that case, prevents my quoting to your lordship the decision itself; but upon the general principle what the Court laid down was thus: In the case of an uninhabited country, all laws in force in England are in force there; but, Jamaica having been a conquered country, and not found parcel of the British dominions, the laws of Jamaica stand in power till others are appointed.

[Lord Mansfield said upon this, the opinions are very loose, and with a total ignorance of facts: Jamaica was conquered by Oliver Cromwell; I believe none of the conquered subjects remained. It is absurd, that in the colonies they should carry all the laws of England with them; they carry only such as are applicable to their situation: I remember it has been determined in the council: there was a question whether the statute of charitable uses operated on the island of Nevis: it was determined it did not; and no laws but such as were applicable to their condition, unless expressly enacted.]

I would farther remark, that where the words "king or sovereign" in treatises of general law are introduced, I would understand them according to the nature of the state of which they are spoken, or to which to be applied. Those words of Grotius, "Rex et regnum," translate them into Dutch, I should call the states general the king or sovereign; and if into English "king and parliament." I don't contend that the formal part of the law of England, but that the legislative part, goes thither. If I am right in my idea of the law of nations, it confines the power of the conqueror, merely within the time of conflict, and whilst the sword is the only law to which either side can resort; but, when a country surrenders to the British arms, when military government ceases, what can come in but the law which governs every particular subject; the legislation of Great Britain? When the sword is once sheathed, I cannot conceive of the existence of any other power but the legislative power, the constitutional law, or government. The forms of their constitution may and must remain till the executive power diffuses those which obtain in his other dominions. I take it that laying on imposts without consent of parliament was one of the great points on which the Revolution turned; and another revolution much earlier; and Magna Charta, and almost innumerable statutes. When we talk upon this subject, the present state of things is always out of the question: I shall therefore discuss the topic freely.

Lord Coke in his treatise on the statute of talliage says, no subject shall have money levied on him without consent of parliament; and after goes farther and says, no man, that is, I conceive, who can call himself a British subject, though in another country, shall be taxed without his representatives.

Here upon the principle of the law of conquest, by what reason can the power extend over the conquering people themselves; shall those who conquered with him share the fate of the conquered? It would be repugnant to every principle of reason, and to every writer upon the law of nations.

Vattel, page 92, lays it down as a principle of the law of nations, that wherever a nation settles and establishes a colony, that colony becomes a part of the dominion, and all that is said of the parent state applies to the colony.

Grotius says, that subjects settled in a country carry the same privileges they left behind them.

What is the difference between settling in a country uninhabited or inhabited? As to the executive power it is this: they must wait the directions of that power; as to the legislative, the law is the same to them as that which governs me, and every man who hears me.

1624, March 17th, 25th, a bill brought into council.—It was that which restrained the fishery.

The journal of the House says—The secretary said this is a conquered country, it is the king's; you have nothing to do with it: the parliament held they were part of the dominions of the state; they say the penalties and forfeitures are void, as not being by authority of parliament.

Sir E. Coke said, how! not subject to parliament! why they pass by the king's letters patent?

To be sure it is true the king cannot grant penalties and forfeitures; for that would be imposing a tax under colour; and it is proved demonstrably the prerogative of the crown had not that power over them.

[*Lord Mansfield.* I take it those penalties were recoverable here.]

The consequence in the very next charter was a grant of a free fishery.

In the charter granted to Mr. Penn there is this remarkable clause, that no imposition shall be levied on the colony without consent of the proprietor and assembly, but by act of parliament in England. Calais was a colony.

[Lord *Mansfield*. Was Calais a colony? It was ceded by the treaty of Bretigny.]

Lord Vaughan, 290, states writs of Non Molestando, issuing out of Chancery to the mayor of Calais, and divers writs of error.

With regard to the other parts not colonized, all mandatory writs issued hence as they might do to any part of the king's dominions. Lord Vaughan, but without precedent, says, writs of error might issue to Ireland; I don't find however that remedial writs ever issued, but mandatory writs.

The conquest of Wales, by Edward the first, has already been very fully considered, and I find no reason to depart from the ground then taken. The language of that king was that every part of his dominions not in his possession was feudatory to him, 'quia in proprietatis dominium totaliter conversa et tanquam pars corpori annexa et unita.'

From the conquest no instance of any but the legal authority exercised.

The conquest of Ireland is the next. Co. 4th Inst. says that H. 2 ordered the laws kept in England to be observed in Ireland, and that he sent a transcript. Leland considered this as merely declaratory of the necessary consequences of the laws already received.

In Harris's Hibernia, from the records, a grant to Felix Stephens, with the wardships: this could not have been constituted without manner of recovering according to the laws of England.

Lord Holt says, (which concurs with this argument,) it was not the mere conquest, but the subsequent settling, which let them into the same rights with the other subjects.

In Mr. Petit, 80, to shew the Commons of England sat separate before the 37 H. 3, a register is cited.

In the 28th of Henry the third, by the queen regent to the archbishops, bishops, &c. of Ireland, to assemble. Therefore Ireland, Wales, Scotland, all partook of the constitution; all were and are exempt from taxation by prerogative. I have spoken already of Pensylvania; the same argument will apply to the other colonies; the same to Grenada.

But secondly, even if the colonies are not exempt from such taxation by prerogative, except the king waive and renounce it, has not the king barred his right?

The capitulation requires liberty of selling lands. They are allowed to sell them to British subjects.

They desire the laws of Antigua and St. Christopher's, which, except a few local ordinances, are the same as in England, and they are promised in answer that they shall be considered as British subjects.

October 7, 1763. That all persons may rely on the royal favour of Great Britain till the assembly can be got together, courts of justice are to be erected, with authority over causes criminal and civil, as near as may be to the laws of England.

Then in March it is taken for granted that they have relied on the encouragement and assurances of the former proclamation, and a survey and distribution of lands is ordered.

Then by the patent creating Mr. Melville governor of Grenada and the other islands, he is ordered to call an assembly as soon as possible, for the purpose of making laws. I can see nothing stronger than the language of the proclamation.

That proclamation was said to be executory. "The calling an assembly is merely discretionary in the governor." Shall the effect of the proclamation be suspended on that event? Must we construe, "I give the law of England until you have an assembly" to this, "You shall not have the laws of England till you have an assembly?"

The legislature of the colonies might make such addition of local ordinances as they should think fit.

One of the benefits is this proclamation.

On what authority was the proclamation? The king had no right to levy the tax 20th July 1764, unless under the patent in April. We need only compare the dates.

But it is said there is no law at all. If the king has not, who has? I answer, the supreme legislative power of the state. The stamp-act prevailed at that time.

It is a principle in contracts between political bodies contracting, still more necessary than between private persons, that the grant once made, can never be recalled, and cannot be released till the conditions of the contract are broken by the one or the other.

This compact is what every speculative writer requires in his closet; what practice requires in all ages between nations; and which mutually and irreversibly bound both parties.

As to the island of St. Christopher's, the opinion of lord Hardwicke and sir E. Northey is observable.

They certify they have prepared a draught of several laws of four and a half per cent. on the conquered part of St. Christopher's, as far as they thought the condition would permit, conformably to the proclamation 1703, which was in the time of the war.

Sir Philip Yorke, in the year 1722, and sir Clement Worge, attorney and solicitor-generals, were asked how far the king could, by his prerogative, levy a tax on the island of Jamaica. They answered, that if Jamaica is still to be considered as a conquered country, the king has that right; but if it be in the situation of the other islands the tax cannot be levied, unless by act of assembly, or of English parliament.

[Lord *Mansfield*.—I believe your report is wrong.]

It was said the tax was expedient. If it is meant that it is expedient to them to have their money taken from them (but I cannot conceive how that should be) the tax is very expedient: but I have no doubt the Court will consider whether it is lawful, and upon that ground rest, with good expectation, the cause of the plaintiff.

Lord *Mansfield*.—They allow the validity of the letters patent of 1764, so far as they annul the poll duty; this comes in lieu of it.

Note, It seems it was never paid after the conquest, and there was an interval of two years.

Mr. *Hargrave*. My lord; when I consider the great importance of the questions arising in this cause, and how ably and learnedly they have been argued by the gentleman on the other side, I find myself under extreme difficulties; and I wish, that the task of answering such learned arguments had fallen upon some person more capable of acquitting himself of it than I am.

Two questions have been made in this cause; one is a general question, Whether the king by his prerogative has a right to tax a conquered country?—The other is a more particular question; and that is, Whether the island of Grenada at the time of imposing the duty of four and a half per cent. was to be considered as a conquered country?

My lord; it is not necessary to debate generally, what is the effect of conquest, or what rights the conqueror has over the people conquered. To destroy, to kill, to despoil and oppress, are pretensions I should be shocked to argue in favour of. But there are some rights which must be allowed to the conqueror; and he has, as I apprehend, a right of making laws to govern a conquered people. If, indeed, he consents to stipulations in their favour, they controul the legislative power of the conqueror; and ought to be rigidly observed. But if there is a submission without any particular terms, then the full sovereignty vests in the conqueror; and he has the legislative power without any other rules to direct him in the exercise, than those which natural justice and equity prescribe. Such is the general doctrine in respect to a conquered country; and under the qualifications I have stated the rights of the conqueror to exist, I apprehend my learned friend will scarce think proper to deny them.——But though the general proposition may be true, still little can be inferred from it to explain, what powers and what prerogatives the king of Great Britain is entitled to exercise over the countries he obtains by conquest. The general doctrine only shews, that the conquered country becomes subject to the dominion of the people conquering: but how such dominion is to be exercised, in what persons the powers of legislation are vested, depends upon their own laws and customs, and the form of their own constitution and government.

If the king of France makes a conquest, the sovereign of course, as soon as the conquest is made, assumes the sole legislation of the people conquered.

In the case of a mixed government like ours, the legislative power over a conquered country may be in the king only, or in the king and the two Houses of Parliament. It might be a question of some difficulty to decide, in whom the legislative power ought to reside in such case according to our constitution, if there were no precedents of law to guide and direct us. But unless I am greatly deceived the point has already been determined: and all the authorities which are to be met with upon the subject, uniformly concur in the doctrine, that the power of imposing laws upon a conquered country belongs to the king as a part of his prerogative. It has been objected by your lordship, that the cases which were cited upon the former argument, as well as those now cited by my learned friend, were so full of inaccuracies, that they were not much to be depended upon. So far as regards historical facts, I agree, that the observation is just: but with respect to the principle of law, the cases are clear, strong, and uniform, and all of them ascribe to the king the prerogative of imposing laws upon a conquered country in terms the most explicit. What countries fall under that description, whether Ireland, Wales, or other countries which have been mentioned fall under it, the authorities differ about: but in respect to the doctrine of law there is not the least disagreement.

The earliest case, in which I find any thing upon the subject, is Calvin's case; and I will state to the Court so much out of that case as is applicable to the present subject. Lord Coke mentions in Calvin's case, that a distinction had been taken between countries vested in the king by conquest and countries coming to him by descent. This gave occasion to an enquiry, whether the king had greater powers over the former than over the latter; and it was agreed by the judges, that he had; and that on a country obtained by conquest he had authority to impose laws. In reporting this doctrine, lord Coke mixes with it another distinction between Infidel and Christian countries, which is now justly exploded. But this ought not to prejudice the other part of the doctrine, which is not liable to the same objection——

Lord *Mansfield*. Don't quote the distinction for the honour of lord Coke.

Mr. *Hargrave*. My lord, I cite the case, not on account of the distinction between Infidels and Christians, but for the doctrine assented to by the judges in respect to the right of the king over all conquered countries. Though the difference derived from the religion of the country may be absurd and unreasonable, still there may be other parts of the case not liable to objection. Lord Coke, describing the king's power over a conquered country, says, "He may at pleasure alter and change the laws of the

kingdom: but till he does make an alteration the ancient laws remain." So that according to the opinion in this case, the king has the complete power of changing the laws of the conquered people, as he thinks proper and convenient. He may give them the laws of England or any other laws: but if the English laws are once given, from that time the king's prerogative of imposing laws ceases; and lord Coke agrees, that then their laws can only be changed by act of parliament. This doctrine from Calvin's case is of importance: for it is the opinion of all the judges, and not altogether extrajudicial, being an observation on a distinction, which had been made by the counsel against Calvin; who distinguished between countries acquired by conquest, and kingdoms coming to the king by descent; and asserted, that countries of conquest are parcel of England, because acquired by the arms and treasure of England, and that such countries immediately become subject to the law of England.

But this is not merely the doctrine of lord Coke's time, the same prerogative has been attributed to the crown in all cases, in which it was necessary to consider the subject both before and since the Revolution. Indeed no case has arisen, which required a judicial opinion; but there have been several cases, in the argument of which the doctrine in Calvin's case has been mentioned and observed upon; and in all of them it has been asserted both by the judges and counsel as law.

The first case I shall mention is Dutton and Howell, Hill. 3 James 2, in the King's-bench, and afterwards in parliament. It is in 3 Mod. 159, and in Shower's Parliamentary Cases 24. This case was an action brought against the governor of Barbadoes for false imprisonment; and the counsel for the plaintiff agreed, that, according to Calvin's case, the king may impose laws upon a conquered country, but denied that Barbadoes was a conquest. The counsel for the plaintiff, whose interest required, that the doctrine should be controverted, if there was a chance of doing it with success, assents to it without hesitation. The words of Shower are, "It was agreed that according to Calvin's case, upon the conquest of an infidel country, all the old laws are abrogated *eo instante*, and the king imposes what laws he pleases; and in the case of the conquest of a Christian country he may change them at pleasure and appoint such as he thinks fit." The reporter goes on and says, "though Coke quotes no authority for it" (which is a mistake of the reporter, for lord Coke cites the case of Ireland and other instances in which the crown had exercised such a power), "this may be consonant to reason. But it was denied that Barbadoes was a conquest. It was a colony or plantation, and that imports the contrary, and by such names these plantations have always gone in letters patent, proclamations and acts of parliament." The book then cites some authorities to prove, that Barbadoes was a plantation or new settlement of Englishmen with the king's consent. Here your lordships will observe, that the sole question was, whether Barbadoes should be deemed a colony or a conquest; and it seems to have been agreed by all, that if it was a conquered country the king had authority to impose laws. But this case was before the Revolution.

Blanchard and Galdy, which has been so frequently mentioned to your lordship, is the next case. It was after the Revolution, and is in Comberbatch 228, and 4 Mod. 215, and 2 Salkeld 411. The question in that case was, whether selling the office of deputy provost marshal in Jamaica was within the statute of Edw. 6, and the Court held that it did not extend to Jamaica, because it being a conquered country, the laws of England did not extend to it till introduced by the conqueror or his successors, meaning clearly, the king, for the word 'successors' will not apply to parliament. I will not repeat to your lordship the words of the report in Salkeld, as they have been already stated more than once.

Another case since the Revolution, in which the doctrine is mentioned, is in 2 Peere Williams 75, and there, my lord, it was said by the master of the Rolls to be determined by the lords of the privy council, that if there be a new uninhabited country found out by Englishmen, as the law of England is the birthright of every subject, so wherever they go they carry their laws with them; but where the king of England conquers a country it is a different consideration, for there the conqueror by saving the lives of the people gains a right and property in the people, in consequence of which he may impose upon them what laws he pleases.

Lord *Mansfield*. It is ill expressed in the report; I take it the master of the Rolls did not express himself so.

Mr. *Hargrave*. My lord, these are the only cases, in which I find, that the general doctrine in respect to the king's prerogative over a conquered country has come into question.

But there are instances in which the king has actually exerted this prerogative of giving laws to a conquered country.

The first instance is that of Ireland. My lord, authors differ very much in their opinions about the manner, in which the laws of England were introduced into Ireland. Lord Coke in Calvin's case considers king John as having given the laws of England to Ireland. The words are—"If a king has a Christian kingdom by conquest, as king Henry the 2d had Ireland, after king John had given unto them, being under his obedience and subjection, the laws of England for the government of that country, no succeeding king could alter the same without parliament." Calvin's case, 7 Co. 176. Here lord Coke treats Ireland as a conquered country, and king John as giving laws as a conqueror. But in the 4th Institute king Henry the 2d is said to have partly introduced them before; and there lord Coke

cites several records of the reign of Henry 3, in which king John is said to have ordained, that the laws of England should be observed in Ireland. But one of them expresses, that he introduced them with the common consent of all in Ireland. The words of the record are, "consuetudines et leges regni nostri Angliæ quas bonæ memoriæ Johannes rex pater noster de communi omnium de Hiberniâ consensu teneri statuit in terrâ illâ." 4 Inst. 349. From the record and other circumstances attending the conquest of Ireland, Mr. Molyneux in his argument against the authority of the English parliament to bind Ireland by statutes, has inferred, that the laws of England were not imposed upon the Irish as a conquered people, but were extended to them at their own desire and with their own consent. But sir John Davis's account of the introduction of the English laws into Ireland seems the most agreeable to history; and according to him they were not established 'simul et semel' over the whole country, but gradually, first over so much of the country as was possessed by the English colonists in Ireland, and at length over the other parts of the island, as the king from time to time thought proper to extend the protection of the English laws, which was not universally till the 3d year of James 1, who by proclamation declared, that he received all the natives under his royal protection. Sir John Davis's Reports, 101 to 108, and his book on the causes why Ireland was not subdued till the beginning of the reign of James the 1st. The further particulars on the subject will be found in Pryn on 4 Inst., sir Matthew Hale's History of the Common Law, the 1st vol. of Leland's History of Ireland, Nicholson's Irish Historical Library, and two controversial tracts on the English parliament's power of making laws for Ireland in Harris's Hibernica. The two tracts were written about the year 1641, though not published till within these few years. The occasion of the controversy was the Act of Adventurers made in the 17th of Charles 1, which declared many Irish persons to be rebels, and disposed of their lands to others. The tract against the right of the English parliament is said to have been written by sir Richard Bolton, or as Mr. Harris rather thinks, by Mr. Patrick D'Arcy, an eminent lawyer of those times; and the tract for the right was written by sir Samuel Mayart, serjeant at law. So much for the time and manner of introducing the English laws into Ireland; and it is remarkable, that however the several writers differ in explaining the mode of establishing the English laws, there is not one who denies the right of the king of England to impose laws on a conquered country by prerogative, except Mr. Molyneux, whose arguments, it must be confessed, have a tendency that way. Some notably attribute the introduction of the English laws to an exertion of the royal prerogative, and the assertion seems well founded in respect to such parts of Ireland as were not English colonies. But whatever the fact might be in respect to Ireland, all, except Mr. Molyneux, agree, that the constitution invested the king with such an authority over a conquered country. In the treatises by D'Arcy and Mayart, Calvin's case is particularly commented upon; and both writers concur in the principle there laid down as to conquered countries; and both recognize it to be the law of England; the only difference between them in this particular being, that Mr. D'Arcy supposes king John to have introduced the laws of England, and that serjeant Mayart supposes them to have been introduced by king Henry the 2d.

My lord, Wales is another instance in which the prerogative of imposing laws either has been, or as all the books agree, might have been exerted. When Edward the first had conquered Wales, some of its ancient laws were changed, and made conformable to the laws of England, though the greatest part of them remained in force till the 27th of Henry 8. But it is not clear, whether the 12th of Edward 1, sometimes called Statutum Walliæ and sometimes the statute of Rothland, by which the alteration was first effected, was an act of parliament or merely a royal charter. It is printed among our statutes, and lord Coke and lord Hale call it a statute, and it is so called in Plowden; but sir John Davis calls it a charter. Lord chief justice Vaughan seems doubtful what it is, and Mr. Barrington in his Observations on ancient Statutes is of opinion, that it is not a statute. 4 Inst. 239; Hale's History of Common Law 132; Plowden 126; Davis's Reports 114; Vaughan 399, and Barrington, 2nd edit. p. 84. But whatever was the mode of first abrogating the Welch laws and substituting the laws of England, lord chief justice Vaughan allows the authority of king Edward to make the alteration without an act of parliament. In speaking of Wales, and of the 12th of Edward 1, his words are, "So as from this time it being of the dominions of the English, the parliament of England might make laws to bind it: but it was not immediately necessary it should; but its former laws (excepting in point of sovereignty) might still obtain, or such other as Edward the 1st should constitute, to whom they had submitted, and accordingly their laws after their submission were partly their old laws, and partly new ordained by him," p. 400.

Lord *Mansfield.* Edward the 1st considered Wales as an antient fief of the crown of England. The statute so represents it.

Mr. *Hargrave.* My lord, so far as lord Vaughan goes the authority is the same; because he treats it as a conquered country, and does not found himself on Wales being a fief of the king of England. He considers Wales as having submitted to Edward the first as a conqueror; and therefore attributes to him a power of imposing laws; though he is doubtful whether he exercised it, or whether the als

teration of the Welch laws was made by the authority of parliament.

I am now come, my lord, to America; and shall state how the prerogative has been exercised there. One general observation may be applied to our colonies in America and the West Indies, which is, that all of them, except some of the few ceded to us by foreign states, whose constitutions have not been yet varied, derive the whole frame of their government from an exercise of the royal prerogative. Their governors, their councils, their assemblies; their courts of justice; all originate from gifts of the crown. Their legislative powers, even their powers of taxation, flow from the same source. The more early charters from the crown, those antecedent to the reign of James the 1st, were mere grants of the soil of newly discovered countries without fixing any form of government. The first charter for erecting the government of an American colony bears date the 10th of April 1606, and was to the two Virginia companies. It is worthy of notice, that by this charter the king vests the powers of government and legislation in such as should be appointed by a council of persons resident in London, and also imposes a duty of two and a half per cent. on merchandize bought and sold within the colony. But this was before the Revolution, in times when the prerogative was too often carried beyond its due and constitutional limits; and therefore much cannot be inferred from exertions of the prerogative during such a period. However, even since the Revolution, there have been great lawyers, who have attributed to the king a prerogative of taxing such of our American and West India possessions as are countries of conquest. The case of Blanchard and Galdy, in which lord chief justice Holt and the other judges of the King's-bench recognized the doctrine in Calvin's case as to the king's general powers of imposing laws on a conquered country, and the case from Peere Williams, in which the same doctrine was laid down as law, have been already stated as a confirmation of the same principle of law.

The instances, in which the king's particular power of imposing taxes on a conquered country has been exercised or come into question with respect to America, shall now be mentioned.

In 1686, the government of New England being seized into the hands of the crown under a judgment in a Quo Warranto, king James 2, appointed a governor and council with power to continue the former taxes, till they should settle other taxes under this commission. The governor and council passed an act continuing the former taxes, and in the year after the Revolution (and it is upon that account I speak of the case, for I should be ashamed to mention a precedent of the time of James the 2nd upon the subject of prerogative, unless it was supported by the opinion of those lawyers, who lived after the Revolution,) lord Sommers and sir George Treby; upon being consulted in the case of one Usher, gave their opinion, that the officers of the revenue who collected such taxes were not liable to any action for so doing—

Lord *Mansfield.* The king appointed the governor and council. What were the powers given them?

Mr. *Hargrave.* A power to collect former taxes till they should settle other taxes; and under this commission the governor and council passed an act continuing the former taxes.

Lord *Mansfield.* That appointment respecting the collection of taxes was temporary.

Mr. *Hargrave.* It was the year after the Revolution that lord Sommers and sir George Treby gave their opinions. Lord Sommers and sir George Treby were consulted upon the legality of such taxes in 1689.

Lord *Mansfield.* They were attorney and solicitor general, I believe.

Mr. *Hargrave.* Their opinion being given so soon after the Revolution becomes a very strong authority, unless a difference can be established between a tax revived and a new tax.

Lord *Mansfield.* How do you authenticate it?

Mr. *Hargrave.* I have the case in my hand with the opinions upon it.

Lord *Mansfield.* Is it official?

Mr. *Hargrave.* I believe it is an official case.

Lord *Mansfield.* Is it referred to them as officers of the crown?

Mr. *Hargrave.* It don't appear in whose name they were consulted; but most probably it was by the direction of the crown. [Here Mr. Hargrave stated the words of lord Sommers's opinion.]

Lord *Mansfield.* They considered the charter being vacated as if it never had existed, and the charter was out of the way, and they had no particular constitution given them by the crown, and so it went from the Revolution down to 1694 or 95 till the 4th of king William, their present charter was given them in the 4th of king William.

[Here Mr. Hargrave stated sir George Treby's opinion, which was much to the same effect with that of lord Sommers.]

Mr. *Hargrave.* I don't however mean to extend the doctrine as far as lord Sommers and sir G. Treby extend it. They seem to make no difference between a conquered country, and a colony without a government.

Lord *Mansfield.* You mistake it, the charter being totally void, they could have no sort of government but that which the colonies that are called provinces have. They are governed not by any charter, not as proprietory governments are by any grant or patent, but by the king's commission, and instructions added to that commission; and in process of time they had an assembly given them by the king's commission, but had no charter. The two gentlemen meant the charter was vacated, and till he gave a new charter it must be governed by the king's commission.

Mr. *Hargrave.* There are still more recent cases in respect to our American possessions.

In 1702 the English conquered the French part of the island of St. Christopher's; and soon after sir Edward Northey, then attorney general, on a reference to him by the privy council, reported it as his opinion, that the queen might by letters patent impose a duty upon goods exported from the conquered part, and the reason he gave was, "that the queen by her prerogative could make laws to bind places obtained by conquest and all that inhabit therein." Accordingly a duty of four and a half per cent. was imposed by the queen, that being the same duty as was payable in the English part of the island under an act of assembly. This duty on the French part was continued till the peace of Utrecht, when the possession of the whole island was confirmed to Great Britain, soon after which an act of assembly was passed extending this duty of four and a half per cent. to the French part of the island.

But there is a more recent case. In the reign of the late king the assembly of Jamaica withheld the usual grants; and this gave occasion to the crown's consulting sir Clement Worge and the late lord Hardwicke, then attorney and solicitor general, to know, whether the king had not a right by his prerogative to impose taxes in that island. Their answer was, "That if Jamaica was still to be considered as a conquered island, the king had such a right, but if it was to be considered in the same light with the other colonies, no tax could be imposed on the inhabitants, but by the assembly of the island or by act of parliament." —It is in vain to urge against these authorities, that in Great Britain, in Ireland, and such of our colonies as were originally settled by emigrants from this country, the legislative power is not entrusted to the crown. It might perhaps be more conformable to the general nature of the constitution, and it might be more convenient, it certainly would be more uniform, if the limits of the king's prerogative were as circumscribed in a conquered country as in the realm of Great Britain. But the question to be decided here is not, what would be the best constitution, but what the constitution actually is; not what bounds ought to be set to the king's prerogative, but what its limits really are. If the royal prerogative is in this instance improper, inconvenient, and dangerous, it is the business of the British parliament to correct and reform it, and to reduce it within narrower bounds; but the business of this court is of another kind.

Lord *Mansfield.* You did not state sir Edward Northey's opinion fully; his opinion, I will read it, is this: "The law extended originally to such part of St. Christopher's as belonged to the crown of England. When that law was made, by virtue of that law they could not raise the duty upon the conquered part, yet her majesty may if she so pleases under the great seal of England direct and command the like duty to be levied upon goods to be exported from the conquered part, and such commands are law there, her majesty by prerogative being enabled to make laws to bind places obtained by conquest, and all that shall inhabit therein."

Mr. *Hargrave.* If, my lord, I have succeeded in establishing the first point, that the king has a right by prerogative to tax a conquered country, the only remaining consideration is, whether at the time of imposing the duty of four and a half per cent. the island of Grenada answered to that description. It is stated in the special verdict, that the island of Grenada was conquered during the late war; and there is nothing in the terms of capitulation which gives a right to the inhabitants of that island to the laws of England. By the 5th and 6th articles the inhabitants require, that they should preserve their civil government, their laws and ordinances with respect to the administration of justice, and that there should be regulations made between the governors of his Britannic majesty and them for that purpose; and in case at the peace the island should be ceded to the king of Great Britain, it should be allowed to the inhabitants to preserve their own form of government or accept that of St. Christopher's. This was what was demanded on the part of the island, but the demand was not complied with. The answer was, that they would become British subjects, but should be continued to be governed by their present laws till his majesty's pleasure should be known. So that the articles of capitulation neither stipulate a constitution nor laws for the island; but leave the royal prerogative as free and unrestrained, as if there had been a submission without any terms. But the great difficulty in the cause arises from the first proclamation, by which a provincial legislature and the laws of England are promised to the island of Grenada, and the commission to governor Melville, by which he is authorized to carry that promise into effect. It is said, that these instruments were an immediate gift of the British constitution and liberties, and of the English laws; and being antecedent to the letters patent for imposing the duty of four and a half per cent. were a waiver of the prerogative of taxing. It is true, that an administration of justice according to the laws of England was to take effect immediately, but both the proclamation and governor Melville's commission suspend the calling of a general assembly, till the circumstances of the island should admit of a change so important. It was left entirely to the discretion of the governor and his council to decide, when it should be proper to execute that part of his commission: and in fact it was not executed, an assembly was not called, till after imposing the duty. Before the first proclamation, the king was the lawgiver of the island; but he thought fit to promise a legislature more conformable to the general frame of our government, and he commissions his governor to fulfil that promise, when the state

of the island should permit. Till that time came, I submit, that the prerogative continued. I submit, that the king's legislative powers did not cease till the assembly to which he promised to transfer them was called. At a seasonable time a new legislative power was to be constituted: but till that time arrived, the old one, however arbitrary, remained; and it was not the king's intention to divest himself of his prerogative sooner. To say otherwise is supposing, that the king meant to leave the island for a time without any legislature, and to quit his legislative powers before the assembly, in which he promised to vest them, was called into existence.

Lord *Mansfield*. There are three instruments. There is the proclamation, the survey in March, and the commission to the governor.

Mr. *Hargrave*. I did not mention the second proclamation, because it seems merely to concern the survey of the island, and the manner of granting crown lands to new settlers.

Lord *Mansfield*. It recites the terms of the proclamation, and invites settlers upon those terms.

Mr. *Hargrave*. But then I answer, it was not a part of those terms to waive the king's prerogative of making laws, till a new legislature was constituted under governor Melville's commission. A promise was made to call an assembly when the circumstances of the island should permit; and it would have been disgraceful not to have performed that promise. But it was performed. All I contend for is, that till actually executed, and till the legislature was established by calling an assembly in order to succeed to the legislative power of the crown, the king's prerogative remained the same as before. Nothing further occurs to me; and I am the less unwilling to trust to the few observations I have made in the latter part of the cause, because it was the principal subject of the former argument.

Mr. *Macdonald* in reply. My lord, as I have already troubled your lordship to a much greater length than I am warranted in doing, and as I conceive I have already anticipated most of the arguments and instances mentioned by Mr. Hargrave, I shall be very short by way of reply.—I shall only bring back to your lordship's recollection, that I endeavoured to explain to the best of my understanding, that the king cannot extend his prerogative power of imposing taxes beyond the time that a country becomes a regular settled part of the state—by the terms of proclamation in question, he expressly transfers to the island of Grenada, the laws of England. And to impose a tax without the concurrence of any other body, is to retract that gift: but Mr. Hargrave has said there are precedents, though not very strong, which shew the king has such power of exercising a prerogative of taxation over a conquered country. One he mentions in James the 1st's time, and at the same time he says he is ashamed to mention another in James the 2d. James the first governed all his dominions according to his own idea of prerogative, conceiving this empire to be made up of so many small parcels, looking up to him for support, and when he drew a comparison of his subjects understanding with his own, he held that they were in proportion to his, as a platter is to the sun in the firmament, or as the brass nails in the pommel of a saddle to the stars in the heavens.—My lord, it is most indisputably true in the general terms in which the proposition is laid down, that the king may tax a conquered country. I have admitted that he may during the war, but then and then only, and I have heard no answer to the arguments by which I confined it to that period; at least, though the king might have a power to lay on a tax before the proclamation, so soon as that proclamation was made, he waived that right, and by virtue of it allowed them a constitution, which was established completely the year after, and I submit, if that proclamation is over-ruled, it will be worse than if it had never existed. It is said with respect to the charters of New England, and other places at the time when they were resumed into the king's hands, that great lawyers soon after the Revolution gave it as their opinions, that those places were considered as conquered countries, and in the same situation as if those charters had never existed. I conceive no precedent whatsoever can warrant such opinion, but as to all the cases quoted by Mr. Hargrave and me, they are very loose, and neither can avail ourselves very much of them; but still with respect to those opinions, they talk of a conquered country without saying what it is or is not, and I hope I have shewn to your lordship that it can only be a country, held by the sword alone.

Lord *Mansfield*. What he says of the American instances is this, there are conquered countries amongst them—New York in particular was conquered from the Dutch, they have their whole constitution from the crown—that is what he says, but always that argument supposes this power of giving a constitution exercised by the king is not exclusive of parliament, there cannot exist any power in the king exclusive of parliament.

Mr. *Macdonald*. Mr. Hargrave at the same time says the king's proclamation is not only executory, but he has the intermediate power of imposing taxes until the assembly can sit—now if that proclamation was not capable of giving these people a constitution, which it does inasmuch as it gives them the laws of England to all eternity, they must remain as a conquered country, and the crown has not the power of doing that act which can give them the benefit of a legislature which every other colony has; if this proclamation does not give it, what is the consequence of that—what your lordship says undoubtedly must be true—the parliament can never be excluded, but there will be a double legislative authority over this country, and parliament may do one way,

the king another, and they will be subject to the miseries of a double government.

Mr. Just. *Willes*. Is not it the case with them all—when a legislative power is given then they are subject to this parliament also.

Mr. *Macdonald*. True, my lord, but I mean there is a double superior government over them: as to their own subordinate legislature, I don't conceive that to be so very material as to be classed with the others, namely, the king alone, or jointly with his parliament, and much of the misery of double and consequently uncertain government will still remain.—I submit to your lordship it is inconsistent that the king should thus have the legislative authority: as to the parliament having it, there can be no doubt of that. With regard to the opinions of lord Sommers and sir George Treby, they were given on circumstances so very particular that they cannot possibly apply to this case, in which no such circumstances are to be found; and with respect to sir Edward Northey, I must remind your lordship that he speaks of a country held by force of arms, and his opinion was that it might then be subject to the king's prerogative only; but when it becomes a colony, that is, as soon as the legislature was established, that prerogative is not to be enforced.

If the sense of the parliament was wanting, there was a bill brought in, in March 1749, in order to make the king's order law in the colonies. That was petitioned against by every one of the colonies, and thrown out.

The words of the Declaratory Act of 6 of Geo. 3, 6, 12, are as strong as possibly words can be, declaring the power of legislation and taxation over the colonies to be in the king and parliament, without any reference to the king's sole prerogative. I need not go over the ground again, for beside the crude ideas which I have submitted to the Court, the learned gentleman who went before me has sufficiently answered every objection in the first argument; wherefore, trusting more to his ingenuity and learning than my own, I hope the judgment of the Court will be for the plaintiff.

Lord *Mansfield*. If neither side desire a further argument, I am ready to give my opinion.

Mr. *Hargrave*. My lord, I am desired to request a further argument, and when I consider my own inability, I hope your lordship will grant another argument.

Mr. *Macdonald*. I am instructed to represent to your lordship that this is a revenue tax requiring an immediate determination, and to say that we should be glad of the judgment of the Court as soon as possible.

Lord *Mansfield*. It has been argued very well.

Mr. *Hargrave*. My lord, it is the wish of Mr. Attorney General to have an opportunity of arguing it, the cause is of great importance, —there is great novelty in it.

Lord *Mansfield*. I have said, if either side desire another argument I will not refuse it.

Mr. *Hargrave*. I am not positive whether Mr. Attorney General authorized me to say that he desired another argument. But I understand from him in conversation, that he meant to argue it the third time, which is one reason for my present application.

Lord *Mansfield*. Let it stand over for a third argument.

On Monday the 6th of June it was moved for farther argument. Stood over till the Tuesday se'ennight.

Tuesday, June 14.

It was entreated it might stand over till Friday.

Lord *Mansfield*.—I don't see any inconvenience in going over till next term. It is your own delay. It is absolutely impossible to give judgment this term. Suppose we were all agreed, many matters are thrown out in argument which are not absolutely necessary in the decision, but of which it would be necessary to the Court to take notice.

What the value of the French duties may be, I don't know: it does not appear in the case. Suppose the Court should be against the imposition of those duties which are imposed in lieu of the French, there would arise a question concerning those duties.

Can you have any doubt upon the most material argument of all?

The first question made in the second argument by Mr. Macdonald, I think, is one of the greatest constitutional questions that, perhaps, ever came before this Court. As my brother Aston is absent, I wish, principally upon that account, that it may stand over. It is impossible it should ever be passed over in silence.

Mr. *Campbell* moved that judgment might be given upon the former argument, but lord Mansfield reminded him that he could get no farther, because it must necessarily come into the Exchequer; and, even if that were not the case, judgment could not have been given in the term, both on the account of the absence of Mr. Justice Aston, and as the last day would be a Wednesday.

November 7, 1774.

The Grenada cause came on for the third argument by Mr. Attorney General on the part of the crown, and Mr. Serjeant Glynn for the plaintiff.

Mr. Serjeant *Glynn*.—This case, one of the most important in its principles, and in the consequences dependent on the decision, that was ever argued, comes before the Court on a special verdict, stating that the island of Grenada was in the possession of the French king, and conquered by his Britannic majesty's arms in 1762. The inhabitants permitted to sell their lands, to the subjects of Great Britain only, by the articles of capitulation in 1763.

Proclamation, reciting the benefits from a regular colonization; promising that assem-

blies shall be called, with power to make laws: in the mean while the subjects to confide they shall be governed by the laws of England.

Provision made of legislation to be executed by the governor 9th of May, 1764. Patent to the governor to call an assembly as soon as convenience shall admit.

Proclamation 20th of July 1764, for levying an impost of four and a half per cent.

Stated—assembly called about the end of the year 1765.

State of custom of the other islands. The impost by assembly.

State of St. Christopher's, only where there is a difference of collection; part having been subject to the king of France.

They find the impost levied on the plaintiff by the defendant; and that it is upon the impost so levied this action is brought. And on the whole matter, if the money legally collected, then they find for the defendant; if not, then they find for the plaintiff.

The question is—whether the king has a power, without acts of assembly or parliamentary regulation, to impose any tax upon the inhabitants of the island of Grenada?

The provision for peopling the island, the commission to governor Melville for the well governing of the island, are both material.

I cannot help taking notice of the principle, on which the claim of the king is founded, to the raising of this imposition, which is, that the king has a right to exercise a despotic power over a conquered country, annexed to the dominion of Great Britain; and that this power is legally, permanently and uncontrolably in him. I think, though not necessary to this decision, it will throw light upon many points contained in it.

If it could be shewn that the law had asserted this, and no contrary decisions had denied it; that the course of history proved it; that it had ever been asserted; that there were no times in which the exercise of it had been disputed, or, if there were, that it had never been judicially contradicted; and that the king had always exercised it: however unagreeing with our principles it might appear, and however dangerous to the constitution that the king should have independent dominion; yet, if it were so upon the authorities as stated, I should hold it a very formidable argument. But I hold that the opinions have been silent; that there have been no decisions; that the course of our history has no vestiges of it; that it never has been exercised; and that every hint of it has been rejected with disgust.

That of Calvin was a question, whether a post-natus of Scotland was a natural-born subject of the king of England, after the Union; it was held he was, because the centre of unity was in the person of the king. No necessity of entering into the discussion whether it be lord Coke's opinion, or of the judges.

The general definition is—of a king of a conquered people, and a proposition is laid down generally.

"If the king make a conquest of a Christian country, their laws remain till he gives them others; but, if he makes a conquest of an infidel country, they are presumed to have no laws; he may give them what law he pleases; but guided by natural justice and equity." I quote this not for the sake of any thing but the use I shall make of it by and by, shewing, that a subsequent authority went to that only: and this was an idea which was not received by your lordship the last term, but rejected with a declaration, that for the honour of lord Coke it ought not to be spoken of; as I hope it never will.

He is speaking of a king, not particularly of the king of this country; if it were to be understood to belong to any king, it would be evidently wrong as to Poland, or as to the then constitution of Sweden. If a conquest be made by a king of Poland by a Polish army, it is made not to the king personally, but to the king and senate of Poland; and so of Sweden at that time.

A very respectable author was cited to your lordship, by Mr. Macdonald, who very ably argued from his book, that all acquisitions by conquest are made for the state; and are therefore at the disposal of those who make them, that is to say, the state according to its several constitutions, and different distributions of legislative power.

In agreement with this author, who states the doctrine in a decisive manner, I think it clear that the conquest made by the state is for the benefit of the state. Execution and administration of all laws in England is in the crown; the power of making laws, according to the constitution of the state which he governs here, is in the crown with the two other parts of the legislature. When lord Coke gives his opinion, he must have taken it from writers of general law, and those for the most part of absolute monarchies; and he took the word 'king' as a general word, which, in their sense of it, comprehends the whole constitution.

Objected, that lord Coke's authority must be taken otherwise, because it has been understood in other cases to belong to the sole power of the king; and it was taken on this authority, the king had the right of making independant laws over a conquered country; and that a king was in the same state even as to a colony, unless otherwise provided by charter.

It is said that in P. W. the same point was determined. But P. W., instead of speaking of the bare power of the king, spoke of the power of a conqueror.

The concession said to be made by sir B. Shower; and that it was of consequence to them to have denied the position, if capable of being denied; was in the case of an island not inhabited when first passed by patent; so if a conquest gave any right, he said it must be over the persons of the conquered people, not over the country.

Upon a state of the history of Jamaica, supposition of fact being mistaken, the argument

that is applied fails. That position, so justly reprobated in Calvin's case, is the point affirmed.

The opinion contended to be settled in that case of Blanchard and Galdy, is founded on my lord Coke's taking them, without civil policy, to be governed arbitrarily, according to the pleasure of the king, as he should think equity and justice; if the concession be any thing it is to be applied to that point; which ought not to be named in a court of justice. This is the principal ground of a case which, from its inaccuracy, gained so little weight with your lordship upon the last argument; if there had been others, the industry of the learned gentlemen who made the best of the last argument for the defendant, would have produced them. Taking the expression from a public writer, I apprehend my lord Coke meant merely to state the principle, not applied to any particular country; and then the king, when applied to England, means not the king solely, but the king and parliament. It is the most natural and rational construction, and is such, I think, as the argument admits.

I think it can never escape your lordship, that my lord Coke, writing without precedents or authority, must necessarily refer to the writers of public law. Mr. Macdonald has well observed, those writers generally used the word emperor or king as an arbitrary power including the whole. If lord Coke is supposed to have laid down the point, it must have been from the history of his country, and that the king from the earliest time exercised this prerogative. Though I should not have laid great stress upon authorities deduced from dark and unsettled times; nor from our Henrys, or even our Edwards, to prove, from the exercise of an act of power, the legality of the claim; (when even in that reign, when the great charter was given, there were so many violations of it, and so many afterwards, and so many confirmations otherwise not necessary.) Though for these reasons, I cannot allow much weight to acts in claim of a prerogative in those reigns, there is no instance of an absolute authority by the king over a conquered country. I don't mean to waive the benefit of what has been so ingeniously argued, with respect to the introduction of laws into Ireland by the charter: but I think Mr. Macdonald has produced an argument in proof, that the laws of England existed before that time, as it refers to them.

I think, therefore, an English constitution had passed; and in general that it is part of the duty of the king to provide, that the English constitution shall be exercised every where over all the subjects of England, however conquered, however acquired, or wherever their situation.

The power of promulgation of laws, issuing of laws, the making preparations and proper regulations, for the introduction and execution of those laws in a country so lately receiving them, is the peculiar prerogative. Though there is an antecedent title by birth or situation, it can only be exercised by means of the trust reposed in the crown, so as to be applied to the benefit of the public.

The enquiry is not what is expedient for the peculiar good of mankind so much as what is necessary or capable of being admitted. Where new laws have been to be introduced, or old ones to be altered, it has always been by the act of the supreme legislation openly, either here or over the states in Ireland. If the providing for the execution of an antient right be called legislation, we will readily allow this legislation to have always existed in the king. But it is necessary, in order to prove the authority claimed in the present case, to shew that the king has abrogated, altered or introduced laws. This has not been done, the king has never exercised such an authority; and the very expression of an idea of such a right has been rejected with resentment and indignation as against the constitution.

And to say, if allowed, that the king legislatively introduced laws in Ireland, by providing for their being received and executed, is to say that he performed this executive trust; which we all allow; and if this be meant by the legislation ascribed to him, it is a salutary and necessary legislation. I know if it be, it hardly will be so interpreted as belonging to that name.

With regard to Wales, (I presume many other instances will not be found of conquered countries,) the statute has always been considered as an act of parliament.

The peculiar authority given to king Edward, which could have been by no means necessary, if there had been a legislative power absolutely and independently in him (and which power was never exercised, and was held by the judges so ill agreeing with the constitution, as to be confined to the person of king Edward 1,) gives room for a strong inference that the regulation was not originally and properly in him, as of his own independant right, but derivatively from the parliament; and that in such a manner as to be at least confined to himself, and not extend to his successors.

The king would never have furnished such an argument against the exercise of legislative authority, had that power then resided in him.

All the cases have been the objects of parliamentary regulations. If he had understood it to be of his right to give laws over those countries arbitrarily, and parliament had recognized this claim; the power of making and altering, the power of abrogating would have been in him, and we should not have had the interposition of parliament.

From the author cited by Mr. Macdonald, I will state the position.

That all conquests are made for the benefit of the conquering state; and wherever the people are composed and pay allegiance, instead of constrained submission, then they are subjects; and owe obedience to the laws of the conquering state, and hold their property from them.

When this conquest was made, from that hour when the king's right was recognized and a composition made, it was for the benefit of the people of this country. Here particularly, its conquest being made with a view to colonization, it is established by the best authority, that of lord Vaughan, on the question, whether a naturalization in Ireland made a man a natural-born subject of Great Britain?

Lord Vaughan—A conquest is not solely for the benefit of the conqueror, but of the subjects; and those who come to reside there have a right to acquire property; lands by purchase; —and be protected in all those particulars, by the laws of their mother country.

The inhabitants then of Grenada, are the objects of all those provisions.

They may acquire property, with the right of residence and purchase; and have the other rights of British subjects.

As to expedience or value, we are not speaking to the equality but the legality; and whatever power has taken a part has the same claim to half or the whole.

The authority here contended for is inconsistent with that right which Mr. Campbell had as a resident, if nothing else was affected by it.

It will be incumbent, by new arguments, to prove a power in the crown of disposal of these acquisitions, without the concurrence of the constitution.

Will this right bear the examination of the laws of England?

Ordinances of necessity, on instant emergencies, provisions for the administration of constitutional rights—I shall not presume to say how far these may be maintained: but they must expire with that necessity, and be occasional and temporary only.

In the present case, no pretence of a necessity.

A conquest of the people, and not of the lands, must mean a power most extensively taken in the times of barbarism, but qualified in these times.

Both in the case of the conquered and conquering people, the laws of the general government are upon the conquest conveyed thither, as a common right of all the subjects: but they require to be actually carried into effect, maintained and executed by that power in which the execution of the laws is lodged, which, with us, is the king. The title is there before the enjoyment; when the king has executed that trust, then is the enjoyment.

The colonies cannot have the power of enforcing those laws: they have the right, though the trust is reposed in the king to effectuate them.

The king has given assurance that they shall be protected in all their rights, honours and possessions, and the free exercise of the Roman Catholic religion—this to the conquered; shall the conquerors be in a worse state?

The king has provided, that, as immutable laws may become inconvenient, therefore there shall be a local one, subject to alteration by their own legislature.

A distinction is taken between Grenada and the other islands; I answer, the grant is not a matter of grace and favour, but the discharge of a trust. If it be a gift, it is not revocable, but an irrevocable right; what distinction then is there between this and the other islands, whose rights the king has recognized by receiving the imposts as a benevolence?

What power antecedent to the patent had existed in the king, is annihilated then. Even considering them as subject before to the sole law of the conqueror, and not as subject to the legislative power of the state, the king has waived the power of taxation if it were admitted he had it before, by granting them assemblies to tax themselves.

The construction cannot be that the inhabitants are not to reap the benefit till a future time: this is so inconsistent with the end, with the construction in which the grants of the king are always received, and the benefit designed, that it will find no weight with your lordship.

Taking it by way of argument that the conquest has annihilated their ancient law, their law cannot have been annihilated and none given them in their place.

If their ancient constitution is gone, the laws of England by their proper force introduce themselves.

It is a future grant, it is said—when the power is given them to call assemblies, they have a provision for a legislature: I don't mean to derogate from the supreme legislature.

The assembly is to be called when circumstances will admit and convenience shall require: so it is here; but yet it is the unalterable privilege of this country.

The people who should come, in confidence of the promise of the rights of British subjects, would, according to this construction, come, and find themselves without one of the most remarkable of those rights, and that which secures all the rest. They would, on coming to reside, find themselves subject to an arbitrary disposal of their property, and might have the whole taken away without their own consent.

My lord, on the whole of the case I presume, whether as a conquered people or as colonies, they had a right to tax themselves, and were not subject to imposts under any claim of prerogative, without their own consent.

Secondly, If they had been subject to taxes by prerogative, that the king, by his proclamation, has concluded himself from this right.

Mr. *Thurlow* (Attorney General). I have ever looked on this as one necessary ground of argument to a doubtful question, that we should see and attend to the nature of the claim, its fitness and expediency; and not confound the idea of it by substituting, in its place, something of a very different nature, and supposing that to be the right which is insisted on and intended to be proved.

If I had been to contend for an absolute independent legislative power in his majesty, I have not that idea of authorities, or of the duties of my profession, that I could have engaged myself in the task of supporting it. Nor should I have thought it a proposition fit to be spoken of in any place, much less in a court of justice.

Without taking that for my ground, I mean to insist that his majesty, as an article of executive power, has an authority, legislative in its nature, but subordinate to the supreme legislature: a right of imposing laws, and impowering others to impose them.

When I shall refer to corporations in England invested with powers to provide laws over part of the dominions of the king of England, from which they were distant, and not natives or inhabitants, I shall think myself entitled to contend that a power which he can delegate he can exercise in his own personal authority.

A method has been taken which requires the right to be considered in rather a different view, and examined in a different mode.

I think it has been endeavoured to be insinuated, or rather declared, that in the article of conquest the laws of England instantly take place in the conquered country, and the conquering people carry the English laws with them. At the same time that this point has been contended, it has been argued that the king, by his executive power, was to establish those laws.

By the subordinate authority to the Lords and Commons (which I consider as being as much subordinate with regard to the dominions acquired to the king, as with regard to the state and dominions of the state here), the king regulates the government, and requires imposts from the country, in such manner as he sees requisite.

But it is said "only particular necessity justifies this claim, and it must be only occasional and temporary: when the sovereign authority has found it expedient to give laws for particular local necessity, every individual carries with him all the laws of England;" that is, it may frequently happen, laws subversive of the laws given. The individual then will have a power denied to the sovereign.

I have the authority of the same celebrated author (quoted on the other side) that there is no difference between a country conquered by the arms of another, and discovered. Vat. s. 203—210.

It was stated in the last argument, in order to shew wherever a country is conquered it becomes part of the conquering people, and their laws are introduced with the conquest, that in Calvin's case this point had been decided. The question there was, whether the dominion of the conqueror or only the realm is included.

The laws of the conquered remain till altered. They have been accustomed to them as modes of regulating and disposing property. They know no other: if there be better, and more complete in their own nature, they are satisfied with their own; they have been accustomed to look up to these for protection on all occasions, and to enjoy under them all the blessings and comforts they have enjoyed.

The question is, whether by the laws of Great Britain, which are the only rule here, the king has been advised justly, and acted within the compass of those laws; or whether those laws are exceeded? This is merely the question.

My reason for stating that dominion and property were acquired by conquest was, because I shall infer that the constitution has intrusted the king with the disposition of the property, and with the ordering of that dominion conquered; subject to the legislation of the country.

The king, both in conquests and colonies, has had this right: there has not been an instance in which the king has not exercised the disposition of the laws and property of the conquered country.

He has granted by his charter the island of St. John.

The king may exercise the right of disposing the lands conquered. With respect to the laws, if we should be carried back to the conquest of Ireland, (which, I think, remains in great doubt, whether by Edward or king John, or whether indeed completely till the reign of Elizabeth, at any period) the great loss of the records of Ireland has made it impossible to go into an accurate discussion. Lord Coke is of opinion that, in point of fact, Henry the second did give the laws of England to Ireland. King John was not, in truth, the sovereign of Ireland; the actual sovereign was Henry the third. It was not till after two descents had been cast that king Henry the third granted the English laws.

Supposing king John gave them those laws, or that they were established there before. It is contended this was a mere act of executive power. It will appear to what extent this power, called executive, was carried.

On the subject of the English laws another ambiguity runs: that it is not only the laws of property and punishment of crimes, but the political laws and constitution of the country.

Suppose the king could not make, nor authorize others to make laws occasionally, the authority of parliament would be necessary to make the change.

With respect to Scotland, whenever they did call a parliament, it was by the king's command and instance, as at Newark; and it is too much to say that the king, in the character of an executive magistrate, has a right not only to create assemblies, but to appoint their meeting; and also that he carries with him, as a part of merely executive power, the power to alter laws.

With respect to Wales, though I believe in my conscience it was in fact obtained by no better pretence than that of the sword, yet Edward did not consider it as such.

Plowden, 126. There is no pretence that the ordinance then made was by king, lords,

and commons: the king considered it as a fief under his own personal dominion.

With regard to many places in France, taken certainly by right of conquest, and ceded by the treaty of Bretigny, my doubt is, whether the English laws came thither.

With respect to the market of Calais, the resort of English introduced the laws there, for convenience, but not in the castle, nor in the town of Calais.

With respect to Minorca, the laws of England do not take place there.

In the year 1713 they were referred to certain of the council, the archbishop of Canterbury, and others; in the year 1727 somewhat was done; in the year 1740 a little more: in 1752 the privy council sent over a great multitude of laws, but the war interfered.

[Lord *Mansfield*.—This, I think, was after the complaint against governor Melville.]

1606. King James grants a charter, with a power of making laws, and an exclusive fishery, from 34 to 35 degrees of latitude, to the corporation of Plymouth.

It is said this charter came into parliament. They came because an exclusive fishery had been granted to a corporation residing at Plymouth, with a power of imposing penalties.

The objection was, that at the time the corporation of Plymouth had not sent colonies.

Charter of Massachuset's bay, with power to call assemblies, granted by the king; vacated and granted anew after the revolution by king William.

I observe, when a passage has been cited from the history of former times, it is the custom to say they were bad times. Where are we to look for the history of this country but in those times, separating the bad from the good?

In the case of St. Christopher's there were given by eminent lawyers very distinct opinions, in favour of the right in the crown to impose duties. I don't recollect there was any evidence of want of exercise of that right; yet it was contended against because an act of assembly twenty-five years after granted the duties.

Yet, if one was to infer from every act that has been made in any of the political constitutions of this country that there was no law before that act was made, it would subvert most of the most important laws of this country.

It was said the king might have enacted a law, but only before the time of the actual surrender; but that, after it surrendered to the sovereignty, it becomes part of the conquering state in a different right; and the ordinances must be only temporary till the king and parliament provides others.

From the moment the conquest has established itself, from the instant in which he has compelled the inhabitants to give up their arms,—there is not any hour in which the parliament cannot bind it.

Suppose this ordinance had been before the capitulation and cession, would it have ceased because by the treaty of peace the king of France says he cedes all his right to the king and crown of Great Britain? What does the treaty more than affirm the right of Great Britain, by ceding all right or pretensions of right. If his majesty thought fit, after having imposed one sort of laws, to give another repugnant sort of laws, or the parliament were to do this, it would be by an authority acting in subversion of the first.

This drives on to another inconsistency upon the claim of political liberty.

The king by his conquest acquired a power to provide laws for his subjects, a power which has been so repeatedly and extensively exercised in other instances.

Has the king superseded that right? The proclamation, it is said, gives the English laws to all the subjects. It was said that it presumed the laws of England prevailed in the country, and that it made a provision in the commission to be given to the judges. What, that they should bring those laws which, by this hypothesis, were there before!

The proclamation might convey the English laws, but not the political and constitutional system in general in this kingdom.

The promise is said to be the same which the king gives here. I don't know by what record it appears that the king has engaged himself to his subjects of this country, that, when convenience shall permit, or occasion shall require, he will permit a parliament to be called.

The king, by his commission, empowers the governor to call an assembly when he shall think convenient, or receive instructions: and his authority was so much executory, that he might have established assemblies either of the five islands together, or in Grenada apart and severally.

It would be of the utmost danger to this constitution to say, till the king or parliament gives them a constitution, he might act in full power, without any laws to decide.

The commission to call assemblies was not executed till above a year after the patent imposing the duty.

In the case of chartered governments the argument would, undoubtedly, take a different turn. It might be said a charter is a grant of an interest to persons named in the grant; but in this nothing could pass, but the constitution existing till some new grant.

The special verdict has not found the time in which the commission passed the great seal. The patent passed for raising the tax in July; the governor did not go over till October; both came together. The king, therefore, had introduced his claim to the impost on the country prior to the time in which any assembly could be called; for his right was introduced the very instant of the governor's landing: and the elder right, in the king especially, will be preferred above all, when it appears the proclamation could not be intended to waive the impost.

Mr. Serj. *Glynn*, in reply. Before I go into the general question I shall speak upon two important points, though an end is made of the case, and the object satisfied to the plaintiff by the decision of the last. The other is so great and important an one in the general consideration that I am persuaded your lordship will not pass over in judgment.

The tax is contended to be legally levied, upon a claim of which the very stating of the case proves the illegality.

My learned friend has set out with disavowing the claim of an absolute independent sovereignty in the crown; but he has maintained his argument, and was obliged to maintain his argument upon it.

He says it is a subordinate legislature. A subordinate legislature, in this sense at least, is difficult to be conceived to those who know not how to make dependence consist with independence: but the state of Grenada distinguishes itself. It is a tax imposed by an act of legislative power, which includes the entire legal sovereignty; but it is not an uncontrouled authority, because the king, with consent of parliament, may depart from this claim, so as to bind his successors: the supreme legislature may repeal it. The king makes an essential part of that legislature. Is it a mark of a limited, subordinate, authority, that he can impose without them what they cannot take away without him? And that he may depart from this is what any man may do in any instance of the most uncontrouled legislative authority.

My learned friend says it is a subordinate act of legislation; an act of execution, not of legislation. It does not depend upon the king whether the laws of England introduce themselves, because the parliament may alter or appoint laws. The king may levy taxes by his sole authority, which shall stand in force till parliament repeals them, which they cannot without him.

I believe my learned friend will hardly prove this power vested in the person of the king. It was the great point our Hampden contended, that no tax can be imposed by the authority of the king. It must, therefore, depend solely upon the question, whether the king has an absolute independent legislation; or whether the power of the crown is not truly executive.

The promulgating and introducing the administration of the laws of England we admit to be in the king, as his peculiar and necessary trust, the making, altering, or suspending of those laws, we deny.

Notwithstanding the observation on the government of Scotland, the states were convened in the first instance of Edward's claim: and if he claimed it as a fief, and obtained as a conqueror, still he governed it as a king of England, with executive and not legislative authority.

As to the claim of a feudal duchy in Wales, it does not appear that the king ever introduced any laws but the laws of England: and when he considers it expressly, as intimately and vitally connected with England, as a part to the body, in one entire dominion, can it be doubted whether he understood that he was to govern it by the laws of England?

Whether lord Coke is right in supposing king John, or any other prince, introduced the laws of England into Ireland, I don't think is material; unless it appears some prince, by his authority, made laws and regulations there, without the concurrence of the English parliament.

The king has the power, because it has been delegated. The case was not that the king, in the grant to the corporation, made laws to bind others without their consent; but he empowered them to make laws which should bind themselves. The case is so far from proving a power to make laws contradictory to the laws of England, that it only proves the power of the king to convey the laws of England.

And because the king can erect a corporation which shall make bye-laws obligatory upon the particular community, therefore the king, it is inferred, can make laws which shall bind those who never gave their consent to them.

The strongest authorities, uniform experience, as well as the principles of the constitution, and rules of law, are against it.

Selden's opinion is against it, and those of the other great lawyers. It has the testimony of the best constitutional lawyers, of which no age was ever more fruitful than that of James the 1st, to negative it. It ought to have been not unsupported by precedents. The character of the prince who is made the example of the claim, ought to have been other than it was: he ought to have been a prince who hated prerogative; who was desirous of keeping the right of the crown within its constitutional limits, and by no means of extending it beyond them.

The next are mere private opinions given by great lawyers, but in private. Though they will have great weight, as far as extra-judicial opinions in courts of law, they are not leading principles of decision: and, had any private opinion been decisive, this cause had never been now before the court. No man reveres opinions of men of great abilities more than I do: but there is not the opinion of any man which standing simply on the footing of authority, I shall not think myself at liberty to question: and even the greatest have been heretofore questioned successfully. I never could be deterred by great opinions, when I considered by what authorities the liberty of the press has been opposed; by what authorities the claim of ship-money was supported; and what the event was upon both those questions.

What was done upon the forfeiture of the charter, before the Revolution, is no authority; but rather an argument of error. After the Revolution some lawyers gave their opinion for collecting the revenues as they used to be

collected; this was done only in the interval of suspension of legislature.

A question of this nature, a power of a kind like this, is not to be gathered from such authorities and circumstances as those which have been stated. Mr. Attorney General was supposing an instant abrogation of all former laws. I did not say so when it was a conquest. There are some unalterable laws to continue. As to the objection made of claiming of property, the former mode must remain till the king appoints another by his executive power.

My lord Vaughan says the subjects don't acquire a property in the soil. If the inhabitants had been turned out of it, it would have been in the king. In the idea of this country the property of all lands was originally in the king. If Mr. Attorney General had been contending for this as a feodal right, the argument would have had weight; but we are not arguing for the property of the soil.

The subjects of England have a right to the English laws: they have a right to assemble: and the reason why the king never says to them, "that he will call assemblies as soon as convenience permits and occasion shall require," is, because in this country convenience always permits, and occasion requires. But still the trust of calling them is reposed in the king.

Mr. Attorney General, after having discussed the point of sovereignty in the case of Ireland, with respect to their assemblies, has said, this is in execution of authority in the king; if so, then the laws were there before, and assemblies called upon the same terms as in England. And that the acts concerning them were by authority of parliament.

With respect to the power of the king to make laws.

He can make no other laws than what shall have been made by the constitutional assemblies: he can repeal none; nor alter without them.

Mr. Attorney General says that by his proclamation the king promises that he will grant them the privileges of British subjects; but then this promise cannot take effect before the governor lands, and an assembly is called, and immediately on his landing, and before an assembly can be called, he has a right to levy imposts.

I take the construction to be, that the promise takes place from the time of issuing it: A constitution takes place immediately. We are not less governed by the laws of this country because a parliament is not constantly sitting.

This cannot be distinguished from the case of any other colony; and if the power claimed be in this case disallowed, the colonies in general will then act all of them with the same dependence on the supreme legislature, and the same conformity in the principles of the British constitution. If otherwise, there will be British subjects under the same name, and with the same nominal rights, some free and others in unconstitutional subjection.

Lord *Mansfield*. I don't remember its being argued in this case on the question whether there is any authority which considers Bretigny as a part of the dominions of the crown of England. Aquitaine and Poictou he held as heir to the house of Anjou.

The parts separated from the crown, and considered as feodal, were governed by a despotic authority. It appears that Calais had the process and judicial writs of this court. Writs of error returnable to this court.

How do you understand the capitulation?

A cession is not necessary to a conquest; it is not necessary for the right. Jamaica never has been ceded, I believe, to this hour.

How do you understand the capitulation? There is an article that they shall pay no other duties but what they paid to the king of France.

Mr. Just. *Aston*.—First of all in this special verdict the articles of capitulation, some of them are stated. I don't understand how the capitulation and treaty of peace agree. But I am to judge upon the verdict.

November 28.

Judgment of the Court was this day given by lord Mansfield, as follows:

Lord *Mansfield*. In this cause of Alexander Campbell against William Hall;

This is an action brought by the plaintiff, who is a natural-born subject of Great Britain, and who, upon the third of May, 1763, purchased lands in the island of Grenada. And it is brought against the defendant, William Hall, who was collector for his majesty at the time of levying the impost, and of the action brought, of a duty of four and a half per cent. upon goods exported from the island of Grenada. And it is to recover a sum of money which was levied by the defendant and paid by the plaintiff, as for this duty of four and a half per cent. for sugars which were exported from the island of Grenada, from the estate and by the consignment of the plaintiff.

And the case is laid upon money had and received; and plaintiff, as for money paid without consideration, the duties having been imposed without sufficient or lawful authority to warrant the same, demands judgment to recover the same against the defendant.

And it is stated in the special verdict that the money is not paid over, but continues in the defendant's hands, by consent of the attorney-general, for his majesty, in order that the question may be tried.

The special verdict states Grenada to have been conquered by the British arms from the French king on the 7th of February, 1762; and that the island of Grenada was ceded by capitulation; and that the capitulation upon which they surrendered, was by reference to the capitulation upon which the island of Martinico had been surrendered.

The special verdict then states some articles of that capitulation, particularly the fifth, which grants that Martinico shall be governed

by its own laws till his majesty's pleasure be known.

Continuance of property, religion, honours, privileges, and exemptions, is demanded. They are referred to the article last stated for answer, which is, that the inhabitants, being subjects of Great Britain, will enjoy their property and the same privileges, derived from their subjection, as in his majesty's other islands.

Eighth article, that they shall be subject only to the capitation tax imposed by his majesty the king of France, expences of justice and public government to be paid out of the king's domain.

Referred to the 7th article, which states the rule—and refers to the duties paid by the inhabitants of the Leeward islands.

The next instrument is the treaty of peace the 10th of February 1763, which states the cession, and other articles not material.

The next and material instrument which they state is a proclamation under the great seal, the 7th of October 1763, reciting thus:

'Whereas it will greatly contribute to the 'settling of our said islands, of which Grenada 'is one, that they be informed of our love and 'paternal care for the liberties and rights of 'those who are or shall be inhabitants thereof; 'we have thought fit to publish and declare by 'this our proclamation, that we have by our let-'ters patent under our great seal of Great Bri-'tain, whereby our said governments are con-'stituted, given express power and direction to 'our governors of our said colonies respectively, 'that, so soon as the state and circumstances 'of the said colonies will admit thereof, they 'shall, with the advice and consent of our said 'council, call and summon general assemblies, 'in such manner and form as is used in the 'other colonies under our immediate govern-'ment. And we have also given power to the 'said governors, with the advice and consent 'of our said council and assembly of represen-'tatives as aforesaid, to make, constitute and 'ordain laws, statutes and ordinances for the 'public peace, welfare and good government of 'our said colonies and the inhabitants thereof, 'as near as may be agreeable to the laws of 'England, and under such regulations and re-'strictions as are used in our other colonies.'

Then follow letters patent under the great seal, or rather a proclamation of the 26th of March 1764, whereby the king recites, that he had ordered a survey and division of the ceded islands, as an invitation to all purchasers to come and purchase upon certain terms and conditions specified in the proclamation.

The next instrument stated in the verdict, letters patent on the 9th of April 1764, gives commission and authority to Robert Melville, esq. appointed governor of this island of Grenada, to summon assemblies as soon as the situation and circumstances of the island would admit; and to make laws in all the usual forms, with reference to the other plantations where assemblies are established.

The governor arrived in Grenada the 14th of December 1764; before the end of 1765, particular day not stated, the assemblies actually met: but before the arrival of the governor in Grenada, indeed before his commission, and before his departure from London, there is another instrument upon the validity of which the whole turns.

Letters patent under the great seal, bearing date the 20th of July 1764, reciting that in Barbadoes, and all other of the British Leeward islands, a duty of four and a half per cent. is paid upon goods exported; and reciting farther:

'Whereas it is convenient and expedient, 'and of great importance to our other sugar 'colonies, that the like duties should take 'place in Grenada; we do hereby, by virtue of 'our authority and prerogative royal, ordain 'that an impost of four and a half per cent. 'in specie shall, from and after the 29th day of 'September next, be raised and paid to us, our 'heirs and successors, for and upon all dead 'commodities of the growth or produce of our 'said island of Grenada that shall be shipped 'off from the same, in lieu of all customs and 'impost duties hitherto collected upon goods 'imported and exported into and out of the said 'island, under the authority of his most Chris-'tian majesty, and that the same shall be col-'lected:' then it goes on with reference to the island of Barbadoes and the other Leeward islands.

The jury find that in fact such duty of four and a half per cent. is paid to his majesty in all the British Leeward islands.

And they find several acts of assembly which are relative to the state of the several islands, and which I shall not state, as they are public, and every gentleman may have access to them.

These letters patent of the 20th of July 1764, with what I stated in the opening, are all that is material in this special verdict.

Upon the whole of the case this general question arises, being the substance of what is submitted to the Court by the verdict: "Whether these letters patent of the 20th of July 1764, are good and valid to abrogate the French duties, and in lieu thereof to impose this duty of four and a half per cent." which is paid by all the Leeward islands subject to his majesty.

That the letters are void has been contended at the bar, upon two points.

1st, That although they had been made before the proclamation, the king by his prerogative could not have imposed them.

2dly, That, although the king had sufficient authority before the 20th of July 1764, he had divested himself of that authority by the proclamation.

A great deal has been said and authorities cited—relative to propositions in which both sides exactly agree, or which are too clear to be denied. The stating of these will lead us to the solution of the first point.

1st, A country conquered by the British

arms becomes a dominion of the king in right of his crown, and therefore necessarily subject to the legislative power of the parliament of Great Britain.

2dly, The conquered inhabitants once received into the conqueror's protection become subjects; and are universally to be considered in that light, not as enemies or aliens.

3dly, Articles of capitulation upon which the conquest is surrendered, and treaties of peace by which it is ceded, are sacred and inviolable, according to their true intent.

4thly, The law and legislation of every dominion equally affects all persons and property within the limits thereof, and is the true rule for the decision of all questions which arise there: whoever purchases, sues or lives there, puts himself under the laws of the place, and in the situation of its inhabitants. An Englishman in Minorca or the isle of Man, or the plantations, has no distinct right from the natives while he continues there.

5thly, Laws of a conquered country continue until they are altered by the conqueror. The justice and antiquity of this maxim is unconvertible; and the absurd exception as to pagans, in Calvin's case, shews the universality of the maxim. The exception could not exist before the Christian æra, and in all probability arose from the mad enthusiasm of the crusades.—In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their present laws, until his majesty's pleasure be further known.

6thly, If the king has power (and, when I say the king, I mean in this case to be understood "without concurrence of parliament") to make new laws for a conquered country, this being a power subordinate to his own authority, as a part of the supreme legislature in parliament, he can make none which are contrary to fundamental principles; none excepting from the laws of trade or authority of parliament, or privileges exclusive of his other subjects.

The present proclamation is an act of this subordinate legislative power: if made before the 11th October 1763, it would have been made on the most reasonable and equitable grounds; putting the island of Grenada on the same footing as the other islands.

If Grenada paid more duties, the injury would have been to her; if less, to the other islands.

It would have been carrying the capitulation into execution, which gave hopes, if any new duties more were laid on, their condition would be the same as that of the other Leeward islands.

The only question which remains then is, whether the king had power after the 4th of February 1763, of himself, to impose this duty.

Taking these propositions to be granted, he has a legislative power over a conquered country, limited to him by the constitution, and subordinate to the constitution and parliament; and a power to grant or refuse capitulation.

If he refuses, and puts to the sword or extirpates the inhabitants of a country, obtaining it by conquest, the lands are his; and if he plants a colony, the new settlers share the land between them, subject to the prerogative of the conqueror.* If he receives them into obedience and grants them property, he has power to fix a tax. He is intrusted with the terms of making peace at his discretion; and he may retain the conquest or yield it up, on such condition as he shall think fit to agree.

This is not a matter of disputed right; it has hitherto been uncontroverted that the king may change part or all of the political form of government over a conquered dominion.

To go into the history of conquests made by the crown of England. The alteration of the laws of Ireland, has been much discussed by the lawyers and writers of great fame. No man ever said the change was made by the parliament; no man, unless perhaps Mr. Molyneux, ever said the king could not do it.

The fact, in truth, after all the researches that could be made, comes out clearly to be as laid down by lord chief justice Vaughan.

"Ireland received the laws of England by the charters and command of H. 2, king John, H. 3, and he adds, &c. to take in Edward, and the successors of the princes named. That the charter 12 king John, was by assent of parliament in Ireland, he shews clearly to be a mistake. Whenever a parliament was called in Ireland, that change in their constitution was without an act of parliament in England, and therefore must have been derived from the king."

Mr. Barrington is well warranted. The 12th of Edward 1st, called the statute of Wales, is certainly no more than a regulation made by the king as conqueror, for the government of the country, which, the preamble says, was then totally subdued; and, however for purposes of policy he might think fit to claim it as a fief, appertaining to the realm of England, he could never think himself entitled to make laws without assent of parliament, to bind the subjects of any part of the realm. Therefore, as he did make laws for Wales without assent of parliament, the clear consequence is, he governed it as a conquest: which was his title in fact, and the feodal right but a fiction.

Berwick, after the conquest of it, was governed by charters from the crown, till the reign of James the 1st, without interposition of parliament.

Whatever changes were made in the laws of Gascony, Guyenne and Calais, must have been under the king's authority; if by act of par-

* "These words seem to mean, that the king's legislative authority over these new settlers, is derived from the circumstance of his having granted them their lands; though, still, the last words 'subject to the prerogative of the conqueror' seem very obscure, since the whole matter in question is to know what is the prerogative of the conqueror." 2 Canadian Freeholder, 51.

liament, that act would be extant; for they were conquered in the reign of king Edward the 3d; and all the acts from that reign to the present time are extant; and in some acts of parliament there are commercial regulations, relative to each of the conquests which I have named; none making any change in their constitution and laws.

Yet as to Calais, there was a great change made in their constitution: for they were summoned by writ to sent burgesses to the English parliament; and, as this was not by act of parliament, it must have been by the sole act of the king.

With regard to the inhabitants, their property and trade, at Gibraltar, the king, ever since that conquest, has from time to time made orders and regulations suitable to the condition of those who live, trade, or enjoy property in a garrison town.

Mr. Attorney General has alluded to a variety of instances, several within these twenty years, in which the king has exercised legislation over Minorca. In Minorca it has appeared lately, that there are and have been for years back a great many inhabitants of worth, and a great trade carried on.

If the king does it there as coming in the place of the king of Spain, because their old constitution continues (which by the by is another proof that the constitution of England does not necessarily follow a conquest by the king of England) the same argument applies here; for before the 7th of October, 1763, the constitution of Grenada continued, and the king stood in the place of their former sovereign.

After the conquest of New York, in which most of the old Dutch inhabitants remained, king Charles the 2d changed their constitution and political form of government, and granted it to the duke of York, to hold from his crown under all the regulations contained in the letters patent.

It is not to be wondered that an adjudged case in point is not to be found; no dispute ever was started before upon the king's legislative right over a conquest: it never was denied in a court of law or equity in Westminster-hall, never was questioned in parliament.

Lord Coke's report of the arguments and resolutions of the judges in Calvin's case lays it down as clear. (And that strange extrajudicial opinion, as to a conquest from a pagan country, will not make reason not to be reason, and law not to be law, as to the rest.) And the book says, that if a king—I omit the distinction between a Christian and infidel kingdom, which as to this purpose is wholly groundless, and most deservedly exploded—"If a king come to a kingdom by conquest, he may, at his pleasure, alter and change the laws of that kingdom; but, until he doth make an alteration, the ancient laws of that kingdom remain: but if a king hath a kingdom by descent, there, coming by the laws of the kingdom he doth inherit the kingdom, he cannot change the laws of himself without consent of parliament. (Plainly speaking of his own country where there is a parliament.)

"Also, if a king hath a kingdom by conquest, as king Henry the 2d had Ireland, after king John had given to them, being under his obedience and subjection, the laws of England for the government of their native country, no succeeding king could alter the same without parliament. Which is very just, and it necessarily includes that king John himself could not alter the grant of the laws of England."

Besides this, the authority of two great names has been cited, who took the proposition for granted. And though opinions of counsel, whether acting officially in a public charge or in private, are not properly authority to found a decision, yet I cite them;—not to establish so clear a point, but to shew that when it has been matter of legal enquiry the answer it has received, by gentlemen of eminent character and abilities in the profession, has been immediate and without hesitation, and conformable to these principles.

In 1722, the assembly of Jamaica refusing the usual supplies, it was referred to sir Philip Yorke and sir Clement Wearg, what was to be done if they should persist in their refusal.

Their answer is—"that, if Jamaica was still to be considered as a conquered country, the king had a right to lay taxes upon the inhabitants; but, if it was to be considered in the same light as the other colonies, no tax could be imposed upon the inhabitants, but by an assembly of the island, or by an act of parliament."

The distinction in law between a conquered country and a colony they held to be clear and indisputable; whether, as to the case before them of Jamaica, that island remained a conquest or was made a colony, they had not examined.

I have, upon former occasions, traced the constitution of Jamaica as far as there are books or papers in the offices: I cannot find that any Spaniard remained upon the island so late as the Restoration; if any, they were few.

A gentleman, to whom I put the question on one of the arguments in this cause, said he knew of no Spanish slave of the white inhabitants of Jamaica; but there were amongst the negroes.*

The king, I mean Charles the second, after the Restoration invited settlers by proclamation, promising them his protection. He appointed at first a governor and council only; afterwards he granted a commission to the governor to call an assembly.

The constitution of every province immediately under the king has arisen in the same manner; not by the grants, but by the commission subsequent to call an assembly. And therefore, all the Spaniards having left the

* Upon this subject see Edwards's History of the West Indies, book 2, chap. 2, *sub. fin.* chap. 3, vol. 1, pp. 158, 159, 168.

island, or having been killed or driven out of it, the first settling was by an English colony, who under the authority of the king planted a vacant island, belonging to him in right of his crown.

The like is the case of the islands of St. Helena and St. John, mentioned by Mr. Attorney-General.

A maxim of constitutional law with all the judges in Calvin's case, and two such men in modern times as sir Philip Yorke and sir Clement Wearg,* I take it for granted, will acquire some authority, even if there were any thing which otherwise made it doubtful; but on the contrary no book, no saying of a judge, no not even an opinion of any counsel public or private, has been cited; no instance is to be found in any period of our history where it was ever questioned.

The counsel for the plaintiff undoubtedly laboured this point from a diffidence what might be our opinion on the second.

But upon full consideration we are all of opinion that before the 20th of July, 1764, the king had precluded himself from an exercise of the legislative authority by virtue of his prerogative, which he had before over the island of Grenada.

The first and material instrument is the proclamation of the 7th of October 1763. See what it is that the king says, and with what view he says it; how and to what he engages himself and pledges his word. "Whereas it will greatly contribute to the speedy settling our said new governments, that our loving subjects should be informed of our paternal care for the security of the liberties and properties of those who are and shall become inhabitants thereof; we have thought fit to publish and declare by this our proclamation, that we have in the letters patent under our great seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of our said colonies respectively, that, so soon as the state and circumstances of our said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies" (and then follow the directions for that purpose.) And to what end? "To make, constitute and ordain laws, statutes, and ordinances, for the public peace, welfare and good of our said colonies (of which this of Grenada is one) and of the people and inhabitants thereof, as near as may be agreeable to the laws of England."

With what view is the promise reciting the commission actually given? To invite settlers; to invite subjects. Why? The reason is given. They may think their liberties and properties more secure when they have a legislative assembly. The governor and council depending on the king he can recall them at pleasure, and give a new frame to the constitution; but not so of the other which has a negative on those parts of the legislature which depend on the king.

Therefore that assurance is given them for the security of their liberties and properties, and with a view to invite them to go and settle there after this proclamation that assured them of the constitution under which they were to live.

The next act is of the 26th of March 1764, which, the constitution having been established by proclamation, invites further, such as shall be disposed to come and purchase, to live under the constitution. It states certain terms and conditions on which the allotments were to be taken, established with a view to permanent colonization and the encrease and cultivation of the new settlement.

In farther confirmation, on the 29th of April 1764, three months before the impost in ques-

* "*Frenchman.* The opinion of sir Philip Yorke and sir Clement Wearg, must indeed be allowed to be an authority in point to the question; because those two learned gentlemen seem to have meant to ascribe to the crown the same perfect and permanent sort of legislative authority over Jamaica, in case it was still to be considered as a conquered country, as lord Mansfield has ascribed to it with respect to the island of Grenada before the proclamation of October, 1763: but yet I cannot think it a very respectable authority, notwithstanding the great learning and eminence of those gentlemen; partly, because it seems to have been rather a hasty opinion, upon which they had bestowed very little consideration, since they did not take the pains to enquire whether Jamaica was to be still considered as a conquered country, or whether, by events subsequent to the conquest of it, it was become a colony; and partly, because it may well be supposed that persons who serve the crown in the offices of attorney and solicitor general, have, in all doubtful matters relating to the royal prerogative, a bias on their minds in favour of it.

"*Englishman.* Persons in their then situations must always be liable to the suspicion of inclining a little to favour the prerogative of the crown: and, as you well observed, this opinion of theirs seems to have been given very hastily and with very little attention to the subject, since they did not take care to inform themselves concerning the then present condition of Jamaica, so as to determine whether it ought to be considered as a conquest or a colony, though this was absolutely necessary to make their opinion of any use to the ministers of state who had consulted them. It must, however, be confessed that, crude and hasty as this opinion seems to have been, it serves to shew that those two great lawyers had a general, loose, floating, idea of the king's being the absolute legislator of all countries acquired by conquest, which, (as I observed to you in the beginning of our conversation,) was an opinion that had been adopted by a great many private lawyers, though I never could see any foundation for it." Canadian Freeholder, Dial. 2, p. 297, *et seq.*

tion was imposed, there is an actual commission to governor Melville, to call an assembly as soon as the state and circumstances of the island should admit.—You will observe in the proclamation there is no legislature reserved to be exercised by the king, or by the governor and council under his authority, or in any other method or manner until the assembly should be called: the promise imports the contrary; for whatever construction is to be put upon it, (which perhaps it may be somewhat difficult to pursue through all the cases to which it may be applied) it apparently considers laws then in being in the island, and to be administered by courts of justice; not an interposition of legislative authority between the time of the promise and of calling the assembly.

It does not appear from the special verdict when the first assembly was called; it must have been in about a year at farthest from the governor's arrival, for the jury find he arrived in December 1764, and that an assembly was held about the latter end of the year 1765. So that there appears to have been nothing in the state and circumstances of the island to prevent calling an assembly.

We therefore think by the two proclamations and the commission to governor Melville, the king had immediately and irrevocably granted to all who did or should inhabit, or who had or should have property in the island of Grenada —in general to all whom it should concern— that the subordinate legislation over the island should be exercised by the assembly with the governor and council, in like manner as in the other provinces under the king.

And therefore, though the right of the king to have levied taxes on a conquered country, subject to him in right of his crown, was good, and the duty reasonable, equitable and expedient, and according to the finding of the verdict paid in Barbadoes, and all the other Leeward islands; yet by the inadvertency of the king's servants in the order in which the several instruments passed the office, (for the patent of the 20th of July 1764, for raising the impost stated, should have been first) the order is inverted, and the last we think contrary to and a violation of the first; and therefore void.*

How proper soever the thing may be respecting the object of these letters patent, it can only now be done (to use the words of sir Philip Yorke and sir Clement Wearg) "by an act of assembly of the island, or by the parliament of Great Britain."

The consequence is Judgment for the Plaintiff.

[Note. I have here again the pleasure of returning my thanks to Mr. Alleyne, by whom I have been favoured with the copy of the Special Verdict in this remarkable cause. I have also used some materials largely with which I have been obliged in the first day's argument; the crowd being then so great that I was hindered in taking notes of my own; and for the same reason I have used the liberty in the judgment of supplying what I found imperfect or mistaken in my own notes in several places, from a printed note of it which has been published; and correcting that in some places where I found it mistaken.]

[*Here ends the Case as reported by Lofft.*]

In the report of Rex *v.* Samuel Vaughan, 4 Burr. 2494, upon a question whether the statutes 12 R. 2, c. 2, and 5 and 6 Edw. 6, c. 16, extended to Jamaica, lord Mansfield says,

"If Jamaica was considered as a conquest, they would retain their old laws, till the conqueror had thought fit to alter them. If it is considered as a colony, (which it ought to be, the old inhabitants having left the island) then these statutes are positive regulations of police, not adapted to the circumstances of a new colony; and therefore no part of that law of England, which every colony from necessity is supposed to carry with them at their first plantation."

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* "The letters patent imposing the duty of four and a half per cent. were published in July 1764; and the commission of governor Melville to be captain general and governor in chief of the island (whereby among other things he was impowered to summon an assembly of the freeholders and planters of it), had passed the great seal in the preceding month of April of the same year 1764; but the first assembly of the province did not meet till about December 1765, that is till near a year and a half after the issuing of the letters patent, that imposed the said duty of four and a half per cent, and more than two years after the publication of the proclamation of October, 1763, which promised the people of Grenada a government by an assembly, not immediately, but as soon as the situation and circumstances of the said new governments would admit thereof. Here, therefore, was an interval of more than two years after the publication of the proclamation of October 1763, before the assembly of Grenada met; during which, according to your way of reasoning, the king was not precluded by his proclamation of October 1763, from exercising his legislative authority in the island of Grenada, in the same manner as before the said proclamation was made, supposing he had before that act been legally possessed of such authority; and in the former half of this interval, namely in July 1764, his majesty did exercise this legislative authority by issuing those letters patent which imposed the said duty of four and a half per cent. These letters patent therefore, according to your doctrine, must have been legal when they were issued if they would have been so before the said proclamation of October 1763." 2 Canad. Freeholder, p. 211. See also the passages immediately preceding and following this.

Mr. Edwards (Hist. of the West Indies, book 3, chap. 2,) gives a brief account of this case of Campbell *v.* Hall, to which he subjoins animadversions on some of the most important passages in lord Mansfield's argument. In his introduction to those animadversions, he says, "It is impossible, I think, not to perceive, throughout these and other parts of the learned judge's argument, a certain degree of bias arising from the unhappy dissentions, which about that period broke out into a civil war between Great Britain and her colonies: in the progress of which, it is believed this noble person distinguished himself as an active partizan, and a powerful advocate for the unconditional supremacy of the mother country."

In the second edition of his work he inserted at the end of that chapter the following

POSTSCRIPT TO THE HISTORY OF GRENADA.

"The first edition of this work having fallen into the hands of a gentleman of distinguished abilities and learning, (one of his majesty's serjeant's at law) he was pleased, at the author's request, to communicate his thoughts in writing on the doctrine maintained by lord Mansfield, concerning the legal authority of the crown over conquered countries, as stated in page 362 of this volume, which I have great pleasure in presenting to the reader, in the precise words in which they were given:

"The ground upon which the Court rested their judgment in the case of Grenada, was clearly sufficient to warrant that judgment, even admitting the doctrine laid down by lord Mansfield on the other point to be well founded; but nothing can be more unfounded than that doctrine:—every proposition upon which it is made to rest, is a fallacy. I deny that the king (at least since the constitution has had its present form) can 'arbitrarily grant or refuse a capitulation.' The power of granting or refusing a capitulation, in the case of a siege or invasion, is certainly vested in him; but it is vested in him, like every other power with which he is entrusted by the British constitution, to be exercised according to the usage which has prevailed in like cases. If that power should be abused, his officers and ministers must answer to the public for their misconduct.

"For the same reason I deny that 'the king can put the inhabitants of a conquered country to the sword, or otherwise exterminate them,' unless such severity be fully justified by the laws of war, as they are understood amongst civilized nations.

"But, supposing that a case should happen wherein such severity would be justifiable, I deny that, upon the extermination of the enemy, the lands would belong to the king himself: I say they would belong to the state; and that they would be subject not merely to the king, but to the sovereign power which governs the British dominions. If the king receives the inhabitants under his protection, and grants them their property, I deny that he has power to fix such terms and conditions as he thinks proper; for he cannot reserve to himself, in his individual capacity, legislative power over them: that would be to exclude the authority of the British legislature from the government of a country subdued by British forces, and would be an attempt to erect *imperium in imperio*. One consequence of this would be, that such conquered territory might descend to an heir of the king not qualified, according to the act of settlement, to succeed to the crown of Great Britain. The king might give it to a younger son, or bestow it on a stranger. A thousand other absurd consequences might be pointed out, as resulting from such incongruity.

"I admit that the king (subject to the responsibility of his ministers,) may yield up a conquest or retain it as he sees best, but I deny for the reasons above hinted at, that he can impose what terms he pleases, or that he can arbitrarily change the law or political form of its government. I think he may agree upon the capitulation, that the conquered people shall continue to enjoy their ancient religion and laws, and even this must be *sub modo*; but I deny that he could, by his own authority, grant these things after the capitulation; for that would amount to an exercise of independent sovereignty. The fallacy of lord Mansfield's argument, proceeds from an endeavour to confound the king's civil and military characters, and to perpetuate in the chief executive magistrate, the vast powers with which it is necessary to invest the generalissimo of the armies, during the continuance of military operations. The moment these operations cease, he resumes his civil character, and in that character no man will venture to assert that, as king of Great Britain, he has the prerogative of being a despot in any part of his dominions. With respect to the cases of Ireland, Wales, and Berwick, even taking them precisely as lord Mansfield puts them, I think they do not weigh a feather in the argument. Those cases happened long before the English constitution had reduced itself to its present form, consequently, before the rights of the people were ascertained and defined as they exist at present. If a few instances of the exercise of arbitrary power by the ancient kings of England, are to be received as decisive cases, to shew what are the powers of the crown at this day, I think it would be no very difficult task to find authorities,* even as low down as the reigns of the Plantagenets and Stuarts, to prove that the British government ought to be a pure despotism!"

But the most valuable investigation which I have seen of the case of Campbell and Hall, and

* See Burke's Speech in the House of Commons February the 11th, 1780, as quoted in 8 State Trials, p. 59, and the preceding passage.

of the judgment pronounced upon it by lord Mansfield, is contained in the second dialogue in the work of my learned and excellent friend Mr. Baron Maseres, entitled "The Canadian Freeholder." There every important position which lord Mansfield in his argument laid down, is investigated with much copiousness, particularity, and elaboration; the authorities on which he relied, are fully and accurately cited, and considered with abundant care and judgment; his reasonings, both abstract and technical, are stated with the most scrupulous exactness, and discussed with great learning and sagacity; the historical transactions to which he referred are luminously developed, and critically traced through all their known ramifications; and the whole merits of the important questions which were agitated in the course of the case, are exhibited with the most instructive and satisfactory illustration. In the following passage the course of investigation pursued in the work is recapitulated:

"ENGLISHMAN,—FRENCHMAN.

"*E.*—I believe we have gone through all the branches of lord Mansfield's argument in support of the sole legislative authority of the crown over conquered countries, and have given them a very full and fair examination: which is all I proposed to do upon the subject. For, as to my own opinion upon it before that decision of lord Mansfield, I have already mentioned it to you in the beginning of our conversation, together with the reasons upon which I grounded it, and had the satisfaction of finding that you entirely agreed with me in both, and even anticipated some of the latter. What effect the mere authority of lord Mansfield, sitting in his judicial capacity, as chief justice of the Court of King's-bench, and delivering a contrary opinion, but grounding it on reasons that we think weak and unconclusive, ought to have upon our minds, I will not pretend to determine. But it is hard to give up one's reason to mere authority.

"*F.*—So hard that I shall not do it. This is too important a point to be settled by a single decision of a court of justice, or, perhaps I ought rather to say, by the opinion of a single judge. For, by what you stated to me of that judgment in the case of Campbell and Hall, it does not appear to be quite certain that all the judges of the court of King's-bench concurred with lord Mansfield in opinion upon that first point of the cause. For, since, as lord Mansfield expressly declared, they all agreed that the plaintiff Campbell was entitled to the judgment of the Court upon the second point, to wit, that the king, if he had had the sole legislative authority over the island of Grenada immediately after the conclusion of the treaty of Paris in February, 1763, had nevertheless precluded himself, by his proclamation of October, 1763, from exercising it from that time forward, and had thereby transferred the said power to the future governors, councils, and assemblies of the said island; I say, since all the judges agreed with lord Mansfield in the opinion that the plaintiff Campbell ought to have judgment upon this second ground, it is possible that they might not concur with him in his opinion upon the first point, concerning the king's original legislative authority over that island before the said proclamation of October, 1763. Unless, therefore, it was expressly declared by lord Mansfield (who seems to have been the only judge that spoke upon that occasion) that the other judges concurred with him in that opinion upon the first point, I do not think we are bound to consider it as being their opinion. I therefore should be glad to know whether lord Mansfield expressly declared that the other three judges of the court did concur with him in that opinion.

"*E.*—I do not find that he did make such a declaration, though, with respect to the second point, he expressed himself in these positive words; 'But, after full consideration, we are 'of opinion, that before the 20th of July, 1764, 'the king had precluded himself from the exercise of a legislative authority over the island 'of Grenada.' There is therefore a possibility that your surmise may be true, that the other judges did not agree with him in opinion upon the said first point. Yet their silence on the occasion seems to imply an assent to what he delivered. So that I don't know what to conclude concerning that matter. All that is certain is, that the other judges did not openly declare their concurrence with lord Mansfield in this opinion.

"*F.*—Well, be that as it may: whether they did, or did not, concur with lord Mansfield in that opinion, I confess I cannot bring myself to accede to it, after having seen the weakness of the reasons which have been alledged in support of it by so very able a defender of it as lord Mansfield. For, if that opinion could have been rendered plausible and probable by any man, I presume it would have been so by lord Mansfield. And yet we have seen how remarkably he has failed on this occasion, both in his reasonings and in his facts; I must therefore adhere to my first opinion till some better arguments are produced to make me change it.—But, as this enquiry has run into great length, in consequence of the full and particular manner in which you have examined the several historical examples adduced by lord Mansfield in support of his opinion, and likewise of some digressions to other subjects which you have made to gratify my curiosity, I must desire you to resume the subject for a little while longer, and repeat the principal conclusions we have agreed upon in answer to the several branches of lord Mansfield's argument, and to state them in as compact and summary a manner as you can, to the end that I may be the better able to arrange and retain them in my memory.

"*E.*—I think this will indeed be very proper,

for both our sakes; and therefore I will endeavour to do it with as much brevity as shall be consistent with a full enumeration of the several conclusions, (relative to the main subject,) upon which we have agreed; but without any mention of the collateral and incidental subjects to which we have digressed. But even this will take up many words.

"We have agreed, then, in the first place, that lord Mansfield has reasoned very inconclusively in the first part of his argument, in which he endeavours to establish the king's sole legislative authority over conquered countries upon general principles of law and reason;—that he has therein confounded the power of making war, and the summary and arbitrary authority necessarily attendant upon it, (which confessedly belong to the crown alone,) with the power of governing conquered countries in time of peace, after they have been finally ceded by their former sovereigns to the crown:—and that he has likewise confounded this latter power of governing a country, and exercising legislative authority over it, after it is ceded, with the power of making peace, or of either accepting the cession of the conquered country from its former sovereign, or restoring the country back to him:—and, lastly, that he has endeavoured to deduce a right of making laws for a conquered country from the right of granting away the vacant lands of it, that is, from a right of ownership; which, if it were to be admitted in other cases to be sufficient for this purpose, would prove every land-owner to be an absolute monarch, or legislator, over the persons who rented, or took grants of, his land. These, I think, are the remarks we concurred in making upon the first part of lord Mansfield's argument, in which he endeavoured to establish this sole legislative power of the crown upon principles of law and reason.

"I come now to his precedents from history, which are the cases of Ireland, Wales, Berwick upon Tweed, Gascony, Calais, New-York, Jamaica, Gibraltar, and Minorca.

"With respect to Ireland we observed, that he argued, from king John's having, by his sole authority, introduced the laws of England into Ireland, that he therefore was the sole legislator of it; which we agreed to be by no means a just conclusion, there being a manifest difference between a power in the conquering king to introduce once for all, immediately after the conquest, into the conquered country the laws of the conquering country, and the regular, permanent, legislative authority by which the laws of the conquered country may, at any time after, be changed at the pleasure of the legislators, (whoever they are,) not only by introducing into it the laws of the conquering nation, but any other laws whatsoever, and this as often, and in as great a degree, as the legislators shall think fit. And we further observed, that lord Coke, in the passage quoted from this report of Calvin's case, has expressly declared that the kings of England were not possessed of this permanent legislative authority over Ireland, not having a right to alter the laws of England, (when once introduced there by king John,) without consent of parliament; and that lord Mansfield has adopted this opinion of lord Coke, though it clashes with the conclusion which he laboured to draw from this case of Ireland in favour of the king's sole legislative power in the island of Grenada. And we further observed that, for some centuries past, at least, the laws which have been made for the government of Ireland have been made either with the consent of the parliament of England, or with that of the parliament of Ireland. So that, upon the whole matter, Ireland appears to be a very unfit example of the exercise of such a sole legislative authority in the crown over a conquered country as lord Mansfield asserted to have belonged to it in the case of the island of Grenada before the publication of the royal proclamation of October, 1763. These, I think, are the principal remarks we agreed upon concerning Ireland.

"With respect to Wales it appeared to us that lord Mansfield had mistaken two very material facts relating to it. For, in the first place, he asserted that that country had not been a fief of the crown of England before its complete reduction by king Edward the 1st, notwithstanding king Edward, in the famous Statutum Walliæ, passed immediately after the reduction of it, expressly declares that it had been so, and notwithstanding a cloud of passages in that venerable old historian, Matthew Paris, (who lived in the reign of king Henry the 3d, king Edward's father,) which prove that it was in such a state of feudal subjection to the crown of England throughout all the reign of king Henry the 3d and for several reigns before. But, in opposition to these decisive testimonies, lord Mansfield will have it that Wales had never been a fief of the crown of England before the reduction of it by king Edward, but was then, for the first time, reduced by his victorious arms, to be a dependant dominion of the crown of England; but that, for some reasons of policy, (which, however, lord Mansfield does not state, nor even hint at,) king Edward thought proper to declare it to have been in a state of feudal subjection to the crown before his conquest of it. And here we observed that lord Mansfield reasoned inconclusively even from his own assumed state of the fact. For, if Wales had not been a fief of the crown of England before king Edward's reduction of it, but had been (as lord Mansfield supposes) an absolutely independant state until that time, yet, if king Edward had, for any reasons of policy, thought fit to consider it (though falsely) as having been before in a state of feudal subjection to the crown, such a plan of policy in king Edward would have rendered Wales an unfit example of the exercise of the power of a king of England over a conquered country; because it must be supposed that king Edward would, in such a case, have exercised only such rights of government over it as were compatible with the political situation

in which he would have thought fit to place it, which would have been that of an ancient fief of the crown reduced into possession. And we observed also that he had misconceived another material fact relating to this country, with respect to the power by which laws were made for the government of it after its reduction by king Edward. For he asserts that king Edward made laws for it by his own single authority, notwithstanding it is expressly declared by that king himself in the preamble of his famous Statutum Walliæ, above mentioned, that the laws he then established for the government of it were made 'de consilio procerum regni nostri,' or by the consent of his parliament.

"These mistakes we observed to have been made by lord Mansfield in what he said concerning those two great examples of Ireland and Wales; which are also of too great antiquity to have much weight in determining a question concerning the constitution of the English government at this day.

"We then observed that all the other instances that were mentioned by him, except those of Gibraltar and Minorca, are of no importance to the question. These instances were the town of Berwick upon Tweed, the duchy of Guienne, or Gascony, the town of Calais in France, the province of New-York in North America, and the island of Jamaica.

"All that he says of Berwick upon Tweed is, that it was governed by a royal charter. But that circumstance is no proof that the king was the sole legislator of it, any more than he is of the cities of York, Bristol, Exeter, and twenty other towns in England, which are governed also by royal charters. And even that charter of Berwick appears to have been confirmed by act of parliament in the reign of king James the 1st.

"As to the duchy of Guienne, or Gascony, and the town of Calais in France, they were not acquired by the kings of England by conquest, but by marriage and inheritance, and consequently can afford no example of the power of the crown over conquered countries.

"And the province of New-York in America is an unfit example for this purpose, because, though perhaps in truth it might be a mere conquest made upon the Dutch in the year 1664, after they had been many years in quiet possession of it, yet it was not so considered by king Charles the 2d, who took it from them, but was claimed and seized upon by his order as a part of the territory of the more ancient English colony of New-England, into which, it was pretended, the Dutch had intruded themselves without the permission of the crown. And, upon this ground of an already-existing right to it in the crown of England, it was granted away by king Charles the 2d to his brother, the duke of York, before ever the fleet, which was sent to take possession of it, had sailed from England; and it was taken possession of by colonel Nicholls, as a part of the king's old dominions, before the king entered into the first Dutch war. As, therefore, it was not considered by the crown as a conquered country, the government established in it cannot be justly cited as an example of the authority of the crown over conquered countries.—And nearly the same thing may be said of the island of Jamaica; since lord Mansfield tells us that he had found, upon inquiring into the history of it, that it had been almost entirely abandoned by the Spanish inhabitants of it soon after its conquest by the arms of England in the year 1655 in the time of Cromwell's usurpation, and that it was occupied only by English settlers at, or soon after, the restoration of king Charles the 2d in 1660; insomuch that it had been considered ever since that period as an English plantation, and not as a conquered country. For, if this be true, (as I do not doubt it is,) it renders this island an unfit example of the exercise of the legislative authority of the crown over conquered countries. I mean only, however, that it is not a direct example for this purpose: for indirectly, I acknowledge, both this island and the province of New-York may be used as arguments in favour of this authority, by reasoning as follows: 'The power of the crown over a conquered country must be at least as great as it is over a planted country, or colony. Therefore, since the king of England exercised legislative authority over the island of Jamaica for about twenty years, without the concurrence of either the English parliament or an assembly of the people; and since the duke of York did the same thing in the province of New-York for about eighteen years by virtue of a delegation of the powers of government to him from the crown by king Charles's letters-patent; and these two countries were not considered as conquests, but as plantations of Englishmen; it follows, *à fortiori*, that in countries that are not only conquered, but considered as conquered, the crown may lawfully exercise the same authority.' This would have been a tolerably plausible argument, and much stronger than any of those which lord Mansfield made use of in that judgment. But he did not make use of this argument; and indeed could not, consistently with the opinion he delivered concerning planted countries, or colonies: for in these he declared that the king alone had not the power of making laws and imposing taxes, but the king and parliament conjointly, or the king and the assembly of the freeholders of the colony conjointly, agreeably to the opinion of sir Philip Yorke and sir Clement Wearg in the year 1722 concerning the island of Jamaica. He could not, therefore, make use of the foregoing argument *à fortiori*, in favour of the king's sole legislative authority over conquered countries, which is built upon the supposition of his majesty's having had such an authority over planted countries, or colonies; because he denied the existence of the latter authority, which is its foundation. According to lord Mansfield's doctrine, therefore, of the king's not being the sole legislator

of planted countries, the instances of New-York and Jamaica cannot afford the above indirect argument *à fortiori* in support of the king's sole legislative authority over conquered countries. Nor can they afford a direct argument, independently of the consideration of planted countries, in support of this authority; because those places, or provinces, (though really conquests,) were considered and treated as planted countries. And therefore they ought not to have been cited by lord Mansfield as proofs of the said authority. As to the opinion of such lawyers (if there are any such at this day) as would go further than lord Mansfield in their notions of the king's legislative authority, and would say, that the king is the sole legislator not only of all conquered countries, but of all planted countries in which he has not divested himself of his authority by some charter or proclamation, I shall say nothing to it, but that I agree with lord Mansfield in considering the opinion of such lawyers as erroneous with respect to planted countries, and that I am inclined to go beyond lord Mansfield in thinking it likewise erroneous with respect to conquered countries, or, at least, that the arguments adduced by his lordship in support of it in that latter case, are not sufficient to establish it.

"As to Gibraltar and Minorca, in which the king has made from time to time some regulations by his orders in his privy council, we have observed that the former of these places is really nothing more than a garrison-town, without an inch of ground belonging to it beyond the fortifications; and that the latter of them, though an island of some extent, has always been considered by the people of England in nearly the same light, or as an appendage to the fortress of St. Philip's castle, which defends the harbour of Mahon;—that its civil government has been intirely neglected by the ministers of state in Great-Britain ever since the conquest of it, and that no attempt has been made to encourage the profession of the Protestant religion in it, or to introduce the English laws there, even upon criminal matters; and yet that the state of the laws, which are supposed to take place there, is so uncertain and undetermined, that, (though the old Spanish laws are supposed to be in force, and most frequently appealed to), the inhabitants sometimes plead the English laws. And from these circumstances of neglect, confusion, and uncertainty,—and likewise from the small importance of the subjects upon which the kings of Great-Britain have exercised a legislative authority over these places by their orders in council, (no laws for creating new felonies or capital crimes, or for imposing taxes on the inhabitants of those countries, or for any other very important purpose, having ever been made with respect to them), we concluded that neither this island nor the town of Gibraltar were fit examples to prove lord Mansfield's assertion concerning the sole legislative authority of the crown over conquered countries.

"These were the principal remarks we made upon lord Mansfield's second ground of argument in support of the sole legislative authority of the crown over conquered countries, which consisted of historical examples, which were supposed to be precedents of the exercise of such an authority.

"I come now to lord Mansfield's last head of argument in support of this authority; which consisted of the opinion of the judges, as reported by lord Coke, in Calvin's case, and of that of sir Philip Yorke and sir Clement Wearg, (Attorney and Solicitor General to king George the 1st), in the year 1722, on a question referred to them concerning the island of Jamaica.

"Concerning the opinion of the judges in Calvin's case we observed in the 1st place, that it was extrajudicial, having little, or no, relation to the question then under consideration, which was, Whether a person born in Scotland since the accession of king James the 1st to the crown of England, was to be considered as a natural-born subject in England as well as in Scotland, so as to be intitled to purchase land, and maintain actions at law for the possession of it, in the former kingdom as well as in the latter. And, upon this ground of its being extra-judicial, we concluded that this opinion of the judges concerning conquered countries was not to be considered as decisive upon the subject.

"In the second place, we observed that this opinion of the judges, concerning the power of the crown over conquered countries, was intermixed with another opinion, concerning the difference between Pagan and Christian conquered countries, which was so unreasonable, illiberal, and unjust, that lord Mansfield said it had long ago been most deservedly exploded. Now, if the opinion of those judges on the latter subject is so very contemptible, it must, surely, lessen our respect for the wisdom and judgment of the judges who delivered it, and consequently must take off much of the weight which their other opinion, concerning Christian countries conquered by the arms of England, would otherwise derive from their authority.

"In the 3d place, we observed that it appears from the history of those times, that the judges, who determined Calvin's case, were considered by many persons of that age as having acted with a servile degree of complaisance to king James on that occasion; which may be supposed to have influenced them in the opinions they delivered upon incidental points that were mentioned in the course of their arguments, as well as in their opinion upon the main question then in dispute before them. And this consideration must contribute to lessen the authority of their opinions upon those incidental points as well as upon the main point, and consequently that of their opinion, so much relied upon by lord Mansfield, concerning the power of the crown over conquered countries.

"And, in the 4th and last place, we observed that this opinion of lord Coke and the other

judges in Calvin's case, concerning the legislative power of the crown over conquered countries, is not the same with lord Mansfield's opinion upon this subject, but materially different from it. For lord Coke ascribes to the crown only the power of changing the laws of the conquered country once for all, upon the conquest of it, and introducing the laws of England in their stead: but he adds that, when once the king has introduced the laws of England into the conquered country, he cannot afterwards alter them without the consent of parliament; which is saying, that the king and parliament conjointly, and not the king alone, are possessed of the permanent right of legislation over it. So that this authority of Calvin's case, (such as it is), is rather adverse than favourable to lord Mansfield's doctrine upon this subject.

"These are the observations we made with respect to this opinion of the judges in Calvin's case, upon which lord Mansfield laid so great a stress.

"The only remaining authority cited by lord Mansfield was the opinion given by sir Philip Yorke and sir Clement Wearg in the year 1722 upon a question that was referred to them concerning the island of Jamaica.

"This opinion, we acknowledged, did really coincide with lord Mansfield's opinion upon the authority of the crown over conquered countries, though the opinion of the judges in Calvin's case did not. But we agreed that, as those learned gentlemen were at that time in the service of the crown in the offices of attorney and solicitor general to king George the 1st, (which must naturally be supposed to have given them some degree of bias in favour of the prerogative of the crown,) and this opinion appears to have been given by them in a very hasty and negligent manner, (since they did not take the pains to inquire, and to form a judgment, whether Jamaica ought to have been still considered as a conquered country, or had by the conduct of the crown in the government of it since the Restoration in 1660, been brought into the condition of a planted country, or colony; which was so necessary to their giving an useful and satisfactory opinion upon the matter referred to them;) I say, we agreed that, for these reasons, this opinion of theirs was not intitled to much regard with respect to the decision of the important question which is the subject of our present inquiry.

"And thus we completed our discussion of lord Mansfield's third and last head of argument, which was grounded on the opinions of judges and other learned lawyers.

"This, I presume, is the kind of recapitulation which you wished me to make to you, of the principal conclusions we had agreed on in the course of our examination of lord Mansfield's opinion upon this subject.

"*F.*—It is: and I am much obliged to you for making it; as it enables me to carry off these conclusions, which we have agreed on, more easily than I otherwise could do. Nor do I think of any thing further to trouble you about upon the subject. And yet, before I intirely quit it, I must beg leave to express my surprize at the very positive and peremptory manner in which lord Mansfield asserted this power of making laws for conquered countries to belong to the crown. 'No dispute, says he, was ever started before upon the king's legislative right over a conquest. It never was denied in Westminster-hall; it never was questioned in parliament.' And again, 'No book, no saying of a judge, no opinion of any counsel, public, or private, has been cited on the other side; no instance has been found in any period of our history, where a doubt has been raised concerning it.' These are strangely confident expressions, considering the weakness of the proofs he adduces in support of them; to which, indeed, they form a remarkable contrast. This, I confess, has surprised me in a man so much celebrated for his learning and abilities as lord Mansfield. I therefore wish to know how you account for it; and the rather, because this extreme positiveness in a man of his abilities has a tendency to dazzle and overbear my judgment, and make me yield implicitly to his opinion, notwithstanding I have satisfied myself, by our discussion of this subject, that the reasons he has adduced in support of it, are very weak.

"*E.*—Your remark is very just. There is a strange degree of positiveness in his assertions, that is very ill suited to the weakness of his arguments in support of them. And what makes it the more surprizing is, that he himself ordered this case of Campbell and Hall to be argued no less than three times, on three different days, at the bar, before he decided it; which would, surely, have been unnecessary, and, consequently, injurious to the parties (by forcing them to suffer a needless delay, and incur an unnecessary degree of expence, in the prosecution of their legal claims,) if the matter had been so extremely clear and free from doubt as he, in delivering his judgment, represents it. But that positiveness of assertion is agreeable to his constant manner of speaking, and may, perhaps, be considered as one of the ingredients of his species of eloquence, as it certainly has the effect you mention, of dazzling, for a time, and overbearing his hearers into an acquiescence in the truth of the propositions he so peremptorily asserts. But you, who have examined the reasons adduced by him in support of his assertion concerning the present subject, and have found them to be insufficient, ought to break through the inchantment, and to yield to the conclusions of your own understanding, and embrace what appears to it to be the truth; agreeably to the old Latin proverb, 'Amicus Plato; Amicus Socrates; sed magis amica veritas.' However, to take off something of the impression which you say those positive assertions of lord Mansfield, which you just now repeated, are apt to make

sentatives of the province of the Massachusets Bay, in the month of January, 1768, to the earl of Shelburne, (who was at that time one of his majesty's principal secretaries of state), it is recited in these words; Sir William Jones, an eminent jurist, declared it as his opinion, to king Charles the second, That he could no more grant a commission to levy money on his subjects in Jamaica, without their consent by an assembly, than they could discharge themselves from their allegiance to the crown.

"In this account we see that this opinion related to Jamaica; which was a conquered country. The only remaining doubt therefore is, whether sir William Jones, when he gave this opinion, considered Jamaica as continuing still in its original state of a conquered country, or whether he supposed its political condition to have been altered by the events that had happened to it since its conquest, (such as the withdrawing of the Spanish inhabitants from it, and the accession of Englishmen to it, who were invited by the king's proclamation to come and settle in it), so as to have been thereby converted into the political condition of a colony, or country that had been originally planted by Englishmen under the king's authority; which is the light in which lord Mansfield seems to think that island ought to have been considered in the year 1722, when sir Philip Yorke and sir Clement Wearg gave their opinion concerning it. But there may be a great deal of difference between the condition of Jamaica, in the year 1722, and its condition in king Charles the 2d's time, about the year 1677, or 1678, when this opinion probably was given: and the reasons for considering it as having changed its political state from that of a conquered to that of a planted country, or colony, were much stronger in the year 1722 than at the other period. For during the greater part of Charles the second's reign, and therefore, probably, when this opinion was given, the inhabitants of Jamaica were governed only by a governor and council, without an assembly of the people: and consequently king Charles, when this opinion was given, had not yet, (by granting them the privilege of being represented by an assembly with a power to make laws and impose taxes for the public uses of the island), divested himself of his antecedent right to impose taxes on them, if such a right had really belonged to him. It seems therefore not unlikely that sir William Jones, when he gave this opinion, might consider the island of Jamaica as continuing still in its original state of a conquered country, notwithstanding most of the Spanish inhabitants had left it: and, if he did consider it in that light, it is evident that this opinion of his would, in such case, be an opinion exactly in point to contradict lord Mansfield's doctrine of the king's sole legislative authority over conquered countries.

"And, agreeably to this conjecture, I find, in another account of this opinion, that sir William Jones did consider Jamaica as a conquered country, and expressly called it so, and yet denied the king's authority to impose taxes on its inhabitants without the consent of an assembly. For in another letter of the same assembly of the representatives of the province of Massachusets bay, written in the same month of January, 1768, as the former letter to lord Shelburne, and addressed to Dennis De Berdt, esq. their agent in England, they speak of this opinion of sir William Jones in these words: 'There was even in those times [the times before the Revolution] an excellent attorney-general, sir William Jones, who was of another mind, and told king Charles the second, that he could no more grant a commission to levy money on his subjects in Jamaica, though a conquered island, without their consent by an assembly, than they could discharge themselves from their allegiance to the English crown.' If this last account of sir William Jones's opinion is the true one, it is evident that he considered Jamaica as continuing still in the condition of a conquered country, and consequently that his opinion with respect to the king's power over conquered countries is directly contrary to lord Mansfield's.

"The other opinion which I mentioned as material to our present enquiry was that of Mr. Lechmere, a lawyer of considerable eminence, and esteemed a man of great integrity, who was attorney-general to king George the 1st. This opinion I had occasion to mention to you in our last conversation, just before I begun the account of the imposition of the duty of four and a half per cent. upon goods exported from Grenada by the king's letters patent of July, 1764. It is shortly thus. When the British ministers of state, in the year 1717, had a design of advising the king to impose, by his royal prerogative, the said duty of four and a half per cent. on goods exported from the island of Jamaica and the little islands of Anegada and Tortola, which are situated at a small distance from St. Christopher's, they consulted Mr. Lechmere, the attorney-general, upon the legality of the intended measure. And he, thereupon, honestly told them, 'that the person who should advise his majesty to take such a step, would be guilty of high treason.' But I do not know whether he considered Jamaica as still continuing in the state of a conquered island, or not. If he did, this opinion of his would be an opinion exactly in point to our present subject, and directly contrary (as well as the opinion of sir William Jones, according to the last account of it,) to the doctrine of lord Mansfield concerning the sole legislative authority of the crown over conquered countries.

"These two respectable opinions, against the said supposed legislative authority of the crown, may fairly be set in opposition to the opinion of sir Philip Yorke and sir Clement Wearg, so much relied on by lord Mansfield, in support of it.

"You now, I hope, are satisfied that lord Mansfield's peremptory assertions, 'that no doubts had ever been entertained by any lawyers, before the said case of Campbell

and Hall, concerning the king's sole legislative authority over conquered countries,' are not quite agreeable to the truth, but that some lawyers of character in former times have presumed to entertain a different opinion, and even to tell the king's ministers that they did so. And consequently you should shake off from your mind that over-great awe and deference to that learned lord's opinion which the peremptory manner of his making those assertions had impressed upon it, and should boldly venture to entertain that opinion upon the subject which, upon the full enquiry you have made into it, appears to you to be the most reasonable.

"*F.*—I will endeavour to do so, as far as I am able. But, I protest, I find it difficult; as his authoritative manner of making these assertions does still retain some influence over my mind, notwithstanding you have now convinced me that they are neither altogether true, nor decisive of the matter in question, if they were true. However, upon the whole, I do venture to conclude that the reasons he has given in support of his opinion, 'that the king alone has a legislative authority over conquered countries,' are far from being sufficient to maintain it. I should therefore continue to hold the opinion which at first appeared to me most reasonable, to wit, 'that the king and parliament conjointly, and not the king alone, had a right to make laws for the inhabitants of conquered countries,' and to impose taxes on them, if it were not for one remaining difficulty, concerning which I must desire the assistance of your opinion. This difficulty is grounded on the authority which lord Mansfield's doctrine may, perhaps, derive from the very circumstance of its being his opinion, and having been delivered by him, as such, in his judicial capacity on a question that brought the subject regularly before him, for his decision; more especially, if we consider the silence of the other judges of the court of King's-bench, when lord Mansfield delivered this opinion, as implying their concurrence with him in it. For in this case it may be said, that, on the only occasion on which this doctrine 'of the king's sole legislative power over conquered countries' has been brought into question before an English court of justice, it has been decided in favour of the crown by the unanimous opinion of all the judges of the court; and that, whatever the law might be before, such a decision must be considered as settling it for the future in favour of the said power of the crown, or must be a peremptory guide to all future courts of justice in their decision of the same question, as often as it shall occur before them. I should be glad to know, therefore, what you think of this conclusion, and whether by the rules observed by English courts of justice with respect to points already decided by the same or other courts, such a question ought to be considered as having been decided for ever in favour of the crown by this one decision of lord Mansfield and the court of King's-bench. If it is to be so considered, I must needs think that lord Mansfield and his brother judges will, by that opinion of theirs in their judgment on the case of Campbell and Hall, have, indirectly, made a law of the most capital importance to Great Britain and the British dominions.

"*E.*—Your question is a very proper one, and not a very easy one to answer; there being no express law, nor even constant usage, that ascertains, in all cases, the degree of deference which is to be paid by courts of justice to the former judicial decisions of the same or other courts of justice. And we have seen lord Mansfield himself, since he has been chief justice of the King's-bench, and his brother judges of that court, in more than one instance, determine a point of law in a manner directly contrary to the determination of it by all the judges of the same court of King's-bench on a former occasion, though the said former determination had been acquiesced in by the party against whom it had been made, and had been taken and reputed for good law ever after, till the new case in which lord Mansfield and the other judges of the court of King's-bench determined the point in a different manner. I particularly remember an instance of this kind in a case in which the names of the parties were Wyndham and Chetwynd, containing the qualifications necessary to the three witnesses who, by a certain statute made to prevent frauds, are required to attest and subscribe a will of lands, in order to its validity. But the general rules concerning the authority of judicial determinations of points of law I take to be as follows.

"In the first place, where a point of law has been agitated in all the courts through which it may be carried by appeal, or writ of error, and has been finally determined by a judgment of the highest court of appeal, that is, of the House of Lords, (for that is, in Great Britain, the highest court of appeal both in matters of law and equity;) such a determination is reckoned to be of almost as much authority with respect to the point so settled, as an act of parliament; or, at least, it is so considered by all the ordinary courts of justice, though, perhaps, the House of Lords itself might, on another occasion, if they thought there was very strong ground for it, determine it in a different manner.

"In the second place, when a point of law has been fully argued, and solemnly determined by one of the four great courts of Westminster-hall, that is, the court of Chancery, the court of King's-bench, the court of Common Pleas, and the Court of Exchequer, and the party, against whom the judgment has been given, has acquiesced in it, and has forborn to bring an appeal, or a writ of error, into the next higher court of justice, to which the right of revising the judgments of the first court, and correcting the errors in them, be-

longs; and such forbearance does not arise from the poverty or inability of the said party to bear the expence of prosecuting such writ of error, or appeal to the next higher court; such a determination acquires a great degree of respect and authority in Westminster-hall, and is usually adopted and followed by the courts of justice in their subsequent determinations of the same point of law, as often as it comes before them. Yet it is not of quite so great authority as a determination of the House of Lords upon a question brought there in the last resort: and we have sometimes seen such determinations overturned by subsequent determinations of the same or other courts of justice in Westminster-hall; as was done in the court of King's-bench in the case of Wyndham and Chetwynd, which I just now mentioned to you. Yet such overturnings of the former solemn determinations of courts of justice are very unfrequent, and are not in general approved of, though, perhaps, in some very strong cases, where the former determinations have been made upon very wrong principles, they may be justifiable.

"In the third place, when a matter has been fully argued before one of the courts of Westminster-hall, and a solemn judgment has been given upon it in favour of one of the parties; and in the said judgment more than one point of law has been determined in favour of such party; and the losing party acquiesces in the said judgment, and forbears to bring a writ of error for a reversal of it in a higher court of justice; the determinations of such points of law acquire a considerable degree of weight and authority in the estimation of lawyers and subsequent courts of justice, but yet are not quite so much respected as the determinations in the two former cases: and for this plain reason, that, as more than one point of law are determined at the same time in favour of one of the contending parties and against the other, it is uncertain, whether the losing party, when he acquiesces under the whole judgment, and forbears to bring a writ of error in a superior court to get it reversed, acquiesces in all the points of law determined against him, or only in some, or one, of them; because, if only one of them is rightly determined against him, the judgment against him would be affirmed upon a writ of error, as much as if all the points had been so determined. This uncertainty concerning the particular points of law, in the determination of which the losing party may be supposed to acquiesce, takes from the determinations of each of the points of law, that are determined against him, some part of the weight and authority which such determinations would otherwise derive from his acquiescence.

"And fourthly, if a matter has been fully argued before a court of justice in Westminster-hall, and a solemn judgment has been given upon it in favour of one of the parties; and in the said judgment one, or more than one, point of law has been determined in his favour, and another point, or points of law have been determined against him; and the losing party acquiesces in the said judgment, and brings no writ of error to reverse it; such an acquiescence of the losing party can operate as a confirmation of only those points of law which are determined against him, and not of those which are determined for him. In such a case, therefore, there will be several determinations of points of law, all deliberately made by the same judges and in the same cause, which will have different degrees of weight and authority, namely, the points determined in favour of the losing party, and the points determined against him. For the points determined in favour of the losing party will have that degree of weight and authority which arises from the respect due to the learning, abilities, and integrity of the judges who have decided them, and to the deliberate manner in which they have been considered and discussed before they were decided; but those which are determined against the losing party will, besides the weight and authority arising from the foregoing circumstances, be entitled to an additional degree of respect arising from the acquiescence of the losing party, which will shew that he, and his counsel learned in the law, despair of having those points determined in a different manner, if they were to bring a writ of error for the purpose.

"These seem to me to be the different degrees of authority which are attributed by the English courts of justice to the aforesaid different sorts of judicial determinations of points of law by former judges: which, I presume, you will agree with me in thinking reasonable.

"*F.*—I enter very readily into these distinctions between the different sorts of judicial determinations, and think them very natural and reasonable. And, according to this gradation of them, it seems to me that the opinion of lord Mansfield, delivered in the case of Campbell and Hall, concerning the sole legislative authority of the crown over conquered countries, (even supposing the other judges of the King's-bench to have concurred with him in it,) must be placed in the fourth, or lowest class of them. For in that case there is no room to infer any thing, from the acquiescence of either of the parties, in favour of that opinion. For, as to the defendant Hall, who was the losing party, all that can be inferred from his acquiescence in the judgment given against him in that action is, that he and his counsel acquiesced in the opinion of the Court upon the 2d point, 'of the immediate operation of the king's proclamation of October 1763, as a bar to the exercise of his antecedent legislative authority,' and despaired of having it otherwise determined, if he should have brought it into the House of Lords by writ of error. And as to the plaintiff Campbell who gained his cause, he could not bring a writ of error to reverse a judgment that was given in his favour. So that the opinion of lord Mansfield upon that first point must, indeed, be considered as the opinion

of that learned lord, and, perhaps, of the whole court of King's-bench, upon a point that had been fully argued before them, and must be entitled to all the respect which is due to it on that account, but cannot derive any additional weight from the acquiescence of either of the parties under it; that is, it must be a judicial decision of the lowest of the four classes of judicial decisions which you have been just now describing.

"*E.*—It is exactly so. The opinion of lord Mansfield upon that first point is a decision of that fourth and lowest class. And therefore I suppose that it would not be considered by the same or any other court of justice in Westminster-hall, on any other occasion in which the same point, 'of the king's legislative authority over conquered countries,' should occur, as being absolutely binding and decisive of the question, so as to be entitled to the confirmation of such court of justice, though the reasons on which it was founded should be entirely disapproved by the judges of which such court should be composed; since we have seen, in the case of Wyndham and Chetwynd, (which was determined by lord Mansfield himself) that even a decision of the second class is not always so considered. But yet it would certainly have considerable weight with the judges of such subsequent court of justice, so as to induce them to give judgment agreeably to it, if they were only in a state of doubt concerning the validity of the reasons on which it had been grounded, and did not thoroughly disapprove them. So that I am afraid we must allow, that (weak and ill-grounded as it appears to you and me,) this opinion of lord Mansfield, concerning the king's sole legislative power over conquered countries, is a temporary judicial determination of that question in favour of the prerogative of the crown. But, as you rightly observed, it is a decision of the fourth, or lowest, class of the several sorts of judicial determinations above described.—But I hope your curiosity is now satisfied with respect to this important question of law, concerning the supposed sole legislative authority of the crown over conquered countries, which, I think, we have very sufficiently discussed.

"*P.*—My curiosity is, indeed, satisfied on this subject: but the pleasure I have had in the enquiry is allayed with some mixture of uneasiness arising from the weight that may be thought to belong to that opinion of lord Mansfield. For how can any lover of liberty and the English constitution (as I most sincerely profess myself to be) not be sorry to find, that the only judicial decision that has been made upon the subject, has ascribed to the crown alone, without the concurrence of the parliament, a power to make laws and impose taxes at pleasure on the inhabitants of all countries that are conquered by the British arms?—I therefore hope, either, that the law upon this subject will soon be altered by an express act of parliament for the purpose, or that the question may again be brought under the consideration of some court of justice, and be there determined in a different manner, as the case just now mentioned, of Wyndham and Chetwynd, was determined, by lord Mansfield himself and the other judges of the King's-bench, in a manner directly contrary to a former determination of the same point of law in the same court of King's-bench, though the said former determination had been a decision of the second class. For it may be of terrible consequence to the freedom of the English constitution to have so enormous a power fixed permanently in the possession of the crown.

"*F.*—I heartily join with you in these wishes: but doubt a little whether they are likely to be soon accomplished. However, if this question were again to come before a court of justice, and the merits of the cause were to turn singly upon the decision of it, (which was not the case in the action of Campbell against Hall,) I can hardly persuade myself that the judges of any court in Westminster-hall would think themselves bound to determine it agreeably to lord Mansfield's opinion, merely through deference to that opinion and without any new reasons that should influence their own judgments in favour of it; seeing that the reasons alledged by lord Mansfield in support of it have appeared, upon examination, to be so very weak, and that its authority as a judicial decision is two degrees lower than that of the case in the court of King's-bench, above alluded to, (which is called the case of Anstey and Dowsing,) which was overturned by the same court in the subsequent case of Wyndham and Chetwynd, that case having been a decision of the second class, and this being only of the fourth. But this is all matter of conjecture, and consequently not worthy our further consideration." Canadian Freeholder; a work of which Dr. Watson, the eminent bishop of Llandaff, has very truly said (Note to Assize Sermon preached at Cambridge in the year 1769) that it is replete with sound and perspicuous reasoning.

With respect to the application of the revenue arising from the four and a half per cent. duty, see some discussions in the House of Lords on April 6, 1802, and in the House of Commons on March 30, 1802; on July 2, 1804, Parl. Deb. vol. 2, p. 902, and on May 8, 1809, Parl. Deb. vol. 14, p. 409.

551. The Trial of ELIZABETH, calling herself Duchess Dowager of KINGSTON, for Bigamy:* before the Right Hon. the House of Peers, in Westminster-Hall, in full Parliament assembled, 15th, 16th, 19th, 20th, and 22d Days of April: 16 GEORGE III. A. D. 1776.† [Printed under an Order of the House of Lords.]

Monday, April 15, 1776.

In the Court erected in Westminster-hall, for the Trial of Elizabeth Duchess Dowager of Kingston, for Bigamy.

ABOUT ten o'clock the Lords came from their own House into the court erected in Westminster-hall, for the Trial of Elizabeth duchess-dowager of Kingston, in the manner following:

The Lord High Steward's gentlemen attendants, two and two.

The clerks assistant to the House of Lords, and the clerk of the parliament.

Clerk of the crown in Chancery, bearing the king's commission to the Lord High Steward, and the clerk of the crown in the King's-bench.

The masters in Chancery, two and two.

The judges, two and two.

The peers eldest sons, two and two.

Peers minors, two and two.

Chester and Somerset heralds.

Four serjeants at arms with their maces, two and two.

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* See the Trials of Mary Moders, vol. 6, p. 273, and of Fielding, vol. 14, p. 1327, for the like offence.

† "REX *v.* DUCHESS of KINGSTON.

"Mr. Wallace had moved on the part of the defendant, for a Certiorari to be directed to the justices of Oyer and Terminer, at Hicks's-hall, to remove into the Court an indictment found against her, at the sessions there, for bigamy; and, upon the motion, the court granted the writ.

"But now lord Mansfield took notice to Mr. Wallace, that the motion was irregular. For a defendant has no right to remove an indictment of felony from Hicks's-Hall, without the consent of the prosecutor; and in this case there was no consent, therefore his lordship said the writ issued *improvidè*, and must be superseded.

"Mr. Wallace said, the only object of removing the indictment was for the purpose of her being bailed; but per lord Mansfield, the purpose for which it was intended, makes no difference.—The next day Mr. Wallace moved for a Habeas Corpus, Mr. Justice Aston having granted a warrant for her apprehension (as had been settled amongst the parties, as the properest method to be taken) upon a certificate of the indictment being found.

"The warrant and the return to it were read; and then Mr. Wallace moved to bail her. He mentioned the suit in the spiritual court, upon the proceedings there against Mr. Hervey, for jactitation of marriage, and also the proceedings in Chancery relating to her marriage; all these proceedings were put into court, and entered as read. He observed, that she must, at all events, be tried by her peers, as Mr. Hervey was now become earl of Bristol.

"Mr. Bearcroft, for the prosecutor, consented to her being bailed, as there could be no doubt (he said) of her appearance to answer to the indictment.

"Lord *Mansfield.* Though we should undoubtedly have bailed her, it is better to take it as upon the consent of the prosecutor; and she must be bound to appear in the House of Lords when required, to answer to the indictment, as well as to appear in this court. But as there is nothing against her in this court, her appearance here may be dispensed with for the future upon motion, without giving her the trouble of actually appearing here in court any more.

"Bail was taken accordingly, herself being bound in 4,000*l.* and each of her four bail in 1,000*l.*

"'The recognizance was as follows:—'England. Duchess dowager of Kingston, 'who stands indicted by the name of Eliza-'beth, the wife of Augustus John Hervey, esq. 'is delivered to bail, upon a writ of Habeas 'Corpus ad subjiciendum, for her appearance 'in the court of our sovereign lord the king, 'before the king himself at Westminster, on 'the first day of the next term, and so from 'day to day, until she shall be discharged by 'the said court, and not to depart the said court 'without leave; and also for her appearance 'before our said lord the king in parliament, to 'answer to an indictment against her for fe-'lony, whenever she shall be thereunto re-'quired. By the Court. BURROW.'

"I have inserted this recognizance, *verbatim*, because there was found only a single instance of the like, (viz. of a recognizance taken in this court to appear in parliament) which was that of the earl of Orrery, taken and acknowledged before lord chief justice Pratt, on the 14th of March, 9 Geo. 1, for his appearance in the court of our lord the king,

The yeoman-usher of the House.

The barons, two and two, beginning with the youngest baron.

The bishops, two and two.

The viscounts and other peers, two and two.

The lord privy seal and lord president.

The archbishop of York and the archbishop of Canterbury.

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before the king himself at Westminster, on the first day of next term, and so from day to day until he shall be discharged by the said court, and not to depart that court without leave, to answer to those things which, on the behalf of our said lord the king shall be objected against him; and also for his appearance from time to time, until he the said Charles lord Orrery shall be discharged by due course of law, before our lord the king in parliament, whenever by our said lord the king he shall be thereunto required, to answer to those things, which on behalf of our said lord the king shall be there objected against him." Cowper's Reports, p. 283.

Upon occasion of these proceedings against the prisoner in the following Trial, Mr. Hargrave was consulted on the part of the prosecution. With his wonted zeal he composed, previously to the trial, a most elaborate, learned, and able discourse 'Concerning the Effect of Sentences of the Courts Ecclesiastical in Cases of Marriage when pleaded or offered in evidence in the Courts Temporal,' which several years afterwards he published in his 'Collection of Tracts relative to the Law of England.' In this discourse he has accumulated a vast mass of judicial decisions and legal reasonings respecting the two main questions of law which were made in this case, viz.

1. Whether a sentence of the spiritual court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?

2. Whether, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be permitted to avoid the effect of such sentence by proving the same to have been obtained by fraud or collusion?

In addition to what will be found in this report of the trial, I must refer the reader for farther illustration of the law respecting these two questions to that treatise of Mr. Hargrave; which it is to be hoped will be incorporated into his valuable 'Jurisconsult Exercitationes' now in course of publication.

Mr. Leach has inserted in his Cases in Crown Law a very brief note of this case, exhibiting the decision of the Court upon the two questions which I have just stated, and also upon another question which was agitated, viz. Whether a peeress convicted by her peers of a clergyable felony is by law entitled to the benefit of the statutes, so as to excuse her from capital punishment, without being burned in the hand, or being liable to any imprisonment?

Four serjeants at arms with their maces, two and two.

The serjeant at arms attending the great seal, and purse-bearer.

Then Garter king at arms, and the gentleman-usher of the Black Rod carrying the white staff before the Lord High Steward.

Henry earl Bathurst, chancellor of Great-Britain, Lord High Steward, alone, his train borne.

His royal highness the duke of Cumberland, his train borne.

The Lords being placed in their proper seats, and the Lord High Steward upon the woolpack, the House was resumed.

The clerk of the crown in Chancery, having his majesty's Commission to the Lord High Steward in his hand, and the clerk of the crown in the King's-bench, standing before the clerk's table with their faces towards the state, made three reverences; the first at the table, the second in the mid-way, and the third near the woolpack; then kneeled down; and the clerk of the crown in Chancery, on his knee, presented the Commission to the Lord High Steward, who delivered the same to the clerk of the crown in the King's-bench to read: then rising, they made three reverences, and returned to the table. And then proclamation was made for silence, in this manner:

Serj. at Arms. Oyez, oyez, oyez! Our sovereign lord the king strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

Then the Lord High Steward stood up, and spoke to the Peers.

L. H. S. His majesty's Commission is about to be read: your lordships are desired to attend to it in the usual manner; and all others are likewise to stand up uncovered while the Commission is reading.

All the peers uncovered themselves; and they, and all others, stood up uncovered, while the Commission was read.

"GEORGE R.

"George the third, by the grace of God, of Great-Britain, France, and Ireland king, defender of the faith, and so forth. To our right trusty and right well-beloved cousin and counsellor Henry earl Bathurst, our chancellor of Great-Britain, greeting. Know ye, that whereas Elizabeth the wife of Augustus John Hervey, late of the parish of St. George, Hanover-square, in our county of Middlesex, esq. before our justices of Oyer and Terminer, at Hicks's-hall, in St. John-street, in and for our county of Middlesex, upon the oath of twelve jurors, good and lawful men of the said county of Middlesex, then and there sworn and charged to enquire for us for the body of the said county, stands indicted of polygamy,* and

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* "Polygamy; or, as it is more frequently, though improperly, called, bigamy, (which only means having two wives in succession,) consists in having a plurality of wives at the same time, and was originally considered as of eccle-

in this behalf is required) is now vacant (as we are informed) we, very much confiding in your fidelity, prudence, provident circumspection, and industry, have for this cause ordained and constituted you Steward of Great Britain, to bear, execute and exercise for this time the said office, with all things due and belonging to the same office in this behalf: and therefore we command you, that you diligently set about the premises, and for this time do exercise and execute with effect all those things which belong to the office of Steward of Great Britain, and which are required in this behalf. In witness whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the 15th day of April, in the 16th year of our reign.

"By the KING himself, signed with his own hand. YORKE."

Serjeant at Arms. God save the king!

Then Garter, and the gentleman-usher of the Black Rod, after three reverences, kneeling, jointly presented the white staff to his grace the Lord High Steward: and then his grace, attended by Garter, Black Rod, and the Purse-bearer (making his proper reverences towards the throne) removed from the woolpack to an armed chair, which was placed on the uppermost step but one of the throne, as it was prepared for that purpose; and then seated himself in the chair, and delivered the staff to the gentleman-usher of the Black Rod on his right hand, the Purse-bearer holding the purse on his left.

Clerk of the Crown. Serjeant at Arms, make proclamation.

Serj. at Arms. Oyez, oyez, oyez! Our sovereign lord the king strictly charges and commands all manner of persons to keep silence, upon pain of imprisonment.

Then the Clerk of the Crown, by direction of the Lord High Steward, read the Certiorari, and the Return thereof, together with the Caption of the Indictment, and the Indictment certified thereupon, against Elizabeth duchess-dowager of Kingston; *in hæc verba*:

"George the third, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth. To our justices of Oyer and Terminer, at Hicks's-hall, in St. John-street, in and for our county of Middlesex, and to every of them, greeting. We being willing, for certain reasons us thereunto moving, that all and singular indictments of whatsoever felonies whereof Elizabeth calling herself duchess-dowager of Kingston, by the name of Elizabeth the wife of Augustus John Hervey late of the parish of St. George, Hanover-square, in the county of Middlesex, esq., is indicted before you (as is said) be determined before us in our parliament, and not elsewhere; do command you and every of you, that you, or one of you, do send under your seals, or under the seal of one of you, before us in our present parliament, immediately after the receipt of this our writ, all and singular the indictments aforesaid, with all things touching the same, by whatsoever name the said Elizabeth is called in the same, together with this writ, that we may cause further to be done thereon what of right and according to the law and custom of England we shall see fit to be done. Witness ourself at Westminster the 11th day of November, in the 16th year of our reign. YORKE."

"To the Justices of Oyer and Terminer, at Hicks's-hall, in St. John-street, in and for the county of Middlesex, and to every of them, a writ of Certiorari to certify into the upper house of parliament the indictment found against Elizabeth calling herself duchess-dowager of Kingston, by the name of Elizabeth wife of Augustus John Hervey, for bigamy, returnable immediately before the king in parliament.—By order of the Lords spiritual and temporal in parliament assembled. YORKE."

The execution of this writ appears by the schedules and indictment to this writ annexed.

"The ANSWER of sir JOHN HAWKINS, knt. one of the justices within-written.

"*Middlesex.* Be it remembered, that at the general session of Oyer and Terminer of our lord the king, holden for the county of Middlesex, at Hicks's-hall, in St. John-street, in the said county, on Monday the 9th day of January, in the 15th year of the reign of our sovereign lord George the 3d, king of Great Britain, and so forth, before sir John Hawkins, knt., John Cox, David Wilmot, John Bretteil, esqs. and others their fellows justices of our said lord the king, assigned by his majesty's letters patent under the great seal of Great-Britain directed to same justices before named, and others in the said letters named, to enquire more fully the truth by the oath of good and lawful men of the said county of Middlesex, and by other ways, means, and methods by which they shall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treasons, misprisions of treason, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the money of Great Britain and other kingdoms and dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceipts, and all other evil-doings, offences, and injuries whatsoever, and also the accessaries of

4 W. and M. (which extended the benefit of clergy to women) passed, it was punishable in female offenders with death, but in males only with burning in the hand, and a year's imprisonment."

them, within the county aforesaid (as well within liberties as without) by whomsoever and in what manner soever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises, and every of them, or any of them, in any manner whatsoever; and the said treasons and other the premises to hear and determine according to the laws and customs of England, by the oath of John Tilney, James Stafford, Richard Phillips, Samuel Stable, Samuel Bird, William Hilliar, Paul Barbot, William Weatherill, Thomas Waddell, John Williams, Samuel Baker, Thomas Sheriff, John Leicester, Thomas Tanton, John Goodere, John Thomas, and Robert Davis, gentlemen, good and lawful men of the county aforesaid, now here sworn and charged to enquire for our said lord the king for the body of the same county; it is presented in manner and form as appears by the indictment and schedules hereunto annexed. BUTLER."

"George the third, by the grace of God, of Great-Britain, France, and Ireland king, defender of the faith, and so forth. To our justices of Oyer and Terminer, at Hicks's-hall, in St. John-street, in and for our county of Middlesex, and to every of them, greeting. Whereas by our writ we have lately commanded you, and every of you, for certain reasons, you or one of you should send under your seals, or the seal of one of you, before us at Westminster, immediately after the receipt of that writ, all and singular indictments of whatsoever trespasses, contempts, and felonies whereof Elizabeth the wife of Augustus John Hervey, esq. was indicted before you (as was said) with all things touching the same, by whatsoever name the said Elizabeth should be called therein, together with the said writ to you directed, that we might further cause to be done thereon what of right and according to the law and custom of England we should see fit to be done: and we do, for certain reasons us thereunto moving, command you and every of you, that you or one of you do wholly supersede whatsoever is to be done concerning the execution of that our said writ; and that you proceed to the determination of the trespasses, contempts, and felonies aforesaid with that expedition which to you shall seem right and according to the law and custom of England, notwithstanding our writ as before sent to you directed for that purpose. Witness William lord Mansfield, at Westminster, the twenty-third day of May, in the fifteenth year of our reign.

"Received 13th June 1775. C. E. By the Court.—By rule of Court. BURROW."

"George the third, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith. To our justices of Oyer and Terminer, at Hicks's-hall, in St. John-street, in and for our county of Middlesex, and to every of them, greeting. We being willing, for certain reasons, that all and singular indictments of whatsoever trespasses, contempts, and felonies whereof Elizabeth the wife of Augustus John Hervey, esq. is indicted before you (as is said) be determined before us, and not elsewhere, do command you and every of you, that you or one of you do send under your seals, or the seal of one of you, before us at Westminster, immediately after the receipt of this our writ, all and singular the said indictments, with all things touching the same, by whatsoever name the said Elizabeth may be called in the same, together with this our writ, that we may further cause to be done thereon what of right and according to the law and custom of England we shall see fit to be done. Witness William lord Mansfield, at Westminster, the eighteenth day of May, in the fifteenth year of our reign.

"By the Court. BURROW."

"At the instance of the within-named defendant, by rule of Court."

The execution of this writ appears by the schedules and indictment to this writ annexed.

"The ANSWER of sir John Hawkins, knight, one of the justices within-written.

"*Middlesex.* Be it remembered, that at the general session of Oyer and Terminer of our lord the king, holden for the county of Middlesex, at Hicks's-hall in St. John-street, in the said county, on Monday the 9th day of January, in the fifteenth year of the reign of our sovereign lord George the third, king of Great Britain, and so forth, before sir John Hawkins, knight, sir James Esdaile, knight, David Wilmot, John Machin, esqrs. and others their fellows justices of our said lord the king, assigned by his majesty's letters patent under the great seal of Great Britain directed to the same justices before-named, and others in the said letters named, to enquire more fully the truth, by the oath of good and lawful men of the county of Middlesex aforesaid, and by other ways, means, and methods, by which they shall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treasons, misprisions of treason, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the money of Great Britain and other kingdoms and dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceipts, and all other evil-doings, offences, and injuries whatsoever, and also the accessaries of them, within the county aforesaid (as well within liberties as without) by whomsoever and in what manner soever done,

committed, or perpetrated, and by whom, or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises, and every of them, or any of them, in any manner whatsoever; and the said treasons and other the premises to hear and determine according to the laws and customs of England, by the oath of John Tilney, James Stafford, Richard Phillips, Samuel Stable, Samuel Bird, William Hillier, Paul Barbot, William Weatherill, Thomas Waddell, John Williams, Samuel Baker, Thomas Sheriff, John Leicester, Thomas Tanton, John Goodere, John Thomas, and Robert Davis, gentlemen, good and lawful men of the county aforesaid, now here sworn and charged to enquire for our said lord the king for the body of the same county: it is presented in manner and form as appears by a certain bill of indictment to this schedule annexed. BUTLER."

"George the third, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth. To the sheriff of our county of Middlesex, greeting: we command you, that you omit not, by reason of any liberty in your bailiwick, but that you take Elizabeth the wife of Augustus John Hervey, late of the parish of St. George, Hanover-square, in the county of Middlesex, esquire, if she shall be found in your bailiwick, and her safely keep, so that you may have her body before our justices assigned by our letters patent under our great seal of Great Britain, to enquire more fully the truth, by the oath of good and lawful men of our county of Middlesex aforesaid, and by other ways, means, and methods by which they shall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treasons, misprisions of treason, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the money of Great-Britain and other kingdoms and dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceipts, and all other evil-doings, offences, and injuries whatsoever, and also the accessaries of them, within the county aforesaid (as well within liberties as without) by whomsoever and in what manner soever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises, and every of them or any of them, in any manner whatsoever; and the said treasons and other the premises to hear and determine, according to the laws and customs of England, at the next general session of Oyer and Terminer to be holden for our said county to answer us concerning certain felonies whereof she is indicted before our said justices; and have you then there this writ. Witness sir John Hawkins, knight, at Hicks's-hall, the 9th day of January, in the fifteenth year of our reign." BUTLER."

"The within named Elizabeth the wife of Augustus John Hervey is not found in my bailiwick.—The Answer of

"WILLIAM PLOMER, esq. and JOHN HART, esq. } Sheriff."

"George the third, by the grace of God, of Great-Britain, France, and Ireland king, defender of the faith, and so forth. To the sheriff of our county of Middlesex, greeting: we command you, as before we have commanded you, that you omit not, by reason of any liberty in your bailiwick, but that you take Elizabeth the wife of Augustus John Hervey, late of the parish of St. George Hanover-square, in the county of Middlesex, esquire, if she shall be found in your bailiwick, and her safely keep, so that you have her body before our justices assigned by our letters patent under our great seal of Great-Britain, to enquire more fully the truth, by the oath of good and lawful men of our county of Middlesex aforesaid, and by other ways, means, and methods by which they shall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treasons, misprisions of treason insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the money of Great-Britain, and other kingdoms and dominions whatsoever, and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champarties, deceits, and all other evil-doings, offences, and injuries whatsoever, and also the accessaries of them, within the county aforesaid (as well within liberties as without) by whomsoever and in what manner soever done, committed or perpetrated, and by whom, or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises and every of them, or any of them, in any manner whatsoever; and the said treasons and other the premises to hear and determine according to the laws and customs of England, at the next general session of oyer and terminer to be holden for our said county, to answer us concerning certain felonies whereof she is indicted before our said justices; and have you then there this writ. Witness sir John Hawkins, knight, at Hicks's-hall, the 14th day of February in the 15th year of our reign. BUTLER."

"The within named Elizabeth the wife of

Augustus John Hervey, esquire, is not found in my bailiwick.—The Answer of

"Wm. Plomer, esq. and John Hart, esq." } Sheriff."

BILL

"*Middlesex.* The jurors for our sovereign lord the now king, upon their oath present, that Elizabeth the wife of Augustus John Hervey, late of the parish of St. George, Hanover-square, in the county of Middlesex, esquire, on the 8th day of March, in the 9th year of the reign of our sovereign lord George the third, now king of Great-Britain, and so forth, being then married, and then the wife of the said Augustus John Hervey, with force and arms, at the said parish of St. George, Hanover-square, in the said county of Middlesex, feloniously did marry and take to husband Evelyn Pierrepont duke of Kingston (the said Augustus John Hervey, her former husband, being then alive) against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity: and the said jurors for our said sovereign lord the now king, upon their oath aforesaid, further present, that the said Elizabeth, heretofore (to wit) on the 4th day of August, in the 18th year of the reign of our late sovereign lord George the second, late king of Great-Britain, and so forth, at the parish of Lainston, in the county of Southampton, by the name of Elizabeth Chudleigh, did marry the said Augustus John Hervey, and him the said Augustus John Hervey then and there had for her husband; and that the said Elizabeth being married, and the wife of the said Augustus John Hervey, afterwards (to wit) on the 8th day of March, in the 9th year of the reign of our said sovereign lord, George the third, now king of Great Britain, and so forth, with force and arms, at the said parish of St. George, Hanover-square, in the said county of Middlesex, feloniously did marry and take to husband the said Evelyn Pierrepont duke of Kingston (the said Augustus John Hervey, her former husband, being then alive) against the form of the statute in such case made and provided, and against the peace of our said sovereign lord the now king, his crown and dignity. O. T."

"True Bill. Augustine Greenland, Ann Cradock, Christopher Dixon, Thomas Dodd, Samuel Harper, John Fozard.—Sworn in Court."

L. H. S. Is it your lordships' pleasure, that the judges have leave to be covered?

Lords. Ay, ay.

Cl. of the Cr. Serjeant at Arms, make proclamation for the gentleman-usher of the Black Rod to bring his prisoner to the bar.

Serj. at Arms. Oyez, oyez, oyez! Elizabeth duchess-dowager of Kingston, come forth and save you and your bail, or else you forfeit your recognizance.

[After her surrender she was, during the Trial, called to the bar by the following proclamation.

Gentleman-usher of the Black Rod, bring your prisoner Elizabeth duchess-dowager of Kingston to the bar, pursuant to the order of the House of Lords.]

Then Elizabeth duchess-dowager of Kingston was brought to the bar by the deputy-gentleman-usher of the Black Rod. The prisoner, when she approached the bar, made three reverences, and then fell upon her knees at the bar.

L. H. S. Madam, you may rise.

The prisoner then rose up, and curtsied to his grace the Lord High Steward, and to the House of Peers: in return to which compliment his grace, and the lords, bowed.

Then, proclamation having been made again for silence, the Lord High Steward spake to the prisoner as follows.

L. H. S. Madam; you stand indicted for having married a second husband, your first husband being living.

A crime so destructive of the peace and happiness of private families, and so injurious in its consequences to the welfare and good order of society, that by the statute-law of this kingdom it was for many years (in your sex) punishable with death: the lenity, however, of later times has substituted a milder punishment in its stead.

This consideration must necessarily tend to lessen the perturbation of your spirits upon this awful occasion.

But that, Madam, which, next to the inward feelings of your own conscience, will afford you most comfort is, reflecting upon the honour, the wisdom, and the candour of this high court of criminal jurisdiction.

It is, Madam, by your particular desire that you now stand at that bar: you were not brought there by any prosecutor.

In your petition to the Lords, praying for a speedy trial, you assumed the title of duchess-dowager of Kingston, and it was by that title that the court of King's-bench admitted you to bail; in your petition you likewise averred, that Augustus John Hervey, whose wife the indictment charges you with being, is at this time earl of Bristol: upon examining the records, the Lords were satisfied of the truth of that averment, and have accordingly allowed you the privilege you petitioned for, of being tried by your peers in full parliament; and from them you will be sure to meet with nothing but justice tempered with humanity.

Before I conclude, I am commanded by the House to acquaint you, Madam, and all other persons having occasion to speak to the Court during the trial, that they are to address themselves to the lords in general, and not to any lord in particular.

Duchess of Kingston. My lords, I, the unfortunate widow of your late brother, the most noble Evelyn Pierrepont duke of Kingston,

am brought to the bar of this right honourable House without a shadow of fear, but infinitely awed by the respect that is due to you, my most honourable judges.

My lords, after having, at the hazard of my life, returned from Rome in a dangerous sickness to submit myself to the laws of my country, I plead some little merit in my willing obedience; and I intreat your lordships' indulgence, if I should be deficient in any ceremonial part of my conduct towards you, my most honoured and respectable judges; for the infirmities of my body and the oppression of spirits under which I labour, leave your unhappy prisoner sometimes without recollection: but it must be only with the loss of life, that I can be deprived of the knowledge of the respect that is due to this high and awful tribunal.

L. H. S. Madam, your ladyship will do well to give attention, while you are arraigned on your indictment.

Then proclamation was made for silence.

After which, Elizabeth duchess dowager of Kingston was arraigned, in the form of the said indictment against her, by the clerk of the crown in the King's-bench.

Cl. of the Cr. Elizabeth duchess-dowager of Kingston, you stand indicted by the name of Elizabeth wife of Augustus John Hervey, late of the parish of St. George, Hanover-square, esq. (now become a peer of this realm) for that you, on the 8th day of March, in the ninth year of the reign of his present majesty our sovereign lord king George the third, being then married, and then the wife of the said Augustus John Hervey, with force and arms, at the said parish of St. George, Hanover-square, in the said county of Middlesex, feloniously did marry and take to husband Evelyn Pierrepont duke of Kingston, the said Augustus John Hervey, your former husband, being then alive; against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity.—The indictment further charges,* that you the said Elizabeth, heretofore (to wit) on the 4th day of August, in the 18th year of our late sovereign lord George the second, late king of Great-Britain, and so forth, at the parish of Lainston, in the county of Southampton, by the name of Elizabeth Chudleigh, did marry the said Augustus John Hervey and him the said Augustus John Hervey then and there had for your husband; and that you the said Elizabeth, being married, and the wife of the said Augustus John Hervey, afterwards (to wit) on the 8th day of March, in the ninth year of the reign of our said sovereign lord George the third, now king of Great-Britain, and so forth, with force and arms, at the said parish of St. George, Hanover-square, feloniously did marry and take to husband the said Evelyn Pierrepont duke of Kingston, the said Augustus John Hervey, your former husband, being then alive.—How say you? are you guilty of the felony whereof you stand indicted, or Not Guilty?

Duchess of Kingston. I Elizabeth Pierrepont, duchess dowager of Kingston, indicted by the name of Elizabeth the wife of Augustus John Hervey, esq. say that I am not Guilty.

Cl. of the Cr. Culprit—How will you be tried?

Duchess of Kingston. By God and my peers.

Cl. of the Cr. God send your grace a good deliverance.

Cl. of the Cr. Serjeant at arms, make proclamation.

Serj. at Arms. Oyez, Oyez, Oyez! All manner of persons that will give evidence, on behalf of our sovereign lord the king, against Elizabeth duchess-dowager of Kingston, the prisoner at the bar, let them come forth, and they shall be heard; for now she stands at the bar upon her deliverance.

L. H. S. My lords, the distance of this place from the bar is so great, that I must desire your lordships' leave to go down to the table for the convenience of hearing.

Lords. Ay, ay.

Then his grace removed to the table.

Duchess of Kingston. My lords, the supposed marriage in the indictment with Mr. Hervey, which is the ground of the charge against me, was insisted upon by him in a suit instituted by me in the consistory court of the right reverend lord bishop of London; by the sentence of which court, still in force, it was pronounced, decreed, and declared, that I was free from all matrimonial contracts or espousals with the said Mr. Hervey: and, my lords, I am advised that this sentence, which I now desire leave to offer to your lordships (remaining unreversed and unimpeached) is conclusive, and that no other evidence ought to be received or stated to your lordships respecting such pretended marriage.

L. H. S. Do the counsel for the prosecution object to the reading of the sentence?

Att. Gen. (Thurlow, afterwards lord chancellor.) My lords, observing that the prisoner was about to make some application to your lordships, I was not solicitous to rise in the order and place wherein I ought to have addressed myself to the House; because I would not interrupt, or prevent, any thing which she

* "The indictment must state the two marriages, and aver that the former consort was alive at the time of the second marriage. In the duchess of Kingston's case the first count stated generally that the defendant on such a day, &c. being then married and then the wife of A. J. H. with force and arms at, &c. did feloniously marry E. P. &c. the said A. J. H. being then alive, &c. The second count stated the time and place of the first as well as the second marriage. When the trial is in the county where the party was apprehended, there is an additional averment of that fact." East's Pleas of the Crown, c. 12, s. 8.

might think material for her to lay before your lordships.

I attended much to the form of the application. If I comprehend the aim of it, she means to object to your lordships hearing any evidence, either given or stated, in support of the present indictment; the ground of her objection being a sentence, said to have passed in the ecclesiastical court, against the first marriage supposed in the indictment. Upon this, your lordships have demanded, whether I object to the reading of the sentence?

If the proceeding referred to had been tendered to your lordships in the only place which can be thought the proper or regular one, for receiving the defendant's evidence, to be sure, many questions would naturally have arisen upon it. First, whether that proceeding, explained as it will be, has the force of a sentence, or amounts to more than a circumstance and proof of the fraud complained of? Secondly, whether a serious sentence of that sort, pronounced between party and party, ought to be admitted in a criminal prosecution, and against the king, who was no party to it, nor could have become so by any means? Thirdly, whether it creates an estoppel, or conclusive evidence against the crown? Fourthly, whether it does so in this peculiar species of prosecution?

But in the way this thing is urged, it seems perfectly impossible, or at least altogether premature, to discuss the force and effect of it, as evidence. That supposes a case already made for the prosecutor, which requires the aid of evidence, on the part of the prisoner, to disprove or explain it. But, if I catch the idea perfectly, the present insisting is, that the sentence now offered to the consideration of your lordships carries some legal force—what, I do not pretend to define or explain; for I protest I have no guess what is meant; but—some legal force with it, which enables the prisoner to demand, in this stage of the business, that the trial shall not proceed, nor any evidence be heard to maintain the indictment, but that the whole matter shall be wound up, and conclude with some resolution of your lordships,—not to acquit (for in order to that you must try) but to dismiss the prisoner without trial, after putting herself upon her peers for trial.

I have, notwithstanding, shortly intimated the nature of the objections which may be made to it, as an article of evidence for the prisoner; partly to point out, how untenable the proposition is of stopping the trial, by interposing a thing whose reality, competence, and effect will be so much disputed in matter of fact and of law; but chiefly, to lay in my claim, that this paper (if your lordships should think it worth hearing) may be read at this time, and for the purpose of the motion now made by the prisoner only, without prejudice to any objection which I may think fit to make to it, if it should be offered as evidence in the course of the trial.

If it be read under the reserve I have mentioned, not as a part of the trial, but to make this application of the prisoner to your lordships, previously to her trial, intelligible; and for the sake of raising the argument upon it, in case your lordships should suffer such a point to be argued at all; in these views, I will not object to the reading of it.

But if it be offered as a piece of evidence for the prisoner, so that I must admit or object to it now, I shall certainly insist upon going on with the prosecution, and drive this article of evidence into its own place, the prisoner's defence. There it will be better seen, how far it is available, or even competent.

Unless I could learn the purpose of offering it from those who advised it, I do not know how to make a more particular answer to your lordships' question.

Duchess of Kingston. Will your lordships please to permit my counsel to be heard to this point?

Lords. Ay, ay.

L. H. S. Mr. Wallace, you may proceed for the prisoner.

Mr. *Wallace.* My lords, I have the honour to be assigned one of the counsel to advise and assist the noble prisoner at the bar in all matters of law that may arise in the course of the trial.

I shall submit with great deference to your lordships, that the present stage of the business is the proper season to introduce the sentence which has been mentioned to the Court.

My lords, the sentence is conceived to be conclusive upon the fact of that marriage which is the ground of this indictment. The indictment supposes that the prisoner at the bar was married to Augustus John Hervey: the sentence now offered to your lordships is not only of a competent jurisdiction to decide that question, but the only constitutional jurisdiction.

My lords, whilst this sentence remains unimpeached, I conceive that it is conclusive against all evidence to be produced of the fact of the marriage. It is in that light the prisoner is advised to offer it to your lordships, that a court of competent jurisdiction having decided the point, it will be in vain to call parole witnesses to the fact; and it will only take up your lordships' time, and it will be of no real use, to state the evidence of witnesses, which witnesses cannot appear to give that evidence before the Court.

My lords, the office of a counsel in opening the case to any Court is, as I conceive, to state with clearness the evidence that is to be adduced, that the Court may better understand and apply it: therefore, unless the evidence is competent, your lordships will not hear any state of it. This too perhaps may be the time, though I shall forbear at present to enter into it, to discuss whether the sentence be admissible; or, if admissible, whether conclusive: but we are now, my lords, upon the order of producing this sentence; and if it has the effect which I shall humbly submit in a proper season

to your lordships that it has, of being absolutely conclusive, then the evidence, which is now ready to be stated by the counsel for the prosecution, ought not to be produced, and of course ought not to be stated. This is the light in which the cause appears to me at this moment; and I trust your lordships will concur in opinion, that if the sentence has the conclusive effect which we are ready to submit to your lordships it has, it repels all testimony, and makes it improper therefore to state any. If a precedent should be thought necessary for what is prayed by the noble prisoner at the bar, I beg leave to refer your lordships to a case determined at the bar of the court of King's-bench in the reign of king William: it is reported in Mr. Serjeant Carthew's Reports, 225, upon a trial of an ejectment. The question was, if sir Robert Carr was actually married to Isabella Jones, by whom he had issue, and under whom the plaintiff in that cause claimed the estate. The defendant, by way of anticipation of the evidence which the plaintiff was about to give, moved the Court, that the plaintiff ought not to be allowed to prove a marriage between them, because there was a sentence in the Arches upon a suit of jactitation brought against her; by which it was decreed, that there was no marriage between them, but that they were free from all matrimonial contracts and espousals. The sentence was then offered in evidence by the defendant's counsel at the bar, to conclude the plaintiff from any proof of the marriage, unless he could shew that the same was repealed: and upon a debate, the Court were all of opinion, that this sentence, whilst unrepealed, was conclusive against all matters precedent; and that the temporal courts must give credit to it, until it is reversed, it being a matter of mere spiritual cognizance: and upon this the plaintiff was nonsuited. Your lordships may perceive that this case is applicable to another part of the business before your lordships; but I cite it now merely to shew the sentence was offered, and received, to preclude the examination of witnesses; and surely if witnesses are not admissible, their testimony ought not to be stated.

Attorney General. My lords, I do not even now comprehend the order of proceeding proposed.

If there be any thing in the present motion, considered as proposing a fit manner of regulating this trial, or as a point of general law; in short, if their proposition be maintainable at all, I do assure your lordships, that I am not anxious, or in any degree desirous, to state a case to this audience which must wound the sensibility of the prisoner: this I would avoid, unless public justice, and the necessity of the prosecution, should absolutely require it of me.

If it be possible, on her part, to make any ground for stopping the prosecution in this manner, I shall be well content to stop here: to me it appears flatly impossible. I stated some general hints to this effect when I spoke last.

The learned counsel, in attempting to make good their proposition of stopping the trial in this stage, have contented themselves with a general averment, that the law is with them; and refer to the manner in which evidence was received in the particular case of one ejectment, where no contradiction or controversy appears to have been raised among the counsel about the nature of the cause depending, the sentence produced, or the parties to both. Here, a great deal is to be previously settled on those heads.

I did not imagine the learned counsel would have stopped so shortly: but if they thought well of the motion, I expected they would have gone the length of arguing on it, and of endeavouring to demonstrate the possibility of winding up the whole proceeding here, by comparing the nature of the sentence with the whole compass of the prosecution, stated with every degree of imaginable aggravation.

Your lordships might easily perceive my reason for expecting the argument to take this course. The sentence may be read; indeed it must be read. It is the only ground of the motion. But unless such is demonstrated to be the effect of it, your lordships can take no order upon it, nor make any use or application of it, without hearing the prosecutor's case. It is not therefore enough to read the sentence.

My reason for troubling your lordships at all was only to observe, that the motion concludes against even hearing the prosecutor; and to submit, according to my humble duty, to your lordships, whether that be a point of law fit to hear the prisoner upon by her counsel. If it be, your lordships will call upon the learned counsel whom you have allowed the prisoner, to sustain it fully in argument. Otherwise your lordships will reject it as inadmissible. All prosecutions might be stopped in this manner.

A Lord. Does Mr. Attorney-General object to the reading of the sentence?

Att. Gen. Subject to the reservation of my right to object to it in every shape, when it shall be offered in evidence: upon that ground I do not object to it. I am not now admitting this sentence to be adduced in the course of the cause, or as a part of the defence, to which I shall say, it is incompetent. But I let it in, to ground a motion anterior to the hearing of the cause. In that view, and in that view only, I admit it to be read. Indeed it seems to be offered as a part of the counsel's speech; and I admit it as containing the whole of the argument, yet offered in support of the motion.

That your lordships may understand what is to be made of this sentence when read, they must read, in their order, the original allegation of Elizabeth Chudleigh; the cross-allegation delivered in by Mr. Hervey; her answer; the articles on which the proofs were taken; the depositions; and the sentence: for thus the sentence proceeded.

Lord *Mansfield.* They must give in evidence the whole sentence.

(The Sentence only begun to be read.)

Att. Gen. I must trouble your lordships again.

They are now offering to read the sentence only, without reading the allegations of the parties, their articles and proofs. For what reason I very well comprehend. But I apprehend, that, if a judgment be read in a court of law, they must read the declaration, plea, replication, and all other matters leading to the judgment, in order to make it intelligible. Here they would read the sentence, abstractedly from the allegations and other matters upon which that sentence proceeded.

Lord *Camden.* I wish to know of the counsel for the prisoner, whether they meant to object to the whole proceedings in the jactitation cause being read.

Mr. Wallace. I have not, upon the part of the noble prisoner, the least objection that all the proceedings should be brought before your lordships. I conceive that what the officer has now brought before the Court was what is usually given in evidence in such case. I do not recollect any other, in any case I have found, being produced but the sentence, which states in short the proceedings had in that court; but I understand the proceedings are here; and on the part of the noble prisoner there is not the least objection to the whole being laid before the Court.

The Lords then permitted the following Proceedings in the Jactitation Cause, and the Sentence pronounced in the Ecclesiastical Court, to be read *de bene esse.*

"SECOND SESSION. *Michaelmas Term,* 1768.

"CHUDLEIGH against HERVEY. Libel given the 9th of November, 1768. BISHOP.

"In the name of God, Amen. Before you the worshipful John Bettesworth, doctor of laws, vicar-general of the right reverend father in God Richard, by divine permission, lord bishop of London, and official principal of the consistorial episcopal court of London lawfully constituted, your surrogate or any other competent judge in this behalf of the proctor of the honourable Elizabeth Chudleigh, of the parish of Saint Margaret, Westminster, in the county of Middlesex, spinster; against the honourable Augustus John Hervey, of the parish of St. James's, Westminster, in the county of Middlesex and diocese of London, a bachelor; and against any other person or persons lawfully intervening or appearing for him in judgment before you by way of complaint, and hereby complaining unto you in this behalf, doth say, alledge, and in law articulately propound as follows; that is to say,

"1. That the said honourable Elizabeth Chudleigh was and is free, and no way engaged in any matrimonial contract or espousals with the said honourable Augustus John Hervey; and for and as a person free, and no way engaged, was and is commonly accounted, reputed, and taken to be, amongst her neighbours, friends, and familiar acquaintance: and the party proponent doth alledge and propound every thing in this article contained jointly and severally.

"2. That the said honourable Augustus John Hervey, sufficiently knowing the premises, and notwithstanding the same, did in the year of our Lord 1763, 1764, 1765, 1766, and 1767, and in the several months therein concurring, and in this present year of our Lord 1768, within the parish of Saint James Westminster, aforesaid, and in other parishes and places in the neighbourhood thereof, and thereto adjoining, or in all, some, or one of the aforementioned times and places, in the presence of several credible witnesses, falsely and maliciously boast, assert, and report, that he was married to or contracted in marriage with the aforesaid honourable Elizabeth Chudleigh; whereas in truth and fact not any such marriage was ever solemnized or ever contracted between them: and this was and is true, public and notorious; and the party proponent doth alledge and propound of any other time or times and places as shall appear from the proofs to be made in this cause, and as before.

"3. That the said honourable Augustus John Hervey hath been oftentimes or at least once, on the part and behalf of the said honourable Elizabeth Chudleigh, and her friends and acquaintance, asked and requested, or desired to desist and abstain from his aforesaid pretended false and malicious boasting, asserting, and reporting, as mentioned in the next preceding article: and the party proponent doth alledge and propound as before.

"4. That the said honourable Augustus John Hervey, being as aforesaid asked and requested to cease, desist, and abstain from his aforesaid pretended false and malicious boasting, asserting, and reporting, hath not in the least, nor doth in the least at present cease, desist, and abstain therefrom, but continually with like malice and rashness does constantly, falsely, and maliciously boast, assert, affirm, and report the same, to the great danger of his soul's health, no small prejudice to the said honourable Elizabeth Chudleigh, and pernicious example of others: and this was and is true, public, and notorious; and the party proponent doth alledge and propound as before.

"5. That of all and singular the premises it was and is, by and on the part and behalf of the said honourable Elizabeth Chudleigh, spinster, thinking herself greatly injured, aggrieved, and disquieted by reason of the aforesaid pretended false and malicious boasting, asserting, and reporting of the said honourable Augustus John Hervey, rightly and duly complained to you the judge aforesaid, and to this Court, for a fit and meet remedy to be had and provided in this behalf: and the party proponent doth alledge and propound as before.

"6. That the said honourable Augustus John Hervey was and is of the parish of Saint James, Westminster, in the county of Middle-

sex, and diocese of London, and therefore and by reason of the premises was and is subject to the jurisdiction of this Court: and the party proponent doth alledge and propound as before.

"7. That all and singular the premises were and are true, public, and notorious, and thereof there was and is a public voice, fame, and report, and of which legal proof being made, the party proponent prays right and justice to be effectually done and administered to him and his party in the premises; and also that by this court it may be pronounced, decreed, and declared, that the said honourable Elizabeth Chudleigh at and during all the times in this libel mentioned was a spinster, and free from all matrimonial contracts and espousals with him the said honourable Augustus John Hervey; and that he, notwithstanding the premises, did, in the years, months and places in this libel mentioned, or in some or one of them, falsely and maliciously boast, assert, and report, that he was married to, or contracted in marriage with, the said honourable Elizabeth Chudleigh; and that he may be enjoined perpetual silence in the premises, and obliged and compelled to cease, desist, and abstain from such his aforesaid false and malicious boastings, assertions, and reports for the future; and that he may be condemned in the costs made and to be made in this cause on the part and behalf of the said honourable Elizabeth Chudleigh, and compelled to the due and effectual payment thereof by you or your definitive sentence or final decree to be given in this cause; and further to do and decree in the premises what shall be lawful in this behalf, the party proponent not obliging himself to prove all and singular the premises, or to the burthen of a superfluous proof, against which he protests; and prays, that, so far as he shall prove in the premises, he may obtain in his petition, the benefit of the law being always preserved, humbly imploring the aid of your office in this behalf.

"ARTH. COLLIER.
"PET. CALVERT.
"WM. WYNNE."

"HERVEY against HERVEY called CHUDLEIGH.
FOUNTAIN—BISHOP.

"Which day Fountain, in the name of and as the lawful proctor of the right honourable Augustus John Hervey, and as such, and under that denomination, did, by all ways and means which may be most beneficial and effectual for his said party in this behalf, and to all intents and purposes in law whatsoever, say, alledge, and in law articulately propound as follows; to wit:

"1. That some time in the year 1743, or 1744, the right honourable Augustus John Hervey, then the honourable Augustus John Hervey, esquire, and son of the right honourable John late lord Hervey, became acquainted with Elizabeth Chudleigh, now Hervey, at Winchester races; and the said honourable Augustus John Hervey, esquire, having conceived a liking and affection for the said Elizabeth Chudleigh, and being a bachelor, and a minor of the age of 17 or 18 years, and free from any matrimonial contract, did privately make his addresses of love and courtship to the said Elizabeth Chudleigh, who was then also a minor, and a spinster of the age of about 18 years, and also free from any matrimonial contract; and she the said Elizabeth Chudleigh, now Hervey, did receive and admit such his addresses and courtship, and entertain him as a suitor to her in the way of marriage, but without the privity or knowledge of either of their relations or friends, excepting her aunt the late Mrs. Hanmer; and they mutually contracted themselves to each other: and the party proponent doth alledge and propound of any other time and place, and of every thing in this article contained jointly and severally.

"2. That in the said year 1744, the said honourable Augustus John Hervey, esquire, was a lieutenant in the navy, and belonged to his majesty's ship Cornwall, which in August 1744 lay at Portsmouth; that the said Elizabeth Chudleigh, in July 1744 being on a visit at John Merrill's, esquire, at Lainston, in the parish of Sparshot in the county of Southampton, with her aunt Mrs. Hanmer, and the said Augustus John Hervey, being then on board the said ship the Cornwall at Portsmouth, went from thence to the said Mr. Merrill's in order to see the said Elizabeth Chudleigh; and the said ship being under sailing orders for and being soon to depart for the West Indies, it was proposed between the said Augustus John Hervey and Mrs. Hanmer, that they the said Augustus John Hervey and Elizabeth Chudleigh should be married privately at the said Mr. Merrill's house; and accordingly they the said Augustus John Hervey and Elizabeth Chudleigh were, on or about the 4th day of August 1744, in Mr. Merrill's house in the parish of Sparshot aforesaid, joined together in holy matrimony, about eleven o'clock at night, by the reverend Thomas Amis, since deceased, a clergyman in holy orders, according to the rites and ceremonies of the church of England, in the presence of Mrs. Hanmer, the aunt of her the said Elizabeth Chudleigh, and Mr. Mountnay, both since deceased; and were then and there by him the said Thomas Amis pronounced for and as lawful husband and wife: and the party proponent doth alledge and propound as before.

"3. That after the said Augustus John Hervey and Elizabeth Chudleigh, now Hervey, were so privately married, they consummated such their marriage at the said Mr. Merrill's house, by having the carnal knowledge of each other's bodies, and laying for some time in one and the same bed naked and alone, but without the privity or knowledge of any part of the family and servants of the said Mr. Merrill: and the party proponent doth alledge and propound as before.

"4. That the said Augustus John Hervey, esquire, continued at the said Mr. Merrill's

about two or three days, and then returned to his said ship Cornwall, wherein he in November following sailed for the West Indies; and that, on account of certain circumstances of his family, it being necessary that the said marriage should be kept a secret from every person, except those before mentioned, therefore the said Elizabeth Hervey continued to go by the name of Chudleigh when she left the said Mr. Merrill's, residing at different places, and passing for a single person; that the said Augustus John Hervey, esquire, remained in the West Indies till the month of August in the year 1746, when he sailed for England, and landed at Dover on or about the 16th of October following; that the said Elizabeth Hervey at that time resided in Conduit-street, where the said Augustus John Hervey, esquire, went to see her as his wife several times, and she received him and acknowledged him to be her husband, but they did not publicly own their marriage, or cohabit together as husband and wife: and this was and is true; and the party proponent doth alledge and propound as before.

"5. That the said Augustus John Hervey, esquire, on the 28th day of the month of November in the said year 1746, went to sea again, and returned to England in the January following; that the said Elizabeth Hervey otherwise Chudleigh at that time continued in Conduit-street; but some differences arising between them on account of the conduct of the said Elizabeth Hervey, they continued to live separate from each other for the future; and the said honourable Augustus John Hervey thereupon forbore visiting the said Elizabeth Hervey, and, some time in the month of May, 1747, sailed for the Mediterranean sea in the ship called the Princessa, and continued abroad till the month of December in the following year; that from the time they so continued to live separate as aforesaid to this time, the said Augustus John Hervey has never visited the said Elizabeth Hervey: and this was and is true; and the party proponent doth alledge and propound as before.

"6. That all and singular the premises were and are true, public, and notorious, and therefore there was and is a public voice, fame, and report, of which legal proof being made, the party proponent prays right and justice to be administered to him and his party in the premises, and that it may be pronounced, that the said right honourable Augustus John Hervey and Elizabeth Chudleigh were and are lawful man and wife. GEO. HARRIS."

"Consistory of London, FOURTH SESSION of Michaelmas-term, 6th December, 1768.

CHUDLEIGH against HERVEY.
BISHOP—FOUNTAIN.

"On which day Bishop, in the name of and as lawful proctor of the honourable Elizabeth Chudleigh, spinster, and as such, and under that denomination, did, by all ways and means which may be most beneficial and effectual in this behalf, and to all intents and purposes in law whatsoever, say, alledge, and articulately propound as follows; to wit:

"1. That as well before as ever since the pretended time of the pretended marriage pleaded and propounded by the right honourable Augustus John Hervey, the other party in this suit, to have been on or about the 4th of August 1744, the said honourable Elizabeth Chudleigh has always passed as a single woman, and has always gone, been known, and been addressed by the name of Elizabeth Chudleigh, and by no other, and hath always visited and received visits as a single woman, and hath always lived separate and apart from the said right honourable Augustus John Hervey, without any interposition, let, or hindrance of the said right honourable Augustus John Hervey, and hath not at any time lived or cohabited with him, or he with her; and this was and is true; and so much the said right honourable Augustus John Hervey well knows and believes in his conscience to be true; and the party proponent doth alledge and propound every thing in this article contained jointly and severally.

"2. That in the year of our Lord 1743, the said Elizabeth Chudleigh was admitted a maid of honour to her royal highness the princess of Wales; and on the death of his royal highness the prince of Wales, on or about the 17th of April 1751, re-admitted and continued maid of honour to her royal highness the princess-dowager of Wales, without any let or hindrance of the said right honourable Augustus John Hervey, and hath during the whole of the said time continued and now continues a maid of honour to her royal highness the princess-dowager of Wales, without any let or hindrance of the said right honourable Augustus John Hervey: and this was and is true; and so much the said right honourable Augustus John Hervey knows and believes in his conscience to be true; and the party proponent doth alledge and propound as before.

"3. That in supply of proof of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex two certificates, and copies of the entries from the treasurer's office of the princess-dowager of Wales, marked with the letters A and B, of the admission of the said Elizabeth Chudleigh as maid of honour, and of her continuance now in such post, and prays that the same may be here read, and taken as if herein inserted; and doth alledge that the same contain true copies of the entries of the said Elizabeth Chudleigh as maid of honour, and was and is signed by Mr. William Watts, deputy-treasurer to her royal highness the princess-dowager of Wales; and that Elizabeth Chudleigh therein named, and Elizabeth Chudleigh party in this suit, was and is one and the same person, and not divers: and the party proponent doth alledge and propound as before.

"4. That in the year 1753, the said Elizabeth Chudleigh, in her own name as a spinster,

and without any interposition, let, or hindrance of the said right honourable Augustus John Hervey, or his being a party thereto or any ways concerned therein, took a lease of the right honourable lord Berkeley of Stratton of certain land in Hill-street, in the parish of St. George, Hanover-square, in the county of Middlesex, whereon the said Elizabeth Chudleigh caused to be built a house, wherein she continued to live for the space of five years and upwards, and afterwards sold the same to Hugo Meynell, esquire, and received the money proceeding from the sale thereof to her own use: and this was and is true; and the party proponent doth alledge and propound as before.

"5. That in supply of proof of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex the original lease of the land aforementioned, dated the 14th of April 1753, executed by the said lord Berkeley and John Phillips, who was interested therein, and thereby leased to the said Elizabeth Chudleigh, spinster, her executors, administrators, and assigns, for the term of 87 years, and marked with the letter C, and prays that the same may be here read, and taken as if herein inserted; and doth alledge that every thing was so had and done as is therein contained; and that Elizabeth Chudleigh, spinster, therein mentioned, and Elizabeth Chudleigh, spinster, party in this cause, was and is one and the same person, and not divers: and this was and is true; and the party proponent doth alledge and propound as before.

"6. That on the 3d of February, in the year of our Lord 1757, the said Elizabeth Chudleigh, spinster, was admitted a copyholder and tenant to the dean and chapter of Westminster for the house and land, or some part thereof, wherein she now lives, at Knightsbridge, in the county of Middlesex, in her own then and now maiden name of Elizabeth Chudleigh, and without any interposition, let, or hindrance of the said right honourable Augustus John Hervey, or without his being a party thereto or any ways concerned therein: and this was and is true; and the party proponent doth alledge and propound as before.

"7. That in supply of proof of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, a copy of the court-roll of the said Elizabeth Chudleigh's being admitted tenant to the premises mentioned in the next preceding article, and marked with the letter D; and that Elizabeth Chudleigh therein mentioned, and Elizabeth Chudleigh party in this cause, was and is one and the same person, and not divers: and the party proponent doth allege and propound as before.

"8. That in the year of our Lord 1762, the said Elizabeth Chudleigh, spinster, transacted business with John Butcher in her own maiden name of Chudleigh, and took a lease from the said Mr. Butcher of certain lands situate in the parish of Kensington, in the county of Middlesex, and this without any interposition, let, or hindrance of the said right honourable Augustus John Hervey, or his being a party thereto or any ways concerned therein; and in such lease the said Elizabeth Chudleigh was described by the name of Elizabeth Chudleigh: and this was and is true; and the party proponent doth alledge and propound as before.

"9. That in supply of proof of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if therein inserted, the said lease mentioned in the preceding article, and marked with the letter E; and doth alledge that every thing was so had and done as therein is contained; and that Elizabeth Chudleigh therein named, and Elizabeth Chudleigh, spinster, party in this cause, was and is one and the same person, and not divers: and this was and is true; and the party proponent doth alledge and propound as before.

"10. That Mrs. Ann Hanmer, the aunt of the said Elizabeth Chudleigh, spinster, the party proponent, and who, in the second article of the pretended allegation admitted on the part of the said right honourable Augustus John Hervey, is pretended to have been present at the pretended marriage pleaded by the said Augustus John Hervey, did, in the year 1762, write a letter with her own hand to the said Elizabeth Chudleigh, spinster, wherein she addresses her as a single woman, therein calling her 'dear Mrs. Chudleigh;' and also in or about the year following did make her last will and testament, and codicil, the codicil not dated, but the will bearing date the 11th day of June 1763, and both will and codicil, as well as the letter aforesaid, are of the hand-writing of the said Mrs. Ann Hanmer, and so known to be by persons who have seen her write and subscribe her name to writings, and are well acquainted with her manner and character of hand-writing; and in which will and codicil, proved in the prerogative court of Canterbury, and now remaining in the registry thereof, the said Mrs. Hanmer hath by the will given a silver sugar-urn and spoon, and by her codicil hath given and bequeathed a legacy of 100*l.* to the said Elizabeth Chudleigh, by the name and description of the honourable Mrs. Elizabeth Chudleigh: and this was and is true; and the party proponent doth alledge and propound as before.

"11. That in supply of proof of the premises mentioned in the next preceding article, the party propounding doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, the said letter marked with the letter F, beginning thus; 'Sunning-hill, 'August the 14th—62. Dear Mrs. Chud-'leigh,' and ending, 'I am, dear Madam, your 'sincere well-wisher and humble servant, 'A. Hanmer;' and also doth exhibit a copy of the said will and codicil of the said Mrs. Hanmer, marked with letter G; and doth alledge that Mrs. Hanmer, the aunt of the party pro-

ponent, who wrote the said letter to the said Mrs. Chudleigh, and who made the said will and codicil, and Mrs. Hanmer, whom the said right honourable Augustus John Hervey pretends to have been a witness to his pretended marriage, was and is one and the same person, and not divers; and that Mrs. Chudleigh mentioned in the said letter, and the honourable Mrs. Elizabeth Chudleigh mentioned in the said last will and codicil, and Elizabeth Chudleigh, spinster, party in this cause, was and is the same person, and not divers: and this was and is true; and the party proponent doth allege and propound as before.

"12. That Mr. Merrill, at whose house the said right honourable Augustus John Hervey hath pleaded the said pretended marriage to have been solemnized, wrote two letters with his own hand, and sent them by the post to the said Elizabeth Chudleigh, party in this cause, wherein he addresses her as a single woman, the said letters being dated Nov. 1st, 1765, and Nov. 3d, 1765, written in one sheet of paper, and superscribed or directed thus; 'To the 'honourable Mrs. Elizabeth Chudleigh, at 'Chalmington, near Dorchester, Dorset;' and in the letter of the 3d of Nov. 1765 are these words, to wit; 'I have added your christian 'name to your surname in the direction of this, 'lest the word honourable should not be sufficient to prevent a blunder, and the letter 'should be given to Mrs. Chudleigh. I have 'met with so many and such gross blunders, 'that I think I can never enough guard against 'them;' and the party proponent doth alledge, that by these words, 'should be given to Mrs. 'Chudleigh,' was meant Mrs. Chudleigh, at Chalmington, aunt to the said Elizabeth Chudleigh, the party proponent, at whose house she then was: and this was and is true; and the party proponent doth allege and propound as before.

"13. That in supply of proof of the premises in the next preceding article mentioned, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, the said two letters mentioned in the next preceding article, the first marked with the letter H, beginning thus, 'Lainstone, November the 1st, 1765. Dear 'Madam, though I have nothing particular to 'write to you upon,' and ending thus, 'Though had I mentioned it to them, Mrs. 'Kelly's and Mrs. Elstop's would not have 'been wanting. I am, dear Madam, your 'most obedient humble servant, John Merrill;' and the other letter, marked with the letter I, beginning thus, 'November 3d, 1765. Dear 'Madam, the above, as you see, was intended 'to go by the last post,' and ending thus, 'that 'I think I can never enough guard against 'them. I am, dear Madam, your most obe'dient humble servant, John Merrill;' and the party proponent doth alledge and propound that the whole body, subscriptions, and superscription of the said letters were and are of the proper hand-writing and subscription of the said John Merrill, and so known and believed to be by persons who are well acquainted with his manner and character of hand-writing and subscription; and that by the words, 'I have 'added your christian name to your surname 'in the direction of this,' was meant and intended the christian and surname of Elizabeth Chudleigh the party in this suit; and that the honourable Mrs. Elizabeth Chudleigh mentioned in the said superscription, and the honourable Elizabeth Chudleigh party in this suit, was and is one and the same person, and not divers: and this was and is true; and the party proponent doth allege and propound as before.

"14. That the said Mr. Merrill hath also in and by his last will and testament, bearing date the first day of January 1767, proved in the prerogative court of Canterbury, and now remaining in the registry thereof, given and bequeathed a legacy or legacies to the said Elizabeth Chudleigh, spinster, party in this suit, by her then and now maiden name of Elizabeth Chudleigh: and this was and is true; and the party proponent doth allege and propound as before.

"15. That in supply of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, a copy of the clause of the will of the said Mr. Merrill, marked with the letter K; and doth allege that Mr. Merrill at whose house the pretended marriage pleaded by the said right honourable Augustus John Hervey is said to have been solemnized, and Mr. Merrill who made the said will, was and is one and the same person, and not divers; and that the honourable Elizabeth Chudleigh mentioned in the said will, and the honourable Elizabeth Chudleigh, spinster, party in this suit, was and is also one and the same person, and not divers: and this was and is true; and the party proponent doth allege and propound as before.

"16. That in the year of our Lord 1766, the said Elizabeth Chudleigh borrowed of Mr. John Drummond, a banker, at divers times, on mortgage and bond security, in her own name, and without any interposition, let, or hindrance of the said right honourable Augustus John Hervey, or his being a party thereto, or his being any ways concerned therein, the sum of 5,160*l.* and gave the said Mr. Drummond a bond for 1,000*l.* part thereof, in her then and now maiden name of Elizabeth Chudleigh, and also mortgaged certain premises situate in the manor of Knightsbridge, in the county of Middlesex, in her said then and now maiden name of Elizabeth Chudleigh, unto the said Mr. Drummond, for the repayment of the sum of 4,160*l.* to the said Mr. Drummond, as will appear by the original bond and mortgage-deed now in the custody or power of the said Mr. Drummond, to which she refers; and the party proponent doth allege that Elizabeth Chudleigh mentioned in the said bond and mortgage-deed, and Elizabeth Chudleigh, spin-

ster, party in this suit, was and is one and the same person, and not divers: and this was and is true; and the party proponent doth allege and propound as before.

"17. That in supply of proof of the premises mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, the counterpart of the said mortgage-deed, dated the 18th of April 1766, marked with the letter L; and doth allege and propound that the same was and is the counterpart of the said mortgage-deed remaining in the custody or power of the said Mr. Drummond, as mentioned in the next preceding article; and that Elizabeth Chudleigh mentioned in the said bond and mortgage-deed, and Elizabeth Chudleigh, spinster, party in this suit, was and is the same person, and not divers: and this was and is true; and the party proponent doth allege and propound as before.

"18. That in the month of February in the year of our Lord 1765, and in the month of June 1768, the said Elizabeth Chudleigh, spinster, borrowed of Mr. William Field, of the Inner-Temple, attorney at law, several sums of money, to the amount of the sum of 1,900*l.* or thereabouts, for which she gave to the said Mr. Field, as security, two bonds in her own name of Elizabeth Chudleigh, without the interposition, let, or hindrance of the said Augustus John Hervey, or without his being party thereto, or any ways concerned therein: and this was and is true; and the party proponent doth allege and propound as before.

"19. That on or about the 25th of February 1756, administration of the goods, chattels, and credits of Harriot Chudleigh, late of Windsor-castle, in the county of Berks, widow, deceased, the mother of the said Elizabeth Chudleigh, party in this suit, was granted to the said William Field, as the attorney and for the use and benefit of Elizabeth Chudleigh, described in the said administration, and in the records of the prerogative-court of Canterbury, by the name and description of Elizabeth Chudleigh, spinster, the natural and lawful daughter and only child of the said Harriot Chudleigh deceased, without the interposition, let, or hindrance of the said right honourable Augustus John Hervey, or without his being party thereto, or any ways concerned therein: and this was and is true; and the party proponent doth allege and propound as before.

"20. That in supply of proof of the premises in the next preceding article mentioned, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, a copy of the administration-act entered on record in the said prerogative-court of Canterbury, and signed by the deputy-registrars of the said court, or one of them, marked with the letter M; and doth allege that Elizabeth Chudleigh, spinster, therein mentioned, and Elizabeth Chudleigh, spinster, party in this cause, was and is one and the same person: and this was and is true; and the party proponent doth allege and propound as before.

"21. That the said Mr. William Field, as the attorney of the said Elizabeth Chudleigh, and by virtue of a letter of attorney from her for that purpose, given in her name of Elizabeth Chudleigh to him, used to receive her salary as maid of honour, without any interposition, let, or hindrance of the said right honourable Augustus John Hervey: and this was and is true; and the party proponent doth allege and propound as before.

"22. That on or about the fifth day of May 1766, the said Elizabeth Chudleigh, party in this suit, presented, in her own name of Elizabeth Chudleigh, by virtue of a presentation signed by her for that purpose, the reverend Mr. John Julian, junior, to the living of Hartford, in the county of Devon, who was in virtue of the said presentation duly instituted and inducted to the said living, without any interposition, let, or hindrance of the said right honourable Augustus John Hervey, or his being a party thereto, or any ways concerned therein: and that this was and is true; and the party proponent doth allege and propound as before.

"23. That in supply of the proof of the premises mentioned in the said next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inserted, an authentic copy of the said presentation marked with the letter N, signed by and also a certificate of the institution of the said reverend John Julian to the said rectory of Hartford, signed by Richard Burn, notary-public, secretary to the lord bishop of Exeter, and marked with the letter O; and doth alledge that Elizabeth Chudleigh mentioned in the said presentation and certificate, and Elizabeth Chudleigh party in this cause, was and is one and the same person, and not divers: and this was and is true; and the party proponent doth allege and propound as before.

"24. That the said Elizabeth Chudleigh, for many years subsequent to the pretended time of the pretended marriage aforesaid, kept a current account of cash with the bank of England in her name of Elizabeth Chudleigh, and as a single woman; and also in all common as well as other occurrences of buyings and sellings, and other money matters, whenever occasion happened, the said Elizabeth Chudleigh, spinster, party in this suit, hath, as well before as ever since the pretended time of the pretended marriage pleaded by the said right honourable Augustus John Hervey, constantly in her own name of Elizabeth Chudleigh, spinster, transacted such business, by paying and receiving money, giving and taking receipts for the same, hiring and discharging servants, and on all other occasions, without the interposition, let, or hindrance of the said right honourable Augustus John Hervey, or his being any ways concerned therein: and this was and is true; and the party proponent doth alledge and propound as before.

"25. That all and singular the premises were and are true, and so forth.

"ARTH. COLLIER.
"PET. CALVERT.
"WM. WYNNE."

"CHUDLEIGH against HERVEY.—SENTENCE read and promulged the 10th of February 1769.

"In the name of God, amen. We John Bettesworth, doctor of laws, vicar-general of the right reverend father in God Richard, by divine permission, lord bishop of London, and official principal of the consistorial and episcopal court of London, having seen, heard, and understood, and fully and maturely discussed the merits and circumstances of a certain cause of jactitation of marriage which was lately controverted, and as yet remains undetermined before us in judgment, between the honourable Elizabeth Chudleigh, of the parish of St. Margaret, Westminster, in the county of Middlesex, spinster, the party, agent, and complainant, of the one part, and the right honourable Augustus John Hervey, of the parish of St. James, Westminster, in the county of Middlesex and diocese of London, bachelor, falsely calling himself the husband of the said honourable Elizabeth Chudleigh, the party accused and complained of, on the other part; and we rightly and duly proceeding therein, and the parties aforesaid lawfully appearing before us by their proctors respectively, and the proctor of the said honourable Elizabeth Chudleigh praying sentence to be given and justice to be done to his party, and the proctor of the said right honourable Augustus John Hervey also earnestly praying sentence and justice to be done to his said party; and we having carefully looked into and duly considered of the whole proceedings had and done before us in the said cause, and observed by law what ought to be observed in this behalf, have thought fit and do thus think fit to proceed to the giving and promulging our definitive sentence or final decree in this same cause, in manner and form following (to wit:)

"Forasmuch as by the acts enacted, alleged, exhibited, propounded, proved, and confessed in this cause, we have found and clearly discovered, that the proctor of the said honourable Elizabeth Chudleigh hath fully and sufficiently founded and proved his intention deduced in a certain libel and allegation and other pleadings and exhibits given in, exhibited, and admitted on her behalf in this same cause, and now remaining in the registry of this court (which libel and allegation and other pleadings and exhibits we take and will have taken as if herein repeated and inserted for us to pronounce as hereinafter we shall pronounce;) and that nothing, at least effectual in law, hath on the part and behalf of the said right honourable Augustus John Hervey been excepted, deduced, exhibited, propounded, proved, or confessed in this same cause, which may or ought in any wise to defeat, prejudice, or weaken the intention of the said honourable Elizabeth Chudleigh deduced as aforesaid; and particularly that the said right honourable Augustus John Hervey hath totally failed in the proof of his allegation given in and admitted in this cause, whereby he pleaded and propounded a pretended marriage to have been solemnized between him and the said honourable Elizabeth Chudleigh, spinster: and therefore we John Bettesworth, doctor of laws, the judge aforesaid, first calling upon God and setting him alone before our eyes, and having heard counsel in this cause, do pronounce, decree, and declare, that the said honourable Elizabeth Chudleigh, at and during all the time mentioned in the said libel given in and admitted in this cause, and now remaining in the registry of this court, was and now is a spinster, and free from all matrimonial contracts or espousals (as far as to us as yet appears) more especially with the said right honourable Augustus John Hervey; and that the said right honourable Augustus John Hervey, notwithstanding the premises, did in the years and months libellate, wickedly and maliciously boast and publicly assert (though falsely) that he was contracted in marriage to the said honourable Elizabeth Chudleigh, or that they were joined or contracted together in matrimony: wherefore we do pronounce, decree, and declare, that perpetual silence must and ought to be imposed and enjoined the said right honourable Augustus John Hervey as to the premises libellate, which we do impose and enjoin him by these presents; and we do decree the said right honourable Augustus John Hervey to be admonished to desist from his boasting and asserting that he was contracted to or joined with the said honourable Elizabeth Chudleigh in matrimony as aforesaid; and we do also pronounce, decree, and declare, that the said right honourable Augustus John Hervey ought by law to be condemned in lawful expences made or to be made in this cause on the part and behalf of the said honourable Elizabeth Chudleigh; to be paid to the said Elizabeth Chudleigh or her proctor; and accordingly we do condemn him in such expences, which we tax at and moderate to the sum of 100*l.* of lawful money of Great Britain, besides the expence of a monition for payment on this behalf by this our definitive sentence or final decree, which we read and promulge by these presents. J. BETTESWORTH.

"ARTH. COLLIER.
"PET. CALVERT.
"WM. WYNNE."

"This sentence was read, promulged, and given by the within-named the vicar-general and official principal on Friday the 10th day of February in the year of our Lord 1769, in the dining-room adjoining to the common-hall of Doctors Commons, situate within the parish of St. Benedict, near Paul's wharf, London, there being then and there present the witnesses specified in the acts of court, which I attest.—MARK HOLMAN, notary-public, deputy-register."

Mr. *Wallace.* Your lordships are now possessed of a Sentence given by the Consistory Court of the bishop of London in a cause instituted there to try a claim made by Mr. Hervey of marriage with the noble prisoner; your lordships find by that sentence the claim examined, and the decree pronounced upon the allegations and the evidence given in the cause; by which decree the noble prisoner at the bar is declared free from all matrimonial contracts and espousals with Mr. Hervey.

My lords, the noble prisoner by the indictment is charged, subsequent to this supposed marriage to Mr. Hervey, to have married the late duke of Kingston.

It is for me now to submit to your lordships, that this sentence is conclusive as long as it remains in force, and that of necessity it must be received in evidence in all courts and in all places where the subject of that marriage can become a matter of dispute.

My lords, I don't know any court which the constitution of this kingdom has placed the decisions of the rights of marriage in but the ecclesiastical: I believe it will not be contended, that the common-law courts of this country have any such original jurisdiction. Marriages may indeed incidentally come to be discussed and determined in the courts of common law, and in many cases absolutely necessary to the due administration of justice; but, my lords, it will not be found, that where the proper forum has given a decision upon the point, the common-law courts have ever taken upon themselves to examine into the grounds, or at all question the validity, of that sentence.

My lords, as far as we have books to resort to, we find instances from the earliest times down to the present, where the power of the ecclesiastical courts is in terms recognized by the common-law courts, and where their decisions have been considered as conclusive upon every question in which they have jurisdiction, and especially in cases like the present, particularly belonging to them.

My lords, I don't know in the common-law courts any instance where the legality of marriage can come directly in question, that the courts have decided upon it without referring to the bishop, the ordinary of the place, to certify; unless the marriage has been decided by a suit instituted in the Ecclesiastical Courts.

Your lordships will permit me to refer your lordships to those authorities of law which are to be found in our books; and by the able assistance which your lordships' indulgence has given the prisoner at the bar, you will more particularly have explained the nature of the proceedings in the Ecclesiastical Courts, how far and to what purposes in those courts they are conclusive, and where they are open to such litigation. I shall beg to refer your lordships to a case reported by lord chief justice Coke, in the fourth part of his Reports, by the name of Bunting and Addingshall. In the 27th year of the reign of Elizabeth, there was a marriage between one Thomas Tweede and one Agnes Addingshall, and subsequent to this marriage a person of the name of Bunting libelled against the wife of Tweede, claiming under a pre-contract, and the spiritual court enforced that contract: afterwards, on the death of Bunting, a question arose between the issue of the second marriage and the collateral relations of Bunting; the collateral relations insisting that the second marriage was utterly void, because there had existed a first marriage, and the husband living at the time of the second. Another objection I shall state to your lordships was, that though it might be conclusive between the parties, yet Tweede the first husband being no party to the suit, nor to the sentence which dissolved the marriage between them in the Ecclesiastical Court, it could not affect him, nor indeed any body but the parties: the resolution of the Court was, that he being then *de facto* the husband, though he was not a party to the suit, nor in the Ecclesiastical Court, yet the sentence against the wife should bind the husband *de facto*; and "forasmuch as the cognizance of the right of marriage belongs to the Ecclesiastical Court, and the same court has given sentence in this case, the judges of our law ought (although it be against the reason of our law) to give faith and credit to their proceedings and sentences, and to think that their proceedings are consonant to the law of holy church, for 'cuilibet in suo arte 'perito credendum est;' and so the issue of the first marriage, in consequence and upon the credit of the sentence, were considered as legitimate." My lord chief justice Coke has also reported another case upon the subject of marriage in the 40th year of queen Elizabeth, which your lordships will find in the seventh part of his Reports, page 41, by the name of Kenn's case, which is shortly this:—Christopher Kenn, esquire, married Elizabeth Stowell, and had issue; afterwards the Ecclesiastical Court pronounced a sentence of divorce between Mr. Kenn and the lady, who were not of the age of consent at the time of the marriage; and in consequence of this sentence he married a second wife: the issue of the first marriage, claiming the inheritance, exhibited a bill in the court of Wards of that day, in order to have the benefit of the succession; and offered to prove, that though the sentence had been given in the Ecclesiastical Court on the ground of his father and mother being within the age of consent, yet that they were above the age of consent; that in truth they had cohabited together for eight or nine years, and had issue of that marriage. There could be no doubt, if the matter was open to examination, that the first marriage was effectual; for in the first place, the parties were above the age of consent, and if they had been under the age of consent, yet their cohabitation together after that age, and more especially as they had issue, would have been sufficient to establish the marriage. It was argued too, that it was open to examination, because both the statute and common law of the country take notice of the age

of consent; and therefore it was equally competent to a court of common law to examine into the question, as to an Ecclesiastical Court. It was further urged, that the question related to an inheritance of which the Ecclesiastical Court had no jurisdiction or controul, and therefore it was a question properly before a court of common law: but the Court then conceived themselves so far bound by the decision of the Ecclesiastical Court, though founded on false suggestion, that they held the plaintiff in that cause not entitled to any relief.

My lords, I beg leave to trouble your lordships with the words of the Court upon that subject: after stating the reasons, the book proceeds:

"But it was resolved by all the justices" (for it was a reference to the two chief justices, to two other justices, to the chief baron, and two other barons) "that the sentence should conclude as long as it remained in force." And, my lords, the reasons given are, "that the ecclesiastical judge has sentenced the contract and marriage to be void and of no effect; and although they were of the age of consent, yet if the original contract was void and of no effect, then there was just cause of divorce; and if the marriage had been within the age of consent, the ecclesiastical judge is judge as well of the assent as of the first contract, and what shall be a sufficient assent or not; and although the ecclesiastical judge shews the cause of his sentence, yet forasmuch as he is judge of the original matter, that is of the lawfulness of the marriage, we will never examine the cause, whether it be true or false; for of things the cognizance whereof belongs to the Ecclesiastical Court, we ought to give credit to their sentences, as they give to the judgments in our courts."

Your lordships find here a case where, according to the facts stated, there was no doubt of the validity of the first marriage, and of the legitimacy of the issue claiming in that cause; and if there had been no sentence of the Ecclesiastical Court, no doubt could have existed of the right of succession: but the sentence in the Ecclesiastical Court having interposed, the court of common law conceived themselves absolutely bound, nay, that they had no right to look into the cause of that sentence, for it was a matter originally of ecclesiastical jurisdiction, and they must give faith and credit to the sentence of the ecclesiastical judge in that cause. Your lordships will find that my lord chief justice Coke cited a case so long ago as the 22d of Edward the 4th, where the same doctrine was laid down in the Ecclesiastical Court having a complete and decisive jurisdiction upon this point.

My lords, these cases, from the reporter and from the judges who determined them, the reporter being one, I take to be of the highest authority, and acknowledging those principles which occur frequently in the books, though not under solemn decisions, but as the received opinions of judges and of lawyers from the earliest of times.

My lords, I did before mention to your lordships a case from Carthew; I shall not state it particularly now, but only to the point which we are now upon, that is, of the sentence being conclusive.

My lords, this was not, as supposed in the argument, a *nisi prius* opinion, which every judge must give with the information he carries with him, and without the assistance of the rest of the judges of the court, but a solemn decision in trial at bar in the court of King's-bench in the 4th of king William, when I think lord chief justice Holt presided in that court: it was too upon a sentence of jactitation of marriage, which your lordships have now before you, which was there held to be conclusive evidence, and that no testimony whatever ought to be received against it. Your lordships will take the words of the Court upon that occasion: "upon the debate, the Court were all of opinion, that this sentence whilst unrepealed was conclusive against all matters precedent; and that the temporal courts must give credit to it until it is reversed, being a matter of mere spiritual cognizance."

Your lordships find, that in the reign of king William, that notion which had from all time prevailed was as strong as ever, and that the judges of the court of King's-bench, in which it was tried, were all clearly of opinion, that a case like the present of jactitation of marriage was conclusive upon the point, till it was reversed or repealed.

My lords, the same doctrine is laid down by my lord chief justice Holt, who presided at the trial of this cause, in a case reported in Salkeld, 290, by the name of Blackham's case: it turns upon the claim of property in the goods of a woman deceased. The plaintiff proved the goods to be in his possession, and to be taken away by the defendant. Against this claim of the plaintiff, the defendant shewed that these were the goods of one Jane Blackham in her life-time, and that the defendant had taken out letters of administration to her, and so was entitled to the goods. Upon this the plaintiff proved, that some few days before her death she was actually married to him; and in answer to that it was insisted, that the spiritual court had determined the right to be in the defendant; for they could not have granted administration to the defendant but upon a supposition that there was no such marriage; and that this sentence being a matter within their jurisdiction was conclusive, and could not be gainsaid as in evidence. My lord chief justice Holt, who was the judge sitting at Nisi Prius, who determined the case I last cited, says thus: "a matter which has been directly determined by their sentence cannot be gainsaid; their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary; but then it must be in point directly tried."

My lords, the sentence before your lordships at present is in a cause, where the object of the prosecution was to question the claim of marriage, and where the marriage is the point di-

rectly tried and determined; so that according to lord Holt's opinion, if the sentence be directly upon the question, it is so conclusive, that it is not competent for any court of common law to examine into the matter, or receive any evidence to contradict it.

My lords, these are cases as far as have happened in the courts of law.

I shall now trouble your lordships with a case determined in the House of Lords, under the name of Hatfield and Hatfield: it came on before the House of Lords in the year 1725. The case, as collected from the printed cases of the times, is thus:—one Leonard Hatfield married Jane Porter, who had different names I see assigned her, and by his will made a provision for her as his wife. In March, 1720, she filed a bill in the court of Exchequer, in Ireland, where the subject of her provision lay, against Leonard Hatfield, a son by a former wife, and against a trustee, to have the benefit of the provision. In January following the defendant, the son and heir of her husband, having discovered that she had been before married to one Porter, which Porter was then living, he procured a release of part of the provision from Porter, and filed a cross-bill for a discovery of the marriage, and to stay the proceedings upon her bill. In this cross bill he questioned her upon her marriage to Porter: she denied that she had ever gone by the name of Porter; but with respect to a marriage with Porter, she pleaded that she ought not to make a discovery, because it tended to criminate herself; and being an accusation of bigamy against her, the plea by the rules of the court of equity was of course allowed, that court never compelling persons to discover on oath crimes which may be the subject of prosecution against themselves.

My lords, however by the plea one pretty plainly discovers, that there was reason to suppose she was the wife—indeed she knew it—it was capable of proof, and would be proved in the cause.

My lords, they proceeded to the examination of the witnesses, and clear evidence was given that this woman was the wife of Porter: Porter himself had confessed it in his answer, and he had stated the minister and the witnesses who were present at the marriage; so that he gave Hatfield, the heir at law, an opportunity of bringing direct proof of the marriage from the very persons present. This woman, finding that she would be pressed by that proof, had recourse to the ecclesiastical court: she instituted a suit against this Porter of jactitation of marriage, pending the cause; and after depositions taken, though not published, she got Porter over to her interest. He was willing to defeat that release which he had given; and therefore he does not enter into proof, but appears by a proctor for form's sake, that a judgment might pass against him. Upon this the ecclesiastical judge decreed, as in all causes of jactitation they do where they find that there is no marriage, that the party libelling was free from all matrimonial contracts and espousals with Porter. In this case Porter had given a release, as her husband had upon oath, in the court of Exchequer in Ireland, stated the marriage with precision, even named the minister and the witnesses at the marriage, yet in the ecclesiastical court he appears by a proctor, and has sentence passed against him, without insisting on the marriage or any defence. The court of Exchequer in Ireland received this sentence as conclusive against the marriage with Porter; they conceived they were bound to give credit to the ecclesiastical court. The plaintiff in the cause, knowing in what manner he had been deceived, that in truth Porter was the husband of this woman, appealed to the House of Lords in England. The House of Lords here conceived, as the court of Exchequer had done, that the matter was determined by a competent jurisdiction; and yet your lordships see there was fraud upon the face of the proceedings, if it had been competent to the Court to have entered into that consideration: but the House of Lords here conceived the matter at an end whilst the sentence remained in force, and the decree of the court of Exchequer was affirmed. Upon the pleading this sentence, the court of Exchequer in the first instance, the House of Lords in the last, proceeded to determine the matter. It is so taken notice of by sir John Strange, in a case I shall presently mention. It is taken notice of by a very laborious compiler of the law, Mr. Viner: under his title of Marriage, he mentions the ground of the determination thus:—the legality of marriage shall never be agitated in equity, especially after sentence in the spiritual court in a cause of jactitation of marriage, although the proceedings in the spiritual court were only faint and collusive.

My lords, I take this to be a case of the greatest authority, a decision of the House of Peers in this country, and upon a point of jactitation of marriage, a sentence of the same nature with the present before your lordships.

I shall beg leave to trouble your lordships with a case or two more upon the subject, which are of more modern times: one is reported by sir John Strange in the second part of his Reports, 960, under the name of Clews and Bathurst. The action was for maliciously procuring the plaintiff's wife to exhibit articles of the peace against him, and for living with her in adultery: the plaintiff proved the marriage by the parson and a woman, and also a consummation; to encounter which, the defendant produced a sentence of the consistory court of London, in a cause of jactitation of marriage brought by the woman against the plaintiff, wherein she was declared free from all contract, and perpetual silence imposed upon the plaintiff; which sentence was pronounced since the issue had been joined in the cause; and the chief justice ruled this to be conclusive evidence till reversed by appeal, and the plaintiff was non-suited. Your lordships find here was a cause rightly brought, clear proof of the

marriage made at the trial by the witnesses present, no doubt of the fact, but the production of a sentence in the ecclesiastical court in disaffirmance of that marriage; a sentence of jactitation. The chief justice who tried the cause considered the business as concluded; that it was of no consequence when the decision was made; if the moment before the trial, it was enough, being by a court having the proper and the sole jurisdiction of the matter, and whose opinion must be decisive; and therefore, though the cause had been brought before any suit instituted in the ecclesiastical court, though there was no doubt of the foundation for that cause, yet the sentence is permitted to have effect, and to non-suit that plaintiff who had been injured in the manner the case states.

My lords, there was too, at the same sittings, another case which is reported in the following page by sir John Strange, of Da Costa and Villa Real, which was an action upon a contract of marriage, *per verba de futuro*, brought by the gentleman against the lady, who pleaded the usual plea *non assumpsit*. When the plaintiff had opened his case, the defendant offered in evidence a sentence of the spiritual court in a cause of contract, where the judge had pronounced against the suit for a solemnization in the face of the church, and declared Mrs. Villa Real free from all contract: and the chief justice held this to be proper and conclusive evidence; that it was a cause within their jurisdiction; that the nature of the contract was properly examinable by them; and therefore, as a point determined, he non-suited the plaintiff in that cause, though the plaintiff there opened, and was ready to have proved, the fact of the marriage before the court; but the sentence having interposed, the court conceived they were to pay that credit which every court before had done in Westminster-Hall, which all judges in every age had done to the ecclesiastical jurisdiction in cases within their jurisdiction; and finding himself concluded by that, defeated the plaintiff of the effect of this suit. My lords, it was in this case that the case of Hatfield and Hatfield was quoted as an authority.

My lords, these are cases upon the very points of marriage, and many of them your lordships find upon the effect and force and conclusion of a sentence similar to that now under consideration, that of a jactitation cause. My lords, this has been more recently and within our own memory understood to be law, recognized to be law, and decided accordingly. It is not long ago since an action was brought against the honourable Mr. Thomas Hervey, by a tradesman, to recover a debt for necessaries found for his wife. On that trial the marriage was proved to the satisfaction of the jury, and the defendant found liable to pay for those necessaries. Mr. Hervey instituted a suit, in the consistory court of the bishop of London, of jactitation, and he was declared free from all espousals and contracts of marriage with the lady. During the continuance of this sentence, though appealed from, another creditor brought an action against Mr. Hervey, and had to produce in evidence the same witnesses who had proved the case of the other creditor before any sentence had been obtained, and had succeeded; but the learned chief justice who tried that cause, conceived it was not then open to examination; that though, in the first instance, when the cause of the first creditor came to be discussed, there was no sentence in the ecclesiastical court, and of necessity the court of common law must decide upon the marriage; but there had then intervened a sentence in the ecclesiastical court, which, whilst in force, was conclusive; and of course dismissed the plaintiff's claim; and the intent of that appeal was to suspend and reverse that sentence; yet while it stood unreversed it was conclusive, the fact of marriage was open to no examination in any court whatsoever. This is only an affirmance of the principles of the law, and the doctrine found in the determinations of a thousand cases which the books furnish.

My lords, it is not peculiar to the case of marriage; it is the same in other instances where the ecclesiastical courts have the jurisdiction; it is so in the probate of wills, it is so in the granting of letters of administration: if a will is forged, if a will is fraudulently obtained of a personal estate, of which the Ecclesiastical Court has the jurisdiction; if that court has granted a probate, it is not open to a court of common law, it is not open to a court of equity, to enter into the fraud made use of in obtaining the will, or to the forgery committed upon a testator. I shall refer your lordships to a case or two upon that head: that of Noel and Wells, in first Levinz's Reports 235, in the 19th of king Charles the second: it was an action brought by the executrix of the husband, and upon the trial the plaintiff produced the probate of the will in evidence. The defendant insisted the will was forged; and the chief justice before whom it was tried was of opinion, he could not give such evidence directly against the seal of the ordinary, in any things within his jurisdiction: upon which a case was made for the opinion of the court, and a verdict was for the plaintiff, and the court held that the chief justice at the trial had done right in rejecting the evidence of the forgery, that no such evidence ought to be given till the probate was repealed: they might indeed, by proving the seal of the ordinary forged, have relief; but if the seal of the ordinary was genuine, then whatever forgery or fraud was committed, it was not open to the examination of a common-law court.

My lords, the same doctrine is to be found in the case of Bransby and Kerrick and others, which was determined by the House of Lords. It was stated in that case, that one Robert Bransby, the complainant's son, being intitled to the reversion of a freehold and copyhold estate expectant upon the death of the complainant, made his will, by which he gave all

his real and personal estate to the defendant Kerrick, and made him his executor, who proved the will in the Ecclesiastical Court, in common form: afterwards, in a contest in the Ecclesiastical Court touching the validity of that will, a sentence was given in favour of the will in the year 1716. Bransby, the father, filed a bill in Chancery, to set aside the will for fraud and imposition. Witnesses were examined, and many acts and circumstances of imposition were proved upon the defendant. The cause came to be heard before lord Macclesfield, then chancellor, upon the 14th of November 1718, when his lordship, struck with the monstrous fraud and iniquity of the transaction, declared the executor should stand as a trustee for the next of kin. Upon appeal, the House of Lords reversed the decree, upon the ground that it was not competent to a court of equity to examine into fraud and imposition in a will touching personal estate; that the court of ecclesiastical jurisdiction had decided that point; that it was no longer open to discussion.

My lords, the same rules obtain with respect to every court of competent jurisdiction, whether foreign or domestic: we give credit to the decisions of all foreign courts in points within their proper jurisdiction, and do not examine into the facts, but are concluded by the sentence. I will only refer your lordships to a case in sir Thomas Raymond's Reports 473. In the war between the Dutch and the French in the time of Charles the second, a ship was seized by the French as a Dutch ship, and condemned. The ship being in truth English, the purchaser under the French condemnation, brought the ship into England, where the right owner seized her: upon this an action was brought by the purchaser under the condemnation. The defendant, the original owner, offered to prove his property, and that the ship was never a Dutch ship, nor was liable to be taken and condemned by the French: but what said the court? We must give credit to the condemnation of the court in France; we are forced to give credit to and believe that this ship was in the condition of a Dutch ship, and subject to a condemnation: and, upon the ground, that if a court of competent jurisdiction gives a sentence, all other courts must be bound by it, the Englishman was precluded from asserting his right.* It was the same upon a case of an insurance, which will occur to some of your lordships, where the ship was warranted Swedish, and condemned in the war between England and France: the parties were concluded from insisting that the ship is any longer Swedish or a neutral, because a court of competent jurisdiction had decided the matter. The same law holds in respect to the courts of Admiralty: whether prize or not prize, belongs to the Court of Admiralty; jurisdiction of that court decides upon the subject; though they have given a wrong decision, though the facts did not warrant it, though the judge has done it corruptly, yet it is a sentence which the common-law courts must be bound by, wherever it comes in litigation here: and I have known, in point of experience, in an action of trespass brought here for seizing a ship, where it has been before a Court of Admiralty and received a decision, that the court of common law no longer entertains the cause, for the question of prize or not prize is peculiarly belonging to the admiralty jurisdiction, and you give faith and credit to that jurisdiction. I might refer your lordships too (but the cases are innumerable upon the subject) to that of Burroughs and Jamineau, in Strange, 233, which was upon a bill of exchange, where, by a peculiar local custom within Leghorn, it is competent to the acceptor of a bill, by a judgment of the court, to have his acceptance annulled, if the drawer becomes bankrupt before the bill be payable. There is no such law in this country; yet, giving credit to the sentence of that court, the Court of Chancery here would not send it to a trial at law, but determined upon the point, that the sentence in that court was decisive upon the subject, it being a matter within their jurisdiction.

My lords, in almost every case where judgment, or records of other courts have been the subject of discussion, the sentences of the Ecclesiastical Court have always been cited and argued from as conclusive upon the subject of dispute, and the courts have uniformly adopted those cases as law; but the attempt has ever been to distinguish cases immediately before the court from those determined by the ecclesiastical jurisdiction. Your lordships will find much of that in the case of Philips and Bury, in Skinner, 468.

My lords, there was a very late case determined in the court of Common Pleas, and which is now got into print, reported by Mr. Serjeant Wilson, which is Biddulph and Ather. It arose upon a question of claim by the duke of Norfolk to all wreck within the rape of Bramber, in Sussex, which was proved by many records: it was a question whether those records were admissible, or, if admissible, were conclusive evidence. The counsel who argued in favour of those records and the conclusion which was to arise from them, compared them to the case of ecclesiastical sentences, and would gladly have brought those records within that rule. The Court in that case acknowledged the argument proper with respect to the Ecclesiastical Courts. The Court admitted that the sentence of an Ecclesiastical Court, in a matter whereof they have the sole cognizance, is conclusive evidence, and parole evidence shall never be received. My lords, there is a manuscript note in being of what the judges particularly said; and I find it was

* See 2 Ld. Raym. 893. Carthew 32. Rex v. Raines, 1 Ld. Raym. 262, 12 Mod. 136. Oddy v. Bovill, 2 East 476. See also that case cited in 13 East 473; and the other cases upon this subject, cited by Mr. Hargrave in his Treatise.

cited, as one of the instances where the sentence was conclusive, by the learned chief justice who then presided in the Court: he says, if there is a sentence in an Ecclesiastical Court declaring a marriage—for instance, if it could be proved by a hundred witnesses that the parties were never within 500 miles of each other, that evidence is not to be received, but the judgment of the Ecclesiastical Court is conclusive upon the point. In many of the cases I have cited to your lordships, the question came directly before the Court, and received a solemn discussion: in some the doctrine has been recognized; in none, nor in any case that I know of, has it ever been doubted. My lords, though the cases respect civil suits, I trust that no real ground of distinction can be made between criminal and civil proceedings: in civil suits, courts go as far as possible to relieve claims founded in equity and justice; in criminal cases, the leaning is always to the defendants; and therefore I should conceive such evidence stronger, in a criminal prosecution, in favour of innocence.

My lords, I will take the liberty, however, of reminding your lordships of two or three cases in criminal law, where the same doctrine has been established, and the acts of the Ecclesiastical Court deemed conclusive upon the subject, until reversed by appeal. My lords, in the 1st volume of sir John Strange's Reports, 481,* your lordships will find a case that happened at the Old Bailey in the 8th of George the 1st; it was an indictment for forging a will of a personal estate. On the trial, the forgery was proved; but the defendant producing a probate, that was held to be conclusive evidence in support of the will, and the defendant was acquitted. This your lordships see was a prosecution for a very serious offence indeed; a prosecution for the forgery of a will: the forgery is stated to have been actually proved at the trial, but upon the production of a probate from the Ecclesiastical Court, whose decisions are final and conclusive upon such subjects, the defendant was acquitted, and the evidence of the forgery rejected. It ought not to have been received, if that circumstance of the probate had been discovered sooner to the Court; but the defendant, perhaps conceiving that there could be no evidence to affect him with the guilt of forgery, withheld the probate; whatever might be the reason, it is immaterial; he produced it in time to save himself; for you must receive a probate in the Ecclesiastical Court against the testimony of ten thousand witnesses.

Your lordships will find the same doctrine in the same book, 1st sir John Strange's Reports, in the case of King and Roberts, where that defendant exhibited a will in Doctors Commons, as executor, and demanded probate; after long contest, it was determined in favour of the plaintiff; and upon an appeal to the Delegates, this sentence was confirmed; after the sentence, the parties who had brought it about fell out amongst themselves, and discovered that the will which had been proved was a forgery. The manner of giving relief was to grant a commission of review; but the person who had been disappointed and injured by this forgery, also preferred a bill of indictment against the persons concerned in the act of forgery. The chief justice refused to try the cause whilst the sentence was in force, but insisted that it should stand off till the sentence was laid out of the case by the decision of the commissioners under that commission of review. My lords, in this your lordships find the doctrine recognized in the strongest manner.

The next case, which came before the court of King's-bench, is the King and Gardell.* It was an indictment prosecuted by Mr. Crawford, a fellow-commoner of Queen's college, for assault upon him. At the trial of the indictment, the defendant, who had acted by the orders of the college, produced the acts of the college by which Mr. Crawford was expelled. He came into the garden of the college afterwards with an intent to take possession of his rooms, and the officer of the college took hold of him, and conducted him out of the limits of the college; and this was the assault in that indictment, and which was in point of law an assault; and unless the defendant had a defence, or an excuse for his acts, he must have been found guilty. The act of expulsion was given in evidence. An offer was made by Mr. Crawford to prove the invalidity of those acts, that by the constitution of this college more persons were necessary to concur in an act of expulsion than had been present at that time, and other objections were made to the validity of those acts. The learned judge, before whom that cause came to be tried, conceived himself concluded upon this subject; that as the college had the sole jurisdiction of the cause, their decision was conclusive upon him; and it did not signify upon what grounds they had gone, for the effect of their judgment was an excuse of the defendant, and so long as it remained unimpeached, and unreversed in the proper course, there could be no doubt but it furnished protection to the defendant, or to speak more properly, a defence against this indictment. This doctrine not being satisfactory to the gentleman, he brought the business before the court of King's-bench; and that Court were unanimously of opinion, that the Court had

* This was the case of the King and Vincent, as to which, see the remarks which were made in the arguments on the part of the prosecution in the case before us. See, too, East's Pl. Cr. ch. 19, s. 43, the various cases stated by Mr. Hargrave in his learned Discourse already mentioned, and the reasons for the appellants in Bouchier and others *v.* Taylor. These reasons were written by Mr. Hargrave, and such of them as relate to the matter before us, are inserted in that treatise.

* See the Case of Collett *v.* lord Keith, 2 East, 260.

done right at the trial of the cause to reject all evidence upon the ground of these acts of expulsion; that the acts themselves, being within the jurisdiction of the college, were sufficient for the defendant to avail himself of; and that it was not competent to the prosecutor of that indictment to shew to the Court that these were not regularly or orderly done, or that they were invalid in any respect whatsoever. My lords, in that case the general doctrine was recognized, that in all courts of competent jurisdiction their acts, however wrong they are, yet while they remain in force, are conclusive upon every other court: the cases of ecclesiastical sentences, and many others, were then mentioned.

I might refer your lordships' memory to the cases in Exchequer seizures, where condemnations are given constantly without a defence almost, and yet all other courts are concluded by them. It has been thought so extremely hard a doctrine, that judges have wished for the liberty of examining into the fact, and to have the matter fully discussed in the courts; yet when the matter came to be fully argued, the result has ever been, that the judgment has been found conclusive upon all other courts whatever.

My lords, under these authorities for a succession of ages, I confidently rest that your lordships will, in the present cause, conceive the sentence of the Ecclesiastical Court now produced, in a case clearly within their jurisdiction, in a case in which they have the sole jurisdiction, to be conclusive; no courts whatever have a direct cognizance of marriage but the Ecclesiastical Court. Suppose a person without any grounds whatever claims a marriage; it may be highly injurious to the lady; she has no remedy but by resorting to an ecclesiastical court, because there is no other court that can bring the matter immediately and directly in question: if a woman separate from her lawful husband, what court is there to compel her to cohabit with him but the censure of the Ecclesiastical Court? It is that forum which the constitution of this country has intrusted with the decision of the legality of marriages.

As there are not to be found, in common-law or ecclesiastical courts, any decision contrary to those I have, with great deference, already submitted to your lordships' consideration, I trust your lordships will give that determination upon the validity and effect of this sentence, which courts of law have ever done, when a sentence of the same kind has been a matter of discussion.

Mr. *Mansfield* [now (1813) Lord Ch. Just. of C. B.]. My lords; I am also to trouble your lordships in support of that sentence, which has been offered to you as conclusive upon the present occasion. The sentence having been read to your lordships, you are now apprized of the contents of it. The proceedings in the Ecclesiastical Court, of which the noble lady at the bar hopes to avail herself, begin, as your lordships have heard, by a complaint on her part, that Mr. Hervey did, before that suit was commenced, improperly and without ground lay claim to her as his wife; in other words, in the language used in that court, that he did jactitate that the lady was his wife. The suit being thus begun, the next proceeding in it is in the common way, where a person thus called upon means to insist upon a marriage. The defendant in the suit admits that he did claim the lady as his wife, and contends that he had a right to do so, because he was lawfully married to her. Such being his allegation, her ladyship's answer to it is, that there is no foundation for his claim; that she is not, that she never was his wife; and she states in the allegations made by her, which your lordships have heard, a great variety of particulars during a very long period of her life, in which in the most public manner, and upon the most important occasions, she was universally reputed, received, and acted as a single woman. After this allegation of hers, the next proceeding was to examine a great variety of witnesses, upon the result of whose testimony follows that which is the important part of the business, that is, the sentence of the ecclesiastical judge; which sentence pronounces in the same way in this as in all other suits, where two parties litigate a marriage claimed on one side and denied on the other—that these two parties were free from any matrimonial contract. If that sentence is to have the force which, as it is apprehended by those who sit on this side of the bar, by law it must have, it will of course follow, that this indictment must fall to the ground; because the sole foundation of the criminal charge is the supposed marriage with Mr. Hervey, which this sentence, if conclusive, must unanswerably prove never to have existed. It must, we submit to your lordships, follow as a consequence, that this is the proper place and point of time to stop: it would be to no purpose for your lordships to sit here to hear a long story, the object of which, when the sentence was conclusive, would only be to give pain to one whose sufferings no one would wish to encrease, and at last, after it had been heard, no possible good effect could follow from it. As evidence ought not to be heard, if this sentence is conclusive, because it would be hearing that which could have no intention, no weight, no consequence; so it would be nugatory to state it, and every body would wish to decline the hearing it for the reasons to which I alluded; and I am persuaded, not only for the sake of the noble lady at the bar, but for the sake of preserving that which every one will always think of great importance, that is, uniformity in legal decisions and judicatures, that this sentence must upon this occasion, as I believe on every one has been in which any such sentence has ever been produced in a court, be deemed decisive and unanswerable.

My lords, that it ought to be so upon this occasion, I will first endeavour to shew to your

lordships by considering the nature of that act of parliament upon which the present prosecution is founded, and the state of the law before that act of parliament was made.

My lords, the act of parliament creates no new offence; it punishes nothing but what was punishable before, a second marriage while a former existed: taking a second husband or wife while there was a former in being, was undoubtedly an offence long before this statute of king James the first; indeed as long as the ecclesiastical constitution of this country has subsisted. This act of parliament makes no other alteration in the law, but as it subjects persons committing this offence to temporal prosecution and punishment; before this act, such an offence could only be the object of ecclesiastical censure and punishment: but, my lords, the makers of this statute never dreamt, that they were in any respect altering the ecclesiastical constitution of this kingdom; that they were in any instance invading or breaking in upon the rights of the ecclesiastical courts: no such thing is to be found in the statute; nothing is to be collected from that. Indeed, if you might collect from the preamble to the act of parliament, it will appear to every one who reads it, that it was not in the imagination of those who framed this law, that a second marriage could be made the object of punishment, where there had been a sentence which prevented a supposed former marriage being binding upon the parties. When I say that, I allude to the exceptions in the act, which make no part of your lordships' present consideration. But besides that, the preamble of the act tells your lordships what it was that the makers of it had in view: the preamble tells your lordships, that divers evil-disposed persons being married, run out of one county into another, or into places where they are not known, and there become to be married, having another husband or wife living, to the great displeasure of God, and utter undoing of divers honest men's children and others. Now it never was supposed by the makers of this act of parliament, that the persons described in the preamble of it would go through the form and ceremony of a trial and litigation, and obtain a decision in the Ecclesiastical Court, before such second marriage was to take effect, which was to be the object of this law: but it is enough that in this statute there is not any thing that tends to diminish or break in upon the dominion of the Ecclesiastical Court; but that the statute left those courts and the law relating to them just in the same situation as they were before. Now if this was an offence before the act, how was it punishable? What would have been the operation of such a sentence before this law? Unquestionably, a person taking a second husband or wife, the first being living, might have been made the subject of punishment in the ecclesiastical courts. Let me suppose a prosecution commenced for that purpose by the second husband or wife, the first husband or wife being living: those who stand near me, who are much better acquainted with the proceedings of the Ecclesiastical Court than myself, will tell your lordships, that, so long as this sentence remains, the relation of husband and wife could not exist, which alone must be the foundation of a prosecution; for taking a second husband upon this statute, the act upon which the whole proceeding is founded, having made no alteration in the case, the law remains the same. It does not follow from thence, nor are your lordships to suppose it, that such a sentence as this would in the Ecclesiastical Court have made adultery lawful, or have made a marriage with a second husband or wife a good one: certainly not; but while the sentence subsisted, it would have proved, that there was no first marriage at any time by any parties interested. Such a sentence as this may be undone; it is a fundamental rule in all matrimonial causes in the ecclesiastical courts, that, in their language, 'sententia contra matrimonium non transibit in 'rem judicatam.' The issue or the kindred of persons intitled to estates may have a variety of reasons for impeaching marriages. As to the continuing in a second marriage, the continuing in adultery, the repeating it is only an increase and aggravation of sin where the first marriage ought to have prevented it. At any time there may be a suit to restore and set up a first marriage, which has been undone by a sentence by accident, by mistake, by collusion, or from any other reason not satisfactory. If all the evidence that could have been had respecting the marriage has not been laid before the spiritual judge, any party who has any interest may at any time again apply to that court, again institute a suit, offer new evidence, have that which has been already heard, heard again, that the marriage, if it did really exist, may be established by a sentence of that court: this is, I believe, clear law, and undoubted in that judicature. If it is, then your lordships are not to conclude, that by any sanction which you give this sentence, you either authorize adultery, or give effect to second marriages while first marriages subsist; no, at any time that first marriage may be established notwithstanding a sentence against it, when any person shall think fit in a legal way in such judicatures to impeach that sentence: but all that is contended for is, that while that sentence remains, the matter is concluded; the marriage cannot be proved to exist; the relation of husband and wife is destroyed.

My lords, if this which I have now submitted to your lordships be, as I apprehend it is, well founded in the known practice and law of these courts, the consequence I trust will be, that this sentence must now have the effect under a prosecution upon the present act of parliament, as it would have had in a prosecution in the Ecclesiastical Court for an adultery, or a crime against the first marriage. In that judicature, the only one which by the laws of this country has a regular jurisdiction to enquire into marriages, by a solemn judgment

these two parties are declared not to be married; that would have been an answer to any prosecution before the statute. The statute leaves the power of the ecclesiastical courts exactly as it was before; leaving it so, a sentence pronounced by that court in a cause, in which it has clear jurisdiction, must I apprehend be decisive. But, my lords, it is undoubted. Various cases, which I shall not trouble your lordships with the repetition of, have been mentioned, which prove that to no purpose can this noble lady at the bar and Mr. Hervey be considered as man and wife, or proved to be man and wife while this sentence subsists. No conjugal duties can be exacted from one to the other; was a wife starving in the streets, she could not in any way oblige him to contribute to her support. Whilst such a sentence remains, the woman cannot be a wife for any beneficial purpose resulting from matrimony: and it will be, I believe, difficult to point out one for which she can be a wife, unless it be for the single purpose of subjecting her to be punished as a felon for marrying a second husband. I can hardly believe that any human creature can be found, who would wish that the noble lady at your bar should for this purpose alone, and in this single instance, be deemed a wife, when she can be in no other. But if there be any who wish it, I am satisfied your lordships' wishes will go along with the law as I understand it to be, if the law be so: and that it will be very difficult to convince your lordships, that she, who was not a wife for any other purpose, should be deemed a wife in order to be subjected to criminal punishment for an open, an avowed, and by her thought an honourable marriage with a noble duke.

My lords, in every instance in which an issue in the temporal courts, in the courts of common law, is joined upon matrimony, where a marriage is insisted upon on one side and denied on the other; in every instance of that sort we know the temporal courts decide not; they send to the spiritual courts to have the matter enquired into and decided upon; nothing is more clear than that rule of law. So it is in cases of dower; where dower is claimed by a widow, where it is denied that she was ever lawfully married to her husband, the temporal court says, it has no power to enquire into the matter, it must refer it to the spiritual court; and the decision of the bishop is final upon the point. It is not only in the case of marriage, but in other cases, that the decision of the Ecclesiastical Court is the only competent one, and is final and conclusive to all purposes: so it is upon questions of legitimacy, where bastardy is alledged and denied; the common-law courts decide not the point; they send it to the Ecclesiastical Court: so it is with regard to the probate of wills; and no case can be stronger than that which was mentioned to your lordships, where even upon a criminal accusation, a charge of forgery, an accusation resembling the present, a decision of the Ecclesiastical Court in favour of a will was held to be conclusive evidence upon an indictment for forgery, and that no proof could be received of the fact of forgery in opposition to such a sentence. It is not only so in these instances of the Ecclesiastical Court; there are others with regard to captures; the decisions of the courts of Admiralty are in like manner conclusive: so the court of Exchequer, upon disputes concerning the revenue: there are many other instances which might be pointed out to your lordships, in which, after the sentences of courts having competent jurisdiction, all other courts are shut out from enquiry into the matter, however it might appear that such sentences are not founded in truth. This rule is so clear and so well known, that I will trouble your lordships with no particular cases or instances in which any such matter is determined: but there are some that have been already mentioned to your lordships, and one other which I shall add, to which I shall beg your lordships' attention on account of another view, which it is necessary for him, who would contend for the full force of this sentence, to see this subject in.

My lords, it may be said, something of that has been hinted already; much we know has been talked out of doors, not all I believe warranted by the fact; but of that now we are not to judge or enquire: but it may be said, in answer to these arguments giving the utmost force to such sentences, let them be final and conclusive as they may, yet if a sentence can be shewn to be the effect of agreement and collusion, that it shall not be final, that it shall not have a binding force. If those, who are to argue against the effect of this sentence in the extent in which it is now endeavoured to be urged, should be at liberty to say, that they would attempt to shew that this sentence now in question before your lordships was the effect of what is called in the common-law courts, covin, or collusion; if there was any ground, as I do most firmly believe there is not, to impute this sentence to any such original; yet before your lordships, I trust it will appear, that this is not the place in which any such collusion ought to be enquired into. Those courts, which the constitution has trusted with the investigation and decision of matters relating to marriage, are fully equal to the decision of any such collusion; they may undo their sentences where they appear to be collusive: and it is not to be presumed that any collusive sentences would be encouraged in those courts. Indeed there is one strong and cogent reason, why no such collusive sentences are to be feared in those courts; because, as I before observed to your lordships, a sentence there, though conclusive while it stands, may at any time be attacked or impeached by those who find an interest in so doing: and if it may, then it would be idle for persons to be collusively obtaining a sentence, when any relations that might be affected by issue of a second marriage, in short, any person who has an interest, might overturn and destroy it. This at least is very obvious upon the sentence that is now urged to

your lordships, and the effect of it with regard to the present prosecution, that, if it was to stop the present prosecution, the utmost consequence that would follow from it would be this, that it could only prevent such prosecutions having effect in cases in which in truth the parties, who had to do in the cause in the Ecclesiastical Court, and who obtained the sentence, were so circumstanced, that it would not be the interest of any human creature to endeavour to undo their work: and that it is not one of that sort of marriages, such a second marriage, as it was the object of this temporal law, the statute of James the first, to make the subject of punishment. It was made on account of temporal mischiefs happening, as recited in the preamble. Although it is mentioned, and truly mentioned in that statute, that such second marriages are to the dishonour of God, and are undoubtedly high offences against religion, and the holy ceremony of marriage; yet if that had been the only evil that had been apprehended or found from such second marriages, it is not to be believed, but that the legislature of this country would have left such marriages to have been considered, enquired into, and punished in those courts, in which all other offences against religion are very properly only cognizable and punishable. It was the temporal mischief that produced that law; and your lordships may easily judge, what apprehensions of any temporal mischief would arise from such weight being given to this sentence, as is contended for from prosecutions being stopped by such sentences, when it is clear that sentence cannot do mischief to any human creature, who does not chuse to sit down and acquiesce under it; for the remotest issue, at the greatest distance, that can be hurt, may commence a suit in the spiritual court, and may therefore get rid of this sentence. Give it therefore its utmost force, let it weigh as much as is desired in the scale in favour of this lady, it would only go to prevent a prosecution, where the marriage undone was of such a sort, that no human creature would have an interest to support it. This I observe to your lordships, supposing that it may be urged against this sentence, that it will be attempted to be proved to be produced by agreement and collusion.

My lords, there are cases, one of which has been already mentioned to your lordships, that in terms prove that that collusion is not the subject of temporal enquiry, that it ought to be confined to the spiritual courts. There are other cases, which seem to me in effect to prove the same thing.

The case of Kenn has already been mentioned to your lordships: in that case it was an attempt by the issue of that marriage, where there had been a divorce between the parents of that issue, to establish the marriage. In the divorce, the sentence had proceeded upon the parties not having been of marriageable age, that is, the man of 14, the woman of 12; that they had never cohabited together, or consented to the marriage after they had attained to marriageable years, to the years of consent, as they are called. But who is it attempts to undo that marriage?—The child who was born of those parents, cohabiting together long after they had attained the age of consent. And yet that issue was not heard: no, the sentence was held to be conclusive; a sentence proceeding clearly upon a ground which must be false; stating that the parties were not of the age of consent; stating that they had never consented after they had attained that age; when it was an undoubted fact, indeed the existence of that issue which litigated it proved, that they must have consented to the marriage after the age of consent.

The next case that I would suggest to your lordships is one that has not been mentioned, but which appears to me to be extremely strong to the present purpose. It is the case of Morris and Webber,* in Moore's Reports, 225. The case, in short, was this: two persons, one of the name of Berry and the other of Wilmot Gifford, had been married; they had been married some years; they had no offspring; a suit was commenced in the spiritual court for a divorce; a sentence was pronounced, which in the words of the book are 'propter vitium per-' petuum et impotentiam generationis' in the husband. The sentence having so proceeded, not long afterwards both these parties married again, and each by the second marriage had several children: some years afterwards a cause arose, in which it became a question, whether the issue by the second marriage of the husband thus divorced could be legitimate? It was contended, that those subsequent children by that husband had proved, and irrefragably proved, that the foundation of the divorce was false; that there could not be that *vitium perpetuum* which was made the ground of the divorce. The common-law court, before whom this question came, clearly held, that that was necessarily proved by the subsequent children which that husband had had; but still clear as it was, that this sentence was founded in an apparent falshood, yet it must stand: it is the sentence of that court to which the constitution of the country has entrusted the decision of such matters; it is not for our courts to enquire into it; we should usurp a jurisdiction which does not belong to us; and upon that ground it was determined, that till that sentence of divorce was undone in the ecclesiastical court, it must be binding and conclusive, and the issue of the second marriage must be deemed legitimate.

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* See vol. 2, p. 849.

Voltaire has remarked, that the ecclesiastical judges derived their cognisance of matrimonial causes from the adoption by the Romish church of the marriage contract into the class of sacraments. In matters of insufficiency, he observes, "Des clercs plaidaient; des prêtres jugeaient. Mais de quoi jugeaient-ils?—des objets qu'ils devaient ignorer."

My lords, no cases can well be imagined stronger than these to shew, that even sentences founded in agreement, founded on what may be called collusion of the parties, are yet binding, till they are rescinded in that court to which alone the law of England has intrusted and confined the consideration of such matters.

Another case, which has already been mentioned to your lordships, is the case of Hatfield and Hatfield, which seems to me also to decide this point, and to decide in terms. The case has been already fully stated to your lordships; I need therefore only point out one or two particulars of it. There was a dispute between the heir of one Hatfield and a woman, who claimed to be the widow of the father of that heir. He insisted upon it, that she was not the wife of Hatfield his father, because she had been married to one Porter. The marriage with Porter was proved. Porter, who was a party to the suit in the court of equity, admitted it upon his oath. A release was obtained by the heir from that Porter. In order to get rid of this release, and though the fact of marriage was proved in the clearest terms, the woman commenced a suit for jactitation of marriage against Porter in the Spiritual Court. A sentence upon his not appearing was pronounced in that court against him, and that was held in the House of Lords to be conclusive. Those who went before your lordships, then sitting in judicature, said, this was a sentence by a court which had the alone jurisdiction of the matter, and, while it stood, it must decide. The books that take notice of this case expressly say, that the sentence was considered—indeed, after the case stated to your lordships it could not but be so considered,—as collusive, I think is one of the words to be found in the books; and yet though appearing to be a feigned and collusive sentence, the answer was, that collusion is to be judged of alone in the court where the original matter arises, which has alone jurisdiction upon the subject; no other court can consider it.

My lords, I am aware that it may be said in answer to this case, that this was in a court of equity, which had no jurisdiction to enquire into questions concerning marriage in the Ecclesiastical Court. My lords, that is no answer; for wherever a sentence founded in agreement between parties is used to the prejudice of a third person, in whatever court it is, unless the subject be of such a nature that it is exclusively confined to the particular court in which it arises, wherever such a sentence is attempted to be used against a third person, that third person may avail himself of the collusion upon which it is founded: for how is it, that in all common cases, where questions arise about collusive sentences, that the party against whom they are used gets rid of them? In order to do that, no proceeding is requisite in the court in which the sentence is: no; the person against whom it is urged says, However that sentence may be between you two, who are parties to it, however it may bind you, it is founded in agreement between you two, and it is nothing to me; as against me it is void. Thus in the common case of executors, a creditor has a right to be paid out of the effects left by a dead person, who is debtor: the executor intending to cheat the creditor by an agreement with another person, who is no real creditor, prevails upon him to commence a suit, and suffers judgment to pass at the instance of such a friend; by which he is made the original creditor, and the executor, as representative, debtor to the person so suing by agreement. The real creditor cannot pursue any steps to undo the judgment: no; he says, by way of answer, That judgment is void against me; you two persons agreeing and colluding together shall not turn the forms of law to my prejudice: and as this may be done in one case, why not in every other, where a judgment or a sentence founded upon collusion is used against a third person, who has no way to answer it but by saying at once, It is void against me, however it may stand good between you?

This, my lords, is the way in which all judgments by collusion or by covin, in my knowledge, are answered and got rid of. But in the case of Hatfield and Hatfield, which I last alluded to, it is answered, that the Court of Equity, and the House of Lords judging as a court of equity, had no authority to enquire at all into a matter depending in the Ecclesiastical Court relating to marriage, because that court hath an exclusive jurisdiction upon the subject; and yet in that case and in this there could be no reason, I submit to your lordships, why, if an agreement of the parties could be a ground for impeaching a judgment, it might not be as well done in that judicature as in this?

My lords, when I am speaking of any arguments that one may suppose to be urged from an attempt to prove collusion, there are differences between any such judgments as are got rid of by a third person, because prejudicial to him, and founded upon an agreement between two parties to a suit with which he has nothing to do: is that the present case? No third person, that has an interest, attempts now to set aside this judgment: the object here is to annul the judgment as between the parties to that suit. In all the cases that can be referred to, where questions arise upon judgments passing by agreement, intended to be levelled against a third person; in all such cases, as between the parties, the judgment stands good. The object of those, who in such respects impeach the judgment, is merely to prevent its having effect against those who are strangers to it: but here this judgment, this sentence must, as between the parties, be totally undone and annihilated, or else it decides the question; because unless it is undone, if it stands good between those two parties till properly impeached in the Ecclesiastical Court, why then they are not husband and wife: and this consideration materially distinguishes such a judgment so impeached as the present is, from the common case in which judgments are to be affected; not so as to be avoided between the

parties, between whom they stand good, but as being laid aside more properly than being avoided, so as not to be turned to the prejudice of a third person, who is not a party to them.

My lords, another distinction which I have before suggested to your lordships, which I remind your lordships of, as upon the present head of the arguments I am suggesting to your lordships, there is this difference between all the cases that can be brought before your lordships upon the head of collusion or agreement; in all those cases, in such as I have alluded to, and a hundred others might be put which fall within the same rule as a judgment set on foot by an executor to defraud an honest creditor; in such cases the parties have no way themselves to commence a suit to set aside this judgment; their mode of doing it is, when the judgment is used against them, answering, Whatever the judgment may be as between you two, as to me it is void: but there is no regular process of law, no suit to be commenced, by which any such judgment can be set aside by a third person; there is no suit. If it could be done at all, it must be done in a manner which furnishes argument in support of the present sentence, because it could only be done by an application to that court in which such a judgment is given. Another court may say, where it is attempted to be used, that if it be proved to be founded in agreement by those who are parties to it, it shall not be turned against a third person; but no other court but that in which the judgment is given can set it aside and annul it.

My lords, these distinctions clearly appear, as I submit to your lordships, in such cases where such judgments are attempted to be got rid of by third persons as detrimental to their interests: but I believe I can produce to your lordships a legislative instance, that a collusive judgment in the Spiritual Court cannot be set aside after once given; that it is final and conclusive. I have already mentioned it to your lordships as one of those points arising in courts of justice, upon which all consideration is confined to the ecclesiastical courts: none is more important than a question concerning bastardy or legitimacy. The way, your lordships know, in which that question is sent to be tried by the Ecclesiastical Court, is this: in actions of various sorts, where a person claims a title by descent, the legitimacy of his birth becomes material. If the party against whom he claims says that he is a bastard, and upon that an issue is joined, the common-law courts in which the question arises send the matter to the Ecclesiastical Court to be enquired of and decided. In answer to a writ for that purpose going from the common-law court the ecclesiastical judge makes a certificate, and he certifies that the party is a bastard, or is legitimate: that certificate is conclusive; it is not only conclusive between the parties to the suit, it is conclusive to all the world; it never can be touched or moved again; that certificate once received, that record in the common-law courts is final for ever.

My lords, to prevent the mischiefs that might arise from such transactions happening by agreement, and a false certificate obtained by collusion, depriving persons of their legal rights, various forms are now requisite by an act of parliament, which I will state to your lordships, that originally were not so. Various proclamations are necessary in the court of Chancery, and likewise in the Court of common-law, in which such question arises, in order to give universal notice to all persons who may by possibility be interested, that such a question is to be sent to the Ecclesiastical Court: but before that act of parliament no such proclamations were necessary. The act of parliament will shew your lordships what then was the effect of a collusive sentence in the Spiritual Court upon the subject of bastardy; and the sentence of that court was conclusive, and could not be touched by any temporal judicature.

My lords, the act of parliament was made in the 9th of king Henry the 6th, chapter the 11th: the title of the act is, "proclamations before a writ be awarded to a bishop to certify bastardy."

My lords, the preamble of the act before it comes to the enacting part is very long. I need not read the whole of it to your lordships: it is in substance this: "that several persons, who are named as petitioning in the law, who claim, some as sisters, and others as claiming under sisters, to be heirs of Edmund earl of Kent, were apprehensive of the effect of a collusive certificate that would be obtained by Eleanor the wife of James lord Audley, who pretended herself to be the daughter of that Edmond earl of Kent; and the meaning of the act was to prevent the effect of such a collusive certificate, which was apprehended would be obtained by this Eleanor wife of James lord Audley; and stating that there was no foundation for any such pretence. That she was not the daughter of the said Edmond, the act goes on to say; nevertheless the said Eleanor, the wife of James, upon great subtilty process imagined, privy labour, and other means and coloured ways, to the intent that she ought to be certified mulier by some ordinary, in case that bastardy should be alleged in her person, hath brought, as it is said, in examination before certain judges in the spiritual court, knowing nothing of these contrivances, certain suborned proofs and persons of her assent and covin, deposing for her, that she was begotten within marriage had and solemnized between the said Edmond and Constance, late wife of Thomas lord Despenser; so that it is very likely that the same ordinary would certify the said Eleanor the wife of James mulier; which certificate so had and made ought, by the law of England, to disherit the said duchess, duke of York, earl of Salisbury, earl of Westmorland, John earl of Typtoff, Alice, Joyce, and Henry, and their issue for ever, of

the whole inheritance aforesaid." Thus your lordships see it is stated that such a certificate, so obtained by the most flagrant covin and collusion, which is stated here in this preamble of the act, is said to have such effect, that it ought by the law of England to disinherit the heirs and their issue for ever, though a certificate most palpably obtained upon the grossest fraud and collusion. Then it goes on to *provide*, "whereupon the premises tenderly considered, and to eschew such subtle disherisons, as well in the said case as in other cases like in time to come, by the advice and assent of the Lords, and at the request of the said Commons, it is ordained, that if Eleanor the wife of James be certified mulier, that no manner of certificate shall in anywise put to prejudice, bind, endamage, or conclude any person, but him or his heirs that was a party to the plea." Thus it provides a remedy in that particular case. Then it goes on to *enact*, that in future all proceedings of this sort shall be attended with different proclamations that are ordered by that act, that it may in future be known when such certificate will be applied for to the spiritual courts, and that all parties interested may have notice to make their objections. Now, my lords, what will be said of the effect, the weight, the authority of ecclesiastical sentences in this part of the law after the act of parliament? Does it not appear by this law, that the certificate, in other words the decision, of the Ecclesiastical Court in a case of bastardy, even though founded upon collusion, was decisive, when once it was formally received from the ecclesiastical judge? And if it was so, will it be at all a stretch of the authority of that judicature now to say, that a sentence in a cause of marriage, which is as peculiarly to be confined to their jurisdiction, ought to have the same force? And if it is not to have the same force, will it not be breaking in upon or evading that jurisdiction, in a way which your lordships' predecessors have never done, if you should now suffer this sentence in another place to be impeached and overturned?

My lords, your lordships will remark, that in those cases which your lordships have been referred to, there is one, the case of forgery, which is the case of Farr, that is more exactly like the present, and where a decision of the spiritual court upon a will is held to be decisive against the clearest proof of forgery. But with respect to the other cases, your lordships will observe, that they are all civil cases: and if this deference and respect is to be paid to sentences by the ecclesiastical judicature in civil causes, I am sure I need not observe to your lordships that in criminal causes, where the noble lady at your lordships bar is to be entitled to every indulgence, to every favour, these decisions do from that consideration acquire double force.

My lords, it may be said, what did this act of parliament of James the first mean? That when there had been such a sentence as this, though those who were parties to it knew that they were in truth man and wife, that after such a sentence either of the parties, so knowing that they were man and wife, should be at liberty to marry again without incurring the penalties of this statute? In answer to that it may be replied, that whilst this sentence stands, if there be any weight in the arguments urged in support of it, it is not to be presumed that it was so, or could be so, known to the parties; because that was to impeach the sentence. But another answer occurs from the act itself; for the act did not mean in all cases to punish a second marriage, where the former husband and wife were found to be living; because there is an exception in the act, an exception which permits, I mean so as not to make it punishable, permits a marriage with a second husband or wife, even though the former be living, and be known to be living. Let but the sea be placed between the husband and wife for seven years, though they know each other to be living, the law takes not place; they are not the subjects of punishment: that I take to be extremely clear. The circumstance of knowledge does not necessarily import, that a person marrying a second husband or wife must be subject to the penalties of this law on account of that knowledge of the first husband or wife being living. As to the immorality of the case, as to the effect against religion, against the eternal sacred obligation of marriage, it remains exactly the same, whether the husband is on this side the channel or the other. But the law has said in that case, though the ceremony of marriage would be thus offended against, though the obligation would be so far violated, that a husband or wife, knowing that the other husband or wife were living, should take a second; yet that knowledge is not sufficient within the act in that instance to subject the party to punishment. It is not therefore in every case that the taking a second husband or wife, even with knowledge that there is a former subsisting, will subject a party to punishment: that the act says. It is not a part of the present question before your lordships. To suppose that after this sentence, the noble lady at your bar could be so well acquainted with the ecclesiastical law, as to know that this sentence would not be binding; that is too absurd to suppose. If a sentence in the Ecclesiastical Court is to have that weight, which it has had from the earliest times; if the same rule is to take place in criminal courts of judicature, and in favour of the criminal, which has been again and again established in civil causes; then this sentence is conclusive; there will be an end of the present prosecution. And your lordships will not forget what I did before take the liberty to suggest to your lordships, that giving the utmost sanction to this sentence, you never bastardize issue, you never disturb families, you never deprive individuals of their right; because every human creature, who is at all interested to dispute a sentence against a marriage, who wishes to set up or support it, may at any time apply to the Ec-

clesiastical Court, and there have the marriage set up again and established. No cause therefore can ever pass, in which a marriage will remain undone by such a sentence, except where there is no human creature who thinks it worth their while to endeavour to support it. And this temporal law may surely very well go unenforced while a sentence stands, and on account of that sentence, which with the utmost weight and credit given to it can produce no temporal mischief. If it be wrong, if the parties to it in procuring it did wrong, it may at any time be undone in the Ecclesiastical Court; and as to the offence against the right of marriage, against the religious constitution of the kingdom, that court may at any time effectually punish those who have been guilty of any such offence, who have improperly married a second husband or wife, who have improperly attempted to get rid of a marriage that was legally established.

And therefore upon the whole I submit to your lordships, that upon the authorities of law there is no ground to impeach or attack this sentence; that it is final, it is conclusive, of course no other evidence ought to be received impeaching this marriage; that the indictment therefore must fall; and that as no evidence can be received, it would be idle, impertinent, and of no use to state it.

Doctor *Calvert*. My lords, it is my duty likewise to trespass a little upon your lordships' patience on the same side with the gentlemen who have gone before me, though this question has been by them considered in the widest extent of view that I believe it is capable of.

My lords, the motion now made by the noble lady at your lordships' bar is this, that having that species of evidence which she apprehends is conclusive in her favour, and precludes the prosecutor from going into any evidence on his part, it may be received by your lordships as the only matter proper to take into consideration.

My lords, that evidence which her grace offers, is a sentence in the Ecclesiastical Court, pronounced in a due suit thereupon, in a direct line of marriage; the purport of which was, that there was no marriage subsisting between the honourable Mr. Augustus Hervey and the noble lady at the bar, as the indictment lays there was, at the time she married the late duke of Kingston, that marriage being the sole foundation of this accusation; for if that fails, the marriage with the duke of Kingston was perfectly innocent. If this is a proof, such a one as your lordships by law ought to abide by, that there was no such marriage subsisting between them, to go into evidence of any sort must be totally nugatory.

My lords, it is well known, that by the constitution of this kingdom there are different courts appointed for the litigation of different questions. These courts are, as the constitution supposes, well adapted to the purposes, and exercise that jurisdiction which can take up the point originally, and determine it directly; and it is contended, that while that determination subsists, it ought to have its effect in all other places, and in all other courts where there shall be occasion to make use of it.

My lords, this is not asserted only of one species of courts, I mean the Ecclesiastical Courts, but it applies, I apprehend, to sentences of all others whatever, that when a judgment has been given by any court having original and direct jurisdiction, though that may incidentally come before another court, yet they don't go into that question which has by a competent judicature been before determined.

My lords, it is true, it is impossible for any courts to continue to exercise their jurisdiction for any considerable time without many questions incidentally arising, which are not really and originally within their jurisdiction, many of ecclesiastical cognizance; and for the purpose of determining that cause, if the incidental point has not already had a decision in an Ecclesiastical Court, they must be gone into; because if they were not, there would be no end of the interruption of justice. Many questions arise in the Ecclesiastical Courts, which are originally of common-law jurisdiction, yet the Ecclesiastical Court must go so far into that consideration, as to see whether the pretence be true: for the purpose only of determining the cause then before that Court, they could not have originally determined this question. Suppose, for instance, a legatee claiming a legacy in an Ecclesiastical Court, the executor may plead a release; now the validity or invalidity of that release is originally cognizable by the common-law courts and no other, yet the ecclesiastical judge must so far take that plea into consideration, as to see whether there is *primâ facie* a release or no: but it was pleaded in reply, that there had been a question upon that release at common law, that it had been there put in issue, and that there was a verdict against that release. I apprehend, that no ecclesiastical judge then would think himself at liberty to enter into the question, whether it was a good release or no; but the verdict must be taken as true, because the Court, though incidentally it was obliged to take notice of it, has not a jurisdiction to determine the original question.

My lords, this may be applied to the question that is now before your lordships: marriage causes are peculiarly by the constitution given to the Ecclesiastical Courts; they alone can determine an original and direct question of marriage as between the parties; and if determinations of courts, having original and direct jurisdiction, are to receive weight, and meet with credit from all other, then the determinations of Ecclesiastical Courts upon marriage ought, wherever they come in question in any other court, likewise to be received as conclusive. The obvious reason of this strikes me to be, because though every court can determine in some measure a question merely as applied to what is then before them, yet they cannot

determine it generally, they cannot determine the very question as applicable to other purposes. As for instance, suppose any temporal right under a marriage is to be considered in a common-law court, and it may be necessary for that purpose to enquire whether there be such a marriage; the general question, whether such persons are to all intents and purposes man and wife, whether they are bound by the obligations of duty arising from that state, is certainly not to be determined but in a court of ecclesiastical jurisdiction: and when that court has been in possession of the original and general question, and has determined it, for the common-law court to enter into it, might be in effect to alter and undo a judgment, as far as the consideration then is before the court, which certainly that court has no jurisdiction to do. That this is to be received as a general position, I apprehend, is supportable upon this ground; upon the great incongruity of sentences which otherwise must arise. Now suppose there be a sentence in a court that has the original jurisdiction to determine marriages between man and wife; to determine upon the state of those persons, whether they are in fact in that relationship; all determinations upon that question in any other court may be directly contradictory to that sentence, which still must remain; for the parties will and must remain man and wife, or the contrary not man and wife, according as the sentence was, if that question has been directly determined in an Ecclesiastical Court; and any determination that would be given by another court, may be contrary to that obligation and that connection which the Court, having a power, has determined was between them. On these considerations, therefore, I apprehend it is, that whenever a question of matrimony has arisen in any common-law court, if there has been no determination in the Ecclesiastical Court, the question may be open; but if that question has ever come directly in point before the Court, having direct jurisdiction to determine it, I apprehend to this time there always has been such credit given to the sentence, that it is taken to be conclusive and be determined between the parties.

My lords, this distinction was made, I conceive upon the best grounds so long ago as that case alluded to by the learned gentlemen who have gone before me: I mean Kenn's case, reported by sir Edward Coke; that was in the reign of king James 1. In that case there is cited the case of Corbett, which was as early as Edward 4. Taking the doctrine laid down upon these two cases together, the position there established, and I trust adhered to ever since, is this, that when there has been a question of marriage litigated by the parties themselves in a proper court, and the question has been determined upon the marriage, the sentence will always hold good, till it is reversed by that court. So much was determined in the case of Kenn. In the case of Corbett it was determined, that where one of the parties is dead, and no such sentence was had between the parties while living, a person cannot commence proceedings in the Ecclesiastical Court relative to that marriage. The reason is, that then the object of such a suit must be temporal considerations only; it must be to bastardize issue, or it must be for some purposes which the Ecclesiastical Court has not original jurisdiction of. But the mere question of marriage, of connection between man and wife, can never come into question, nor ought it to be litigated after the death of the parties: therefore, the Ecclesiastical Court, after the death of the parties, does not entertain that suit, nor can it be legally commenced.

My lords, there are a variety of cases which have been determined that have been quoted already to your lordships, and which I should be very sorry to take up your time in repeating; but it seems to me on those authorities to have been established, that as often as these sentences have been pleaded, they have been allowed, whether they were sentences in causes of nullity of marriage, or in jactitation of marriage.

My lords, if danger is to be apprehended from too much credit being given to such sentences, lest for improper purposes they might be unduly obtained, there seems to be less danger in questions that arise upon marriage than in any other; for this reason, that there can be no determination against a marriage but what is open to future litigation. We all know, that in a question of marriage any person that has an interest may intervene before sentence given; and any person having an interest, though they have neglected to intervene in that cause, might appeal within the proper time: nay, I will go so far as to say, that if any person having an interest should have so far neglected it as to omit availing himself of an intervention or appeal, yet he might still come before the court, shew his interest, and be heard. A marriage cause goes farther still; for I believe in most other cases a determination would be for ever binding, at least to the parties; but in these questions, I conceive it is not: for if there was to be a question between a husband and wife in a cause of jactitation, and, as in this cause, it was determined that there was no marriage; yet the party against whom that sentence was obtained, I apprehend, might appear afterwards, he might produce any new proof that he did not know of at that time, or, even if he had not produced what proof he had, he might be heard upon it. The reason of that indulgence I take to be this: by the canon-law a marriage was held to be indissoluble, and for that reason a sentence against it never could be final; 'sententia contra matrimonium nunquam transibit in rem judicatam.' The canon-law, it is well known, has been received in this country with respect to marriage, particularly as to that position of its being indissoluble. In most other questions, as of property, a person might be bound by time, bound by not making an

good a case as he should have done; but as a person cannot release himself from the obligations of marriage by any lapse of time, or any neglect in stating his case, the question is ever open; therefore these cases are certainly the least dangerous, because if any body appears who apprehends himself injured in this matter, and has an interest to shew that this judgment was not duly obtained, he may be heard; but while such a sentence remains unimpeached, I apprehend it is conclusive. The sentence now before your lordships is a sentence in a cause of jactitation. It has been supposed upon the authorities, many of which have been cited to your lordships to-day, that when a sentence determining upon this point has been offered in any court coming in incidentally, it has been constantly received: but, my lords, it has been received with this restriction, as it is laid down expressly in Blackham's case, which has been already quoted, it must be where the marriage has been directly in issue; for if it be an incidental point only, it would not then be satisfactory. In Blackham's case, where the question arose upon the grant of an administration, it was argued, that the Ecclesiastical Court having determined upon that administration, they had virtually determined the marriage, and therefore it was binding upon all parties: but it was said, No, the question must be originally and directly upon the marriage, or it shall not have effect; and the distinction seems to be exceedingly good.

My lords, in order to bring the present case therefore within this principle, it is necessary to shew, that the sentence now under your lordships' consideration is a direct determination upon a marriage; because if it be not, it would be liable to the objection which I have now stated.

My lords, the proceeding is that of a cause of jactitation, which is begun by a man or woman: in this cause it was the woman calling upon the person who claims to be the husband, for having boasted and asserted that lady to be his wife, to abstain from such assertions for the future.

My lords, here the question originally seems to be, whether the person called upon had ever really claimed the lady. In that stage of the cause, if the claim had not gone as far as a justification, some of the books assimilate this proceeding to a cause of defamation, supposing it to be a case of words only; and when upon a marriage being pleaded to justify the claim, the question turns upon that marriage, it may perhaps be argued, that it is not a direct case of marriage, but an incidental one only: it may not therefore be improper to consider it in this case, lest such an observation should be made. I take it, that when in a cause of jactitation the defendant gives in a plea stating a marriage, and that marriage is contradicted by the plaintiff, though it is intended indeed as a defence to the accusation for which he is called upon to answer, that of having claimed the lady, yet the question then alters its nature; the plea is not only intended to entitle the defendant to his admission, but the court is then in possession of the question, whether there was a marriage between the parties, and the determination is direct upon a marriage. If the marriage be proved, there is the same sentence passed as in a matrimonial cause; there is a sentence directly pronouncing there was a marriage, the parties are pronounced to be man and wife, and they might be admonished to restore to each other conjugal rights. If, on the contrary, the defendant should fail in proof, the determination is this, that the party has failed in his justificatory matter; and the sentence in this case goes, that the judge has found that he has failed in the proof of the marriage alleged to have been had between them, he is declared to be free from all matrimonial contracts, and injoined not to boast in future; it would be therefore a fallacy to argue, that this is not a direct determination of the question of marriage: it is indeed ingrafted upon the original cause of jactitation, but that is agreeable and consonant to practice in other instances.

My lords, it is not a monstrous thing to assert that a cause may change its nature from its original institution.

(On motion of a Lord, part of the Sentence was read.)

Dr. *Calvert*. Unacquainted as I am with the proceedings of this high and august court, which I never had the honour to appear in before, I conceive it is my duty to take immediate notice of those words which have been read, as I suppose they were called for, because I ought to confine my observations to them before I go any farther. The lady, who is the object of that enquiry, is pronounced to be a spinster as far as yet appears.

My lords, these words are inserted in this sentence, and I apprehend are in every sentence of this nature; the purport of which, I trust, means this, that the case is open to future disquisition upon the principles that have been already stated; that though the judge determines upon the evidence that is then before him, yet the parties having an interest to bring that question on again, may be heard. As far as yet appears to us, says the judge, the lady is free from all matrimonial contracts; and as long as that sentence remains, I mean to argue that it is a conclusive sentence. I don't mean that the Court is precluded from another enquiry; I have stated, that no parties are precluded from another enquiry; and I conceive the meaning of those words are to express, that according to the light which then appears to the Court, the Court pronounces the sentence. But a sentence of that sort is not from thence to be argued to be nugatory, and that the Court determines nothing: the Court determines upon what it has heard; and as long as that sentence remains, that is the way in which I meant to put it, it is decisive and conclusive.

My lords, I have said, that though the cause

began originally upon the one party calling on the other to justify his claim as husband in a cause of jactitation, it is nothing monstrous to suppose it has so far changed its nature as to become a marriage cause; and I will mention other cases in which the ecclesiastical courts, as is well known to the practitioners in those courts, adopt and admit of a similar practice. Suppose, for instance, a man was to bring a suit against his wife for the restitution of conjugal rights; in bar of that restitution, the woman may plead adultery or cruelty in the husband, which is certainly a reason against admonishing her to return home to her husband. But, my lords, this is not all that the Court would do in such a case; for she having pleaded adultery, that plea becomes in fact a libel in the cause, and it will become a cause of adultery; and I have known within my memory, and since my attendance at the bar, instances of that sort. In a case of Mathews and Mathews, determined in 1770, in the Consistory of London, the wife pleaded adultery in bar to restitution; the cause went on in that suit, and there was a sentence of divorce: would any body contend, that it was not as direct a sentence of divorce, as if it had been so originally instituted? and in case either of those parties had married again during that divorce, and an indictment had been preferred for polygamy, can it be contended that this sentence of divorce would not be a defence under the proviso in the body of the act?

My lords, another instance: suppose a man brings a suit for separation by reason of adultery against his wife; the wife may recriminate, and may give in an allegation pleading adultery in the husband. The prayer indeed on each side would be for a separation; but there is a very considerable difference between a sentence for separation formed upon a crime being in the man or in the woman, whether it is at the suit of one or the other: but if the party that is defendant in the original suit should go on and prove that adultery, and the plaintiff should not, the defendant would be entitled not only to a dismission from the suit the plaintiff originally brought, but to a separation upon account of the adultery pleaded by the defendant.

I mention these cases to shew, that it is not enormous to suppose, that though the original question might begin in a cause of jactitation, yet the marriage being pleaded, the sentence either one way or the other is and must be as determinate as if the question had originally been upon marriage. There is a case that was litigated in the Ecclesiastical Court not long ago, and which at the time was much talked of, and is well known; I mean the case of Mr. Thomas Hervey, who brought a suit of jactitation of marriage in the Consistory Court of London against Mrs. Hervey. In that court a marriage was pleaded; the sentence was against that marriage; the same was affirmed in the court of Arches; but when it was appealed to the court of Delegates, they reversed this judgment, and pronounced for the marriage; pronounced not only that Mrs. Hervey was justified in her jactitation, but pronounced expressly and directly for the marriage; and I believe nobody will doubt, but that marriage was as conclusively determined between them as if it had been originally a marriage cause, or a suit of nullity of marriage. That these sentences have been held to be conclusive in the courts of common law where they have been offered, those many instances that have been mentioned seem to me to put it out of all doubt.

It will not be improper to consider what effect a sentence of this sort would have in the Ecclesiastical Court; and I shall contend, that while a sentence of this sort is existing, a wife could not be heard to have any claim upon her husband; she could not claim the restitution of conjugal rights; there is no light in which she would be understood to be the wife until the marriage be again brought into question. There is a case in print that seems to me to go exactly to the point I am now contending for; it is in the case of Clews and Bathurst, which has been mentioned already to your lordships, as reported in Strange, 968. But, my lords, that case is reported likewise in another book, a book lately published, which I am told is good authority, and the cases well and correctly taken; it is called, Cases in the time of Lord Hardwicke, and it is to be found in page 11. There the case is stated a little more at large; and a case is said to be quoted by Dr. Lee, of Mellisent and Mellisent in the year 1718. In that case a woman had claimed to be the wife of a Mr. Mellisent. Mellisent libelled her in the Ecclesiastical Court in a jactitation of marriage. She pleaded a marriage, but failed in the proof; and there was a sentence, I apprehend, of the same sort as in this cause. After the death of her husband the woman would have made out her right to the administration, and for that purpose she pleaded her marriage; that must have originally began in the inferior court, and from the nature of the suit, I suppose, came from the Prerogative; but, however, the determination I am alluding to was in the court of Delegates: it was determined, as there remained in force a sentence which was a bar to her, she could not be heard to make out her case as a widow to the deceased. Your lordships very well know, that though the Prerogative is an ecclesiastical court, yet the jurisdiction of that court is confined merely to probates and administrations, and it does not entertain causes of marriage. Mrs. Mellisent there claiming as the widow of the deceased in that court where the sentence of the marriage could not be set aside, it was held, there being a sentence in a cause of jactitation, in which the marriage was pronounced against, she could not claim as widow. In that case the Prerogative Court held the same, as we are contending your lordships will upon this occasion.

There was another case in the Prerogative

Court in the year 1771, lady Mayo against Brown. The question arose upon an administration to Gertrude Brown, who died intestate. Administration had been granted to Stephen Brown as her husband, he having married her in the year 1720. Afterwards that administration was called in by lady Mayo, a daughter by a former husband; and she contended that Brown had no right to that administration, inasmuch as at the time he married Gertrude he was already the husband of one Eleanor Cutts. In answer to that it was pleaded, that there had been a suit of jactitation of marriage brought by Brown against Cutts, in which the marriage was pronounced against, and he was pronounced to be free from all matrimonial contracts with Eleanor. In answer to that, another plea was given, stating that it was a collusive suit; that they could shew fraud and collusion. The admission of this allegation came on to be debated before the judge of the Prerogative; and thus far the judge said: there being a sentence now in another court (this was in the Prerogative that had not jurisdiction of marriage, there being a Consistory of London) by which it is pronounced that this person was free from matrimonial contract, this court cannot admit this allegation: and all proceedings in that court were stopped, that is, that allegation was not admitted, till the party, if she thought proper, might go to the proper court to reverse it. Nothing has been done in that cause since; and I conceive in all probability never will: I apprehend therefore that this sentence, which is now under your lordships' consideration, must, as long as it remains in force, be held to be conclusive, for this reason; because though it can be enquired into, yet it is not now even in a way of litigation; nothing has been done to repeal it, nor are there any steps towards it, but it remains in its full force.

My lords, the learned gentlemen who have gone before me have thought proper, in order to obviate any objections that may arise, to consider what would be the case, supposing it should be urged by the counsel on the other side, that the prosecutor would undertake to shew that this was a fraudulent sentence, and obtained by collusion. My lords, the reason of our mentioning that is, not on supposition or belief that there would come out any such practices in the present cause, but that, taking it up as we do as a previous question, it is our duty to consider it even in the most disadvantageous view, and to maintain, that in no case which they can suppose ought evidence to be received against the sentence: and upon that head I apprehend that every argument which can be adduced to shew that the consideration of truth or the want of truth in such a sentence ought not to be gone into by this court, may with equal propriety be applied against going into the question of collusion, because that court which gave the sentence is open to that enquiry, and, I apprehend, alone proper and competent to the purpose. How vague and unsatisfactory must be the enquiry of different courts proceeding upon different matter, different principles, even the terms made use of quite different! Should they enquire into the question, whether the proceedings were fair or not, it may be productive of error. Suppose it should be shewn in some particular that there was evidence supplied, how would it appear the judgment did depend upon that ground? Their entering into the proof of collusion would be as strongly exceptionable as their enquiring into the right or propriety of the sentence, whether it was duly and rightfully pronounced by the judge, which is an exercise of jurisdiction which no independent court has over the sentences or judgments of another. Your lordships are well acquainted, that there is no appellate jurisdiction in a criminal court over an ecclesiastical court; the question can only be, whether that sentence shall be received as final and conclusive: but the method in which it was obtained, whether it was rightly and duly pronounced, are very good questions for a court of appeal, which can reverse that sentence; but an enquiry into the method of obtaining it is improper, as long as the sentence remains. If then a sentence of this sort will be held to be conclusive and satisfactory in all civil questions, and I conceive the authorities which have been quoted will be sufficient to establish that principle, surely it will much more strongly apply to all criminal cases; because your lordships will see it to be the strangest proposition to maintain, that when a man or woman are not to be considered as husband and wife to any civil purpose, yet they shall be so only for the purpose of punishment: this surely would be the greatest absurdity. Yet supposing the sentence not repealed, which imports the man and woman are not husband and wife; and suppose that be the general sentence that ought to apply to them in every situation whatever, though the criminal jurisdiction should go on to pass censure upon the person accused (for that is all the criminal jurisdiction can do) that will not destroy the sentence in the Ecclesiastical Court, and they will remain not husband and wife, though the criminal court should punish one of them for what is supposed a second marriage.

My lords, I suppose it will not be contended, that a determination before a criminal judicature ought to have the effect of a determination directly upon the marriage: I apprehend, that in point of law it cannot be supposed it should be so argued. Your lordships will see the injustice of such a proceeding then would be prodigious, because then a criminal jurisdiction must determine upon the rights of many persons who have not a possibility of being heard. Keep their question in the civil court, adhere to the determination of that court that has an original jurisdiction, there all parties might have been heard, and they may in future, if they can set up any interest; but a determination in a criminal court that might apply in the most remote degree to determine

civil causes, would be the most manifest injustice, because no persons could be heard for their interest.

The question for your lordships' determination, if it should be ever gone into, will be upon the marriage said to be had with Mr. Hervey. Any determination here that may affect that right, may affect not only the persons that were immediately the parties to that suit; but your lordships see many connections arise upon marriage, many relationships and new claims that may be precluded by such a sentence as this. Suppose the duke of Kingston had had children by his marriage, it would be as much their interest to establish this sentence, as it would be of interest of any other to impeach it; and that such rights as these should be determined in a criminal jurisdiction where the parties cannot be heard, I apprehend, is a position that never was yet maintained.

Upon these principles, I hope your lordships will be of opinion, that the rule ought to be applied as well to questions that can arise in criminal jurisdictions as in civil ones. That criminal courts have determined upon these principles, there are cases which have been alluded to, and which are, I apprehend, extremely pertinent. One is the case of the King against Vincent, Strange 481, mentioned to be an indictment for forgery in having forged a will. The reporter says, forgery was proved, but the defendant produced a probate under the seal of the ordinary: and if was held, that that was satisfactory proof of the validity of the will. That is a very strong case; but that there is no right to determine upon civil matters in such a way as this, or even to prejudice civil matters, is very clear in that report.

My lords, there is another case reported by the same author, sir John Strange 703, the king against Rhodes, that came before the King's-bench, when sir Robert Raymond was the chief justice. That was upon an indictment likewise upon a forgery for having forged a will. That will had been proved in the Ecclesiastical Courts. My lords, it appears by this report, that it was not only a probate in the common form, it was when there had been a long litigation in the Ecclesiastical Courts, and when by a decree of the court of Delegates the will was pronounced for. Upon application to the King's-bench for a Habeas Corpus *ad testificandum*, the Court there decreed not to issue the writ for this reason, because it appeared that there was then existing a direct sentence for the will; and that sentence if it had been pleaded in bar to going into the question of forgery, I apprehend, would have been allowed to be conclusive evidence; for the Court said, it was not fitting to determine the property on an indictment. It likewise appeared, that though there had been a sentence of the court of Delegates pronouncing for the will, that yet there had been an application for a commission of review; so that it was within the knowledge of the Court that the cause was in a means of having a revision. But it was understood that the sentence still remained perfectly in force; for your lordships know perfectly well the difference between an appeal and an application for a commission of review: in case of an appeal, the sentence is suspended, but not so on an application for a commission of review. By the statute of Henry 8, it is provided, that the sentence of the Delegates shall be final, and no appeal shall be had from them; but it is now indisputable law that the king may by his royal prerogative, upon a personal application, and a special case laid, direct a commission for reviewing the sentence: but there is no appeal; the sentence remains the same, unless the reviewers in their judgment shall think proper to reverse it. In this case it appears, that there was then existing a full and direct sentence upon the validity of that will. It was understood then that this right had been pleaded by the defendant, and the chief justice stopped the proceeding, and did not even grant that motion which was then sent. These two cases, I am told, have been recognized again in that court in a very late case of a man who was executed for a forgery, one Perry; and I am told the judge at that trial offered to the prisoner to put off his trial, if he had a mind to make use of that plea: but I am told, it was not accepted by the prisoner, and the trial went on. But this I am sure, no use can be made of that case to shew, that the former determinations were at all impeached by it; because at least, if the probate was not insisted on by the defendant; consequently not over-ruled by the Court, these cases then remain in their full force. And I will ask, in what manner they may be said not to be applicable to the principle we are contending for, that in a criminal court, cases of this sort ought not to be gone into? Will it be said, that this being a prosecution under a special act of parliament, the crime consists in having married two persons, that the marriage must necessarily come under the consideration of that court which is to determine? and they cannot by the act of parliament itself acquire an original jurisdiction to enquire into the right of marriage. Does not it apply exactly as strong to the case I have now alluded to of forging a will; for it is by express act of parliament made a felony of death to forge a will; and it may as well be argued from hence, that every criminal court has by that act acquired an original jurisdiction as to wills. It cannot be argued a moment, that a criminal court has original jurisdiction of marriage. I do not say, when it has not been determined before, but that the Court must necessarily enquire into the fact; but that it cannot originally entertain such a question. Now there cannot be a case stated wherein a question was between the parties upon the validity of their marriage and upon their state of man and wife, to shew that it can be determined by a criminal court. If it cannot, I conceive clearly, it cannot be said to have original jurisdiction upon the point, the fraud

and collusion; which, for the reason that has been given, it was thought proper to mention, lest it should be made use of upon the other side. It will be said perhaps, that there are many instances where parties trying to avail themselves of a judgment, or the sentence of another court, of the adverse parties being allowed to shew that those sentences were obtained collusively: this distinction I conceive has been made. If any court ever is permitted to enquire into the question, it must be a court having concurrent jurisdiction; and then your lordships will see the question upon very different grounds; because a court having concurrent jurisdiction has also the opportunities, all the methods of enquiring into the original question. They being competent to determine the original point, it makes no considerable difference whether it comes before them at first, or whether it has before been determined by another court. It will not be contended, I conceive, that a criminal court has any concurrent jurisdiction with the Ecclesiastical Court. It clearly cannot be so; it can never entertain the abstract question between parties, whether they are man and wife or no. The only way it can be taken up is incidentally; and if the authorities are good to shew, that where an incidental question arises, if it has been determined by a court having original jurisdiction, it ought to be conclusive, that will apply to the case now before the Court. ' For these reasons, and for those that have been more weightily argued by the gentlemen who have gone before me, I hope your lordships will not think proper to recede from the established and legal principles, or make a precedent on this occasion. But if whatever has been, was upon the strength of former determinations; and if there is good ground in law to say that this sentence ought to be conclusive to the point to which it is now offered; I trust your lordships will be of opinion that the prosecution ought not to be permitted to go into any evidence.

Dr. *Wynne.* Notwithstanding there has been so much and so ably said upon this question, I hope that the duty I owe to the noble person at your lordships' bar, will plead my excuse for offering a few words upon the same side, in support of the sentence of the Ecclesiastical Court, of the effect with a view to which it is now produced before your lordships.

My lords, the duchess of Kingston is now upon her trial, upon an indictment found against her grounded on stat. 1 Ja. cap. 11, for that being the wife of Augustus John Hervey, she married the duke of Kingston, the said Augustus John Hervey, her former husband, being then alive. The foundation of this whole proceeding therefore is a marriage alleged in the indictment to have been had between the duchess of Kingston, at that time Mrs. Elizabeth Chudleigh, and Mr. Augustus Hervey.

That marriage, my lords, is the only fact that can make any criminality in the present case; and if it shall appear to your lordships a fact, which has been already enquired into and decided upon; that it has been put in issue in that court which alone could properly take cognizance of it; that that court has pronounced its sentence against the marriage then put in issue, or any matrimonial contract between Mr. Hervey and Mrs. Chudleigh, who were the parties to that suit; and that this sentence still remains in force; it is submitted to your lordships to be impossible that those who are prosecuting this indictment against her grace, can be allowed to go into an examination of witnesses upon that marriage; it being a fact now decided by the legal sentence of a proper court, and consequently not the subject of that kind of evidence which the prosecutors are, we presume, endeavouring to offer to your lordships upon it, as if it had been a question upon which no sentence had ever been given.

My lords, the sentence, upon which we rely, was passed in the month of February 1769, and it recites all the proceedings had in that cause prior to the sentence, and which are sufficient, as we apprehend, to found that effect which we contend it ought to have before your lordships. The sentence recites, that a suit had been brought by the duchess of Kingston against Mr. Hervey for boasting that he was her husband; that Mr. Hervey appeared in that cause; that he admitted and justified the jactitation; and alleged, that he was well warranted in making such jactitation, for that he was actually married to the lady: by that means they were at issue upon the fact. The sentence goes on to say, that he had entirely failed in the proof of the marriage which he had pleaded and propounded; in consequence of which the Court pronounces Mrs. Chudleigh to be entirely free from all matrimonial contract, and particularly with the said Mr. Hervey, ' so far as to us as yet appears;' and upon that goes on to admonish him to cease from farther jactitating in that behalf. The question now for your lordships' consideration therefore is, what is the effect of that sentence? And I contend that in the way in which this cause was proceeded in, it is as decisive, as absolute a sentence against the marriage, as the Ecclesiastical Court has power to give.

If the party who is accused in such a suit does not justify the jactitation by pleading a marriage, it is otherwise; for in that case, whether the fact of jactitation is admitted or denied, the sentence is only upon the jactitation, not upon the marriage. If the jactitation is admitted, and is not justified, the party is admonished to do so no more; if the jactitation is denied, the only question before the Court is, did the party jactitate or not? and if the jactitation is proved, the sentence is the same, viz. a monition to cease from doing so for the future. But if the party cited confesses the jactitation, and justifies it by pleading that he or she was and is actually and lawfully married to the other party who has brought the suit, it is no longer a cause of jac-

titation, it is as much and as directly a marriage cause as a cause of nullity of marriage, or a cause for restitution of conjugal rights. It is as absolute and decisive proof of this, in my humble apprehension, that if the party cited in a cause of jactitation pleads and proves a marriage, the court does not in that case dismiss, and say, The party it is true jactitated, and had a ground for jactitating, therefore we dismiss: no, the court pronounces for the marriage. And I take it to be most clear, that such a sentence having been pronounced in any ecclesiastical court, if the party cited should immediately pray restitution of conjugal rights, the court will grant its monition grounded upon that sentence, that the parties who were proved to have been lawfully married, should cohabit and perform the duties of their marriage. It will not I presume be contended, that any court can deal so very unequal a measure of justice between parties, as to say, If a marriage is proved, we will pronounce for it; and yet in a cause of exactly the same nature, if a party pleads a marriage, and fails in the proof of it, we will not pronounce against it. The supposition is absurd and shocking to common sense; and it is impossible that such a cause as a cause of jactitation could ever have been in use, if the party who brought it might lose his cause, and be engaged in a marriage he was desirous to avoid, but could never obtain any sentence against the party jactitating, that would have any legal effect. It is impossible, with great deference to your lordships, that such doctrine should ever have obtained; but the truth is directly the reverse, and in all courts where these sentences against a marriage in a cause of jactitation have been produced, they have been allowed to be as decisive as any sentence in an ecclesiastical court in a marriage cause could be. In the case of Jones and Bow, reported in Carthew, it is expressly said, that it was a cause of jactitation. In the case of Clews and Bathurst, which has been mentioned to your lordships, it was a cause of jactitation; and I rather rely upon that case, because it appears by the report of it in the book intitled Cases in lord Hardwicke's time, p. 11, Hil. 7 Geo. 2, that it was attended by as able a civilian as any of his time, Dr. Lee, afterwards dean of the Arches: he argued in that cause, that a sentence against a marriage in a cause of jactitation is an absolute and decisive sentence. And it appears from the report, that he quoted another case, which was that of Mellisent and Mellisent; in which it had been so held in the Court of Delegates, which your lordships know is a court of appeal in ecclesiastical causes, in which there are both judges of the common law and civilians. The case which was last alluded to, and which was in the Prerogative Court, your lordships will allow me to state a little more fully, because it will shew the opinion of the great judge who now presides in that court. It was upon the right of administration to one Mrs. Gertrude Brown. The question was between Stephen Brown, who alleged himself to be the husband, and the lady viscountess Mayo, the daughter of the deceased by a former husband. The marriage between Brown and Mrs. Aylemore, which was the deceased's former name, was not denied; but lady Mayo insisted, that at the time of the marriage with Mrs. Aylemore, Mr. Brown had another wife at that time living, whose name was Eleanor Cutts. Mr. Brown to that replied, that he had brought a cause of jactitation in the consistory court of London against Mrs. Eleanor Cutts, and that sentence had been pronounced exactly as in the present case, and that he was free of all matrimonial contracts with said Elizabeth Cutts. Lady Mayo then offered an allegation, in which she pleaded, that the sentence in such cause of jactitation had been obtained by collusion; and annexed to that allegation she exhibited many letters between Stephen Brown and Elizabeth Cutts, by which it appeared, that after the date of the sentence they had corresponded together; that he had acknowledged himself to be her husband in several of these letters, but told her it would be exceedingly inconvenient to his affairs, and entirely destroy his claim to the administration of Mrs. Aylemore, which was of some considerable value to him, if his marriage with Mrs. Cutts was known, and therefore desired her to be silent, and not give him any further trouble: that was the effect of lady Mayo's allegation. The moment that allegation was brought into court, the proctor for Brown desired that the proctor for lady Mayo might be asked, whether he confessed or denied the subscription of the officer who authenticated the copy of the sentence given in the cause of jactitation? which being confessed, and the sentence by that means regularly proved, the judge said he could go no farther; he could not enquire upon what grounds that sentence was given, but would give a time to the party, if she thought it for her interest to apply to the consistory court of London, and see whether that sentence could be reversed; but it was held, that so long as it remained in force, it was decisive upon the question of the marriage, and absolutely binding upon the judge of the Prerogative Court.

This being the case then, the question for your lordships' consideration now is, what effect the sentence given in the consistory court of London, in 1769, in the cause of jactitation of marriage brought by the duchess of Kingston, then Mrs. Elizabeth Chudleigh, against Mr. Hervey, should have in the present cause before your lordships? My lords, it would be a very unpardonable waste of your lordships' time, at this hour of the day, for me to take up a moment of it in arguing, that marriage is by the law and constitution of this country of ecclesiastical cognizance. There cannot be a doubt, that if there be any impediment to the marriage of two people living together as man and wife, that if one of the parties denies either the fact or validity of the marriage, that if one of the parties refuses to perform the duties of it

by cohabitation, that if one of the parties treats the other with intolerable severity, that if a person boasts of a marriage which he cannot justify, or if some kind of contract or solemnity passed between parties which may occasion a doubt whether it amounts to a lawful marriage or not; in every one of these cases the Ecclesiastical Court has cognizance to decide upon the questions that arise; and it is a denial of justice to refuse it, and would be a just ground of appeal to a superior court.

It is true, that in some cases where a marriage is brought not directly, but collaterally and consequentially in question, as where it is a question of legitimacy in order to make a title to an inheritance, it may originally commence in the temporal courts, and sometimes is finally determined there; as in the case of what is by common law called special bastardy, that is, where there is no doubt about the marriage, but about the priority or posteriority of the birth of the party who is claiming the inheritance to that marriage; there, it being a mere matter of fact, whether the person was born before marriage or after, it is proper for the jury to determine; and there is no need of the interposition of the Ecclesiastical Court at all. So in other cases, where the matter begins as a question upon an inheritance. A person makes a claim to an inheritance as being the lawful son of A and B. If the parties to the marriage or one of them be dead, the application must be made originally in this case to the temporal courts, and they will proceed in it, and will either determine it finally, or direct a case to the ordinary to certify upon the marriage, according as they find it necessary to do, and according as any question arises upon the legality of the marriage or not. But even in this case, which is merely a question upon a right to an inheritance, and not between parties to a marriage, but between parties claiming under a marriage, if one of them produces a sentence formerly given upon the marriage by the Ecclesiastical Court in the life-time of the parties to such marriage, the moment that sentence is produced, the court of common law is estopped; and notwithstanding the original parties to that sentence are dead, the parties to the suit upon the inheritance must still have recourse to the Ecclesiastical Court to repeal the sentence formerly given upon the marriage, before the temporal court can proceed a step further: and if this sentence of the Ecclesiastical Court is not set aside, the judgment of the temporal court must be agreeable to that sentence. The cases of Bunting and Leppingwell, and Kenn's case, reported by lord Coke, are decisive upon this point: and it would, I should conceive, in framing your opinion upon the credit due to the doctrine laid down in these cases, be worth one moment's consideration at what time the latest of them was determined. Kenn's case was in the fifth of king James the first. Your lordships know extremely well, that was a time when the different jurisdictions of the temporal and ecclesiastical courts were not so completely settled, or at least that settlement was not so completely acquiesced in, on the part of the ecclesiastical courts then, as it has been since: they did frequently desire to arrogate to themselves more jurisdiction than the temporal courts were willing to allow; and the consequence of that was, they were very frequently withstood. This produced a complaint to the privy-council in the 3rd of king James 1, when archbishop Bancroft, in the name of the whole clergy, exhibited a set of articles against the judges of the realm (as lord Coke expresses it, 2d Inst. 601,) entitled, 'certain articles of 'abuses which are desired to be reformed in 'granting prohibitions.' These articles were delivered to the judges, who in the 4th of king James made their reply to them; in which they justified the proceedings objected to by the archbishop in every particular, and that not without some considerable degree of warmth and resentment. Now, with great deference to your lordships, I should conceive, that a resolution solemnly and unanimously made by the two chief justices and five other judges of the common law in the very next year after such a dispute as this had been carried on between the two jurisdictions, cannot well be suspected of partiality to the Ecclesiastical Court: and lord chief justice Coke, who was one of the court, was not a judge that would at any time have stood up for their encroachments; and therefore there is not the least room to apprehend, that there was any undue or improper degree of authority attributed by that resolution of the judges to sentences of the ecclesiastical courts.

My lords, this case of Kenn, which is reported 7 Coke, 43, has been already opened to your lordships: but it being in my apprehension extremely material in this cause, containing the whole learning that is to be met with in the book upon the subject, and going the whole length, as I humbly submit to your lordships it does, that it is our business to contend for in behalf of the noble person at the bar, your lordships will not perhaps think it mis-spent time in me to state it more particularly. It was a case in the court of Wards, in which Thomas Robertson and Elizabeth his wife were plaintiffs, and Florence lady Stallenge defendant. The case was, that Christopher Kenn *de facto* took to wife Elizabeth Stowell, and had issue by her Martha; soon after this, there appears to have been a suit brought in the court of Audience, in which the judgment given was in these words: "prætensum contractum et matrimonium inter Chr. Kenn et Eliz. Stowel in minore ætate eorundem aut eorum alterius habitum fuisse: eosdemque Chr. et Eliz. tam tempore solemnizationis dicti matrimonii quam etiam continuo postea, eidem matrimonio dissensisse, ac eo prætextu hujusmodi matrimonium irritum et invalidum fuisse: necnon antedictos Chr. Kenn et Eliz. Stowel ab dicto matrimonio separandos et divorciandos fore pronunciamus, eosque separamus et divorciamus, iisdemque Chr. et Eliz.

libertatem ad alia vota convolandi concedimus per hanc sententiam nostram definitivam."

My lords, after this Kenn married another wife, Elizabeth Beckwith; and after this it appears that Elizabeth Beckwith brought a suit before the commissioners ecclesiastical to enquire again into the validity of the marriage between Christopher Kenn and Elizabeth Stowell: there that marriage was again pronounced against, and the marriage of Christopher Kenn with Elizabeth Beckwith was affirmed. Then Elizabeth Beckwith died, and Christopher Kenn married Florence, by whom he had issue Elizabeth, and then died. At last the question came on between the issue of Christopher Kenn by Florence, and Martha the issue of said Christopher Kenn by his first wife Elizabeth Stowell, who desired she might be permitted to aver against the sentence formerly given against the marriage between Christopher Kenn and Elizabeth Stowell, declaring that she could prove, that the whole was founded on an absolute falsehood; and that those parties, who are declared by the sentence of the Ecclesiastical Court to have been married in their minority, and to have dissented to the marriage in the moment it was solemnized, and ever after, had cohabited as husband and wife for ten years, and had issue Martha, the party before the court. This the said party avowed, and undertook to prove in the court of Wards, in order to avoid the effect of the sentence of the Ecclesiastical Court against the marriage between her father and mother. But it was resolved by all the justices and barons, that the said sentence should conclude as long as it remained in force. And in answer to the averment that the sentence was founded upon false facts, they said, that though the ecclesiastical judge sheweth the cause of his sentence, yet forasmuch as he is judge of the original matter, the loyalty of matrimony, we shall never examine the cause, whether it were true or not: for of things the cognizance whereof belongeth to the Ecclesiastical Court, we must give credit to their sentences, as they give to the judgments in our courts. In that same case it was, that lord Coke quoted the case of Corbett, and there there had been no sentence in the Ecclesiastical Court: that originally began upon the question of a right to an inheritance; and the party who claimed the inheritance was advised to bring a suit in the Ecclesiastical Court there against a woman who jactitated, as he said, of an undue marriage with his elder brother. The party against whom this suit was brought in the Ecclesiastical Court applied for a prohibition, and the temporal court granted it; for they said, there is no sentence of the Ecclesiastical Court in this case for you to reverse, no sentence has been given; therefore we will enquire, as far as we see we can do without interfering in matters of mere ecclesiastical cognizance, respecting the loyalty of the marriage; and we may direct the ordinary to certify hereafter, if there is a necessity for it; but there is no need to apply to the Ecclesiastical Court in the present state of the case.

In exact conformity to this principle, it was resolved by the judges of the common law in the case of Bunting and Leppingwell, 4th Coke, 29, forasmuch as the cognizance of the right of marriage doth belong to the Ecclesiastical Court, and the same court hath given sentence in this case, the judges of our law ought (although it be against the reason of our law) to give faith and credit to their proceedings and sentences, and so always have the judges of our law done: and so it was resolved, that the plaintiff was legitimate and no bastard.

This is the light in which the sentences of the Ecclesiastical Courts, given in matters properly within their cognizance, were considered in the courts of common law at the time when the cases I have just referred to were determined; and there is such a train of cases exactly conformable to them down to very modern times, which have been already quoted, and therefore I will not trouble your lordships with repeating them, that I cannot help thinking it must be looked upon as a point absolutely settled and at rest.

But, my lords, not to rest the matter merely upon authority, however strong, if your lordships consider the grounds upon which these determinations were made, I apprehend they will be founded, not only in justice, but in absolute necessity; and that the confusion would have been so infinitely great, if, admitting different courts to take cognizance of different matters, their sentences should not be allowed to take effect when they were given, but the matter might be examined over again, and a different sentence given in another court, the former sentence remaining unrepealed, that there would be no possibility of enduring such a practice. Consider for a moment what effect it would have. Suppose a man to have brought a suit for jactitation of marriage against a woman in the proper Ecclesiastical Court; that she should plead her marriage by way of justification, and obtain a sentence for it: the man dies intestate after that, and she applies to the Prerogative Court for an administration as the widow: the next of kin of the deceased appears there, and denies her to be the lawful widow: in proof of which she produces the sentence; is the Prerogative Court to give credit to this sentence or not? If it is to give credit to it, (as it does daily) the reason is because it binds universally as long as it is in force; for, though they are both Ecclesiastical Courts, there is no more privity between the Prerogative Court and the Consistory Court of any diocese, than between the Prerogative and the court of King's Bench. The Prerogative Court has the mere cognizance over probate and administration; and therefore if universal credit is not due to the sentence of the Court which pronounced for the validity of the marriage, the Prerogative Court must in the case supposed go into the question over again, whether the party de-

ceased and the party claiming to be his widow were married or not married. The Prerogative Court is an ecclesiastical court, and proceeds upon the same rules, so far as they are applicable: it proceeds in the same manner by allegation and by written evidence; the judge is a person bred in the same profession; and the practicers are the same with those that practise in the Consistory Court of London; and therefore there is a probability that the Prerogative Court in this case might agree with the judge of the Consistory in opinion that the marriage was a good one, and consequently decree the administration to the party praying it as the widow. What would be the consequence of that? Why, the party would have had two law-suits instead of one, and have got by them two pieces of paper called sentences for her marriage, and letters of administration, but she would not be a bit the nearer getting possession of the deceased's effects. For these she must apply to a court of common law; and there, according to this doctrine, the first person she is obliged to bring an action against will be at liberty to say, Who are you?—The administratrix and widow.—No, I deny that: it is true, you have obtained a sentence for your marriage and an administration from the Prerogative Court as the widow; but those sentences were founded upon false facts: therefore I object to them, and desire there may be a third suit to have it enquired into in this court, whether there was a real marriage or not. Now, supposing that in this third suit a jury should be of a different opinion from the two former courts, what would be the consequence? Why, that the party who brought a suit for a debt would be non-suited: so that here would be a legal administration subsisting (unless the court in which the action was brought could repeal it and grant a new one, a power which I believe no temporal court has ever yet exercised) but the hands of the administrator would be absolutely tied up, the effects could never be administered, the debts of the testator could never be called in, the estate could never be distributed. Your lordships see plainly that the confusion would be so extreme, if this doctrine was to prevail, that no error in a sentence, however apparent, nor any inconvenience arising from it to particular persons, however great, can be a sufficient cause for any court to examine into the merits of a sentence given in a matter of which itself has no legal cognizance; and that there is the utmost wisdom in those resolutions which declare, that there is an implicit credit due from all other courts to the sentences of courts having the proper jurisdiction over the matter in which the sentence has been pronounced.

My lords, the cases that I have hitherto mentioned and alluded to have been all in civil causes. Will it be said, that the question now before your lordships, being in a criminal cause, that varies the case? and, that although a sentence of the Ecclesiastical Court would be binding and conclusive evidence in a civil cause, yet in a criminal cause it would not have the same effect? My lords, the same effect I can very readily agree that, according to my poor notions of law and justice, it would not have; but I should think it would have ten times greater: and I cannot conceive it possible, that it can be held in any case, or in any country in the world, that a sentence, which would be held to be conclusive evidence to avoid a civil demand against a person, would not be held to be conclusive evidence and defence against a criminal prosecution: I cannot conceive that to be possible. 'In penalibus causis benignius 'interpretandum est,' is a maxim of universal law. Undoubtedly it is the business of all criminal judicatures to enquire strictly into crimes; to punish those acts which the law has made criminal, and which are legally proved; but courts of law do not strain points in order to make crimes, and inflict punishments; it never was so contended: and I do conceive that many instances might be enumerated by those who are conversant in the practice of the criminal law, which I am not in the least, in which parties prosecuted are indulged with peculiar privileges. I believe that they are not bound by their first plea. If a party has been ill-advised in his plea, he is bound down by that in a civil cause; but in criminal prosecutions the prisoner may plead over and over again, and is allowed to avail himself of every nicety in the law to avoid conviction.

Upon these grounds therefore I hope it will appear to your lordships to be most clear, that the sentence of the Ecclesiastical Court always has been esteemed and must be allowed to be final, to be the only evidence that can be received concerning the fact upon which it has been pronounced, and that the fact is no longer the legal object of enquiry by any other court. I do apprehend this to be so clearly and fully established, that I can scarce conceive that the gentlemen will deny it; but I apprehend and do expect that they will endeavour to find a distinction. And they will say, Though we should admit your rule, that the sentence of an ecclesiastical court is binding so long as it subsists in general, yet if that sentence was obtained by collusion and fraud, it is otherwise; and if it can be proved to have been so obtained, it will immediately lose its effect. I expect we shall be so told; and I do admit, that to maintain our present point, which is, that the sentence is conclusive evidence, we must say that it is a rule without any exception; we must say, that collusion in obtaining the sentence would not give your lordships any jurisdiction to enquire into the fact: and I do, with great submission, contend before your lordships, that no court which has not an absolute and an entire jurisdiction over a fact, as much as the former court had, can take cognizance of a matter that has been already decided upon in that former court, upon a suggestion or even proof that collusion was used in obtaining the former sentence. I may, and I am

afraid I shall, talk very ignorantly respecting those cases in which the courts of common law take cognizance of matters which have been already decided upon by other courts, upon proof that the decision was obtained by fraud and collusion of the parties at that time before the court. I own I am by no means master of that subject; but I apprehend they are only in such cases where each court, suppose the court of King's-bench and Common Pleas, or any other, has an entire concurrence of jurisdiction; where there was an option in the parties to commence the suit originally either in one court or the other, and where the effect of the sentence of the two courts would be perfectly equal. In such a case, if after sentence given in one of those courts application should be made to the other to rehear the matter, on proof that the former decision was not fairly obtained, this might be a just ground for the court to which proof of the fraud is offered, to say, We will hear the matter over again, which we had a right to have heard as well as the other court had, had it not been that the cause was commenced with them: but I apprehend no court can do this, the sentence of which, when it is given, will not have the same legal effect to the full as the sentence of the former court. Nor can it be said that this court, high and august as it is, or any other court of criminal jurisdiction, can give a sentence upon a marriage, which will have all the effects that the sentence of the Ecclesiastical Court will have. Strip the question of its circumstances, and let it be asked simply, Has the House of Lords a power to try the validity of a marriage? Every body will say at once, It has not. Allow me to consider what would be the consequence if your lordships were to take cognizance of this matter, and were, notwithstanding the sentence of the Ecclesiastical Court, upon the suggestion of collusion, or any other suggestion, to say, We are not barred by it, we will go into it; and that the party tried under such circumstances should be convicted of polygamy: what would be the consequence of that? Would it set aside the second marriage? I take it most clearly it would not. Suppose that after the wife had been convicted of polygamy for marrying B, in the life-time of A, her former husband (a sentence against her marriage with A having first been obtained in the Ecclesiastical Court) she should by any means become entitled to a fortune, by legitimacy or otherwise, would not B. have a right to demand the legacy, or any other effects that came to the woman subsequent to the conviction? I submit to your lordships, be certainly would. Suppose B to die intestate, might not the wife, notwithstanding such a conviction as this, pray the administration to his effects? and if her interest as widow was denied, as having been the wife of A, at the time she married B, and she in reply to this should produce the sentence in the Ecclesiastical Court against her marriage with A, bearing date prior to her marriage with B, the Court could not refuse to grant administration to her. Suppose that after the conviction the parties to the second marriage should continue to cohabit, and should have children, would not they be entitled to the inheritance as the legitimate issue of the second marriage? I take it, that under the authority of the cases of Bunting and Leppingwell, Kenn, and the rest that have been since determined conformably to those cases, there cannot be a doubt that they would, if a question should arise upon the right to the inheritance in a court of common law, so long as the ecclesiastical sentence against the first marriage remained in force: in short, the conviction would have no operation at all upon any civil effect of the second marriage. The consequence therefore of proceeding to convict for polygamy for a second marriage, in a case where there had been a sentence of the proper ecclesiastical court against the first, would be, that a woman who had been convicted of felony for marrying, might under that criminal act (as it would then be pronounced to be) derive to herself all the privileges and advantages that accrue to a wife in the fortune of her husband by a lawful marriage, and convey a title to her issue to the greatest honours and estate in the kingdom. These are such glaring contradictions and absurdities, as I should with great deference apprehend that neither your lordships, nor any other court of justice, would give occasion to, without the utmost reluctance. There is a case or two which have not yet been mentioned, and which appear to me to be extremely material, to shew the extraordinary and unusual steps that have been sometimes taken by courts, and in cases extremely similar to the present, to avoid a contrariety of sentences of courts having different and distinct jurisdiction. In the case of Boyle and Boyle, in the King's-bench in 1687, reported 3d Mod. 164, a libel was admitted in the spiritual court against a woman 'causâ jactitationis maritagii.' The woman prayed a prohibition to the Ecclesiastical Court; and the suggestion was, that this person, who now libelled against her in a cause of jactitation, had been indicted at the sessions in the Old-Bailey for marrying her, he having a wife then living; that he was thereupon convicted, and had judgment to be burnt in the hand; that therefore they had no right to proceed, and therefore a prohibition was prayed. Serjeant Levinz in that case moved for a consultation, because no court but the Ecclesiastical Court can examine the marriage. Upon the contrary it was said, that if a prohibition should not go, then the authority of these two courts would interfere, which might be a thing of ill consequence: that if the lawfulness of this marriage had been first tried in the court Christian, the other court at the Old-Bailey would have given credit to their sentence, and upon this ground and this principle merely, that there might be a contrariety of sentences, which would be mischievous. The court went certainly a great way, for it prohibited the Ecclesiastical Court from proceeding

in a marriage cause *inter vivos*, of which it has the clearest and most uncontroverted jurisdiction.

My lords, another case was that of Fursman and Fursman, which began in the Consistory Court of Exeter: it was a cause of restitution of conjugal rights brought by the woman. The libel was admitted; and then there was an appeal to the court of Arches. The judge pronounced for the appeal, and was proceeding upon the merits of the cause; but upon the 4th of November 1727, he was served with a prohibition. And the ground for obtaining this prohibition was, that Sarah Fursman pretending to be the lawful wife of the said Fursman, had indicted him for bigamy in marrying another wife, and failed in proof of her own marriage; whereupon the said Fursman was acquitted; and therefore it was said the Ecclesiastical Court should not proceed. Now, my lords, if a prior judgment given by a court, in a matter in which it can have only an incidental partial jurisdiction, is a sufficient cause for stopping all subsequent proceeding in the same case, even in the court which has the entire ordinary jurisdiction over the question, on account of the ill consequence that would ensue from the interference of the authority of the two courts; surely, by all parity of reasoning, in a case where it appears that the court, which the law and constitution have entrusted with the entire jurisdiction over the matter in question, has already taken cognizance of it and pronounced its sentence, the court of incidental jurisdiction will give credit to such sentence, and conform its own sentence to it.

If the ill consequences arising from clashing and contradictory judgments of different courts may be allowed to have any influence upon your lordships' judgment in this matter, there is no need to rack the invention for circumstances that might happen: the case before your lordships need but be plainly stated, to shew those inconveniences in the strongest light. The sentence of the Ecclesiastical Court pronouncing and declaring the noble prisoner to be free from all matrimonial contracts with Mr. Hervey, was given in February 1769: soon after, she married the duke of Kingston under the dispensation that is usually granted for the marriage of persons of that rank. Under this marriage the duke and duchess cohabited between four and five years as husband and wife; at the expiration of which the duke of Kingston died, having first made his will, by which he gave the most affectionate and most honourable testimony of his considering her as his wife. At last, in July 1775, comes a bill of indictment, which is to set the sentence of the Ecclesiastical Court entirely at nought, and to brand this open and solemn marriage, confirmed by a cohabitation and reputation of so many years, with the name of a felony.

My lords, if this indictment should be proceeded upon, and the fact of the first marriage found differently from what appeared to the chancellor of London at the time of pronouncing his sentence upon it, the confusion, the scandal (I think I may venture to call it) that would arise from the contrariety of the two sentences that would then be pronounced, and both still in force, would be such, that I cannot conceive that any court of justice would hazard it, upon any suggestion or apprehension of error in the former sentence, or fraud in obtaining it, and which was irremediable by any other means, or any other the most striking or plausible argument that could be urged to induce them to it. But the plea of the necessity of doing an extraordinary act to set aside an improper sentence, or the effect of such a sentence, is certainly less applicable to the Ecclesiastical Court, than to any other court known in this kingdom; and least of all is it applicable to their proceedings in marriage causes. There is a course of appeal in the ecclesiastical courts, a deliberation in their proceedings, that is unknown to any court in this kingdom; from the archidiaconal court (if the cause be originally instituted there) to the consistory of the diocese; from thence to the metropolitical court, which is the court of Arches; from thence to the king in his court of Chancery; from which a commission of Delegates, to hear appeals, issues *ex debito justitiæ*: in every one of these courts the parties are not bound down to what has been given in evidence in the court below: it is not merely error in law, but error in fact likewise may be corrected upon appeal in the Ecclesiastical Court; and if there are any facts material to the point in issue, that have not been pleaded and examined to in the inferior court, they may be pleaded and given in evidence in the Court of Appeal; and so down to the last court. Besides this, in every one of these courts it is not a matter confined to the two parties that institute the suit, and therefore may carry it on collusively; for in any period of the cause a third person, that has any interest in the matter in question, if he sees that the two original parties are colluding, or that one of them is negligent, or if he has any other reason to be dissatisfied with the manner in which the business is conducted, he may intervene for his interest, and the court must *ex debito justitiæ* admit him to do so; he may give in a plea, if he intervenes before the cause is concluded; he may examine his own witnesses, and act in all respects as a party in the cause. What possible human means of providing against collusion and surprize is omitted out of this method of proceeding! But, my lords, even this is not all; for when the cause has run this great length, application may be made to his majesty in council, who, if he is advised that there is a ground for it, has a power *ex gratiâ* to grant a commission to review the whole matter over again. From this view of the method of proceeding in ecclesiastical courts, I apprehend it will appear to your lordships, that they are not so ill provided with means either to avoid, or to reform errors in their

judgments, as to stand in need of the extraordinary interposition of other courts, in any matters that are properly within their jurisdiction; but least of all is this necessary in a marriage cause, for a marriage cause is never at an end: let the cause have been argued ever so often, let it have been sifted with the most scrupulous exactness and attention, let there have been one or more appeals, let every step have been taken that can be taken to give a final conclusive judgment, still the same party may come before the court, and say, The court has been imposed upon; I desire this matter may be examined over again. The court, upon such application, would and must take cognizance of it.

I will trouble your lordships with quoting but one authority for this, which is that of Sanchez in his treatise de Matrimonio, lib. 7, disp. 100, c. 1, who lays it down in these positive and explicit terms: "Id in matrimonio speciale est, ut sententia in conjugali causâ lata, quacunque circumspectione præmissa, sive his ab eâ provocatum fuerit confirmataque sit, sive lapsus terminus ad appellandum sit, nunquam transeat in rem judicatam, ac proinde non ita efficacem auctoritatem sortiatur, quin retractanda sit, quoties compertum, fuerit eam errore quodam latam fuisse." And the reason assigned for making this material and singular distinction between marriage causes and all other causes is, that in general the consent of the party who does not appeal from a sentence which is given against him, gives force and authority to the sentence, though there might otherwise be a ground for him to complain of it. But, says the author before quoted, "sententia per errorem lata in causâ conjugali, transiens in rem judicatam, foveret peccatum, separando veros conjuges, vel uniendo eos qui tales esse nequeunt: at nullam vinculum quantulumcunque multiplicatum, potest firmare actus, ex quo peccatum consurgit."

The same doctrine is laid down in a multitude of other writers upon the canon law, of which there are waggon loads; but they are unanimous in establishing the maxim, "sententiam in causa matrimoniali nunquam transire in rem judicatam;" which I am sure your lordships will not hear denied or disputed by the other side.

From hence it will appear to your lordships, how little ground there is for that notion which seems to have got abroad, that the proceedings of the ecclesiastical courts in causes of jactitation, or any other causes, are such as tend to loosen the bonds of matrimony (which both in a civil and a religious light without doubt is the most essential bond of society) and give parties an opportunity of dissolving it at their pleasure. The court in these, as in all other cases, must determine 'secundum allegata et probata,' according to the evidence before it: but where is the encouragement given to parties to collude, or what security can they have under a sentence obtained by fraud, when that fraud may at any future time be detected, by bringing forward that evidence which was before withheld, and, upon proof that the former sentence was erroneous, another of a direct contrary tendency will be given?

My lords, the marriage, which is the only fact in dispute in the present case, has many years ago been put in issue in the proper manner in the proper court, and a sentence given against it as decisive as any that court can give in a marriage cause: upon trust and confidence in that sentence it was, that the act was done for which the noble prisoner is now accused before your lordships; the sentence is produced, remaining in full force; and, for the reasons that have been urged, we humbly hope your lordships will be of opinion, that it is the only legal evidence that can now be given respecting the fact upon which the accusation is founded, and that your lordships will therefore receive it in bar of any other.*

* Mr. Hargrave, in his Treatise 'Concerning the Effect of Sentences of the Courts Ecclesiastical in Cases of Marriage,' &c. after having stated the numerous authorities on which he founded his conviction of the conclusive quality of sentences by courts having a peculiar jurisdiction, and of the application of that general doctrine to the case of the duchess of Kingston, enters upon the examination of certain objections to his conclusions, viz. 1. That the sentence in this case being *contra matrimonium* hath not the effect of a thing finally adjudged; or, according to the language of the civilians and canonists, 'non transit in 'rem judicatam;' and that as it would not be conclusive to a spiritual court, therefore it ought not to be so to the temporal one. 2. That though the sentence, so long as it remains in force, may bind the lady and gentleman who were the parties, strangers ought not to be affected by it. 3. That the interest of the king is not bound by judgments or sentences in suits between private persons; and therefore that the sentence ought not to be conclusive in proceedings to which he is a party, as he is in an indictment. 4. That sentences of the ecclesiastical courts in matrimonial cases are not conclusive in the temporal courts; because in them the suit is *diverso intuitu*. 5. That the act of the 1st of James the 1st, on which the lady is indicted, having given to the temporal courts the trial of polygamy, they ought, so far as regards that offence, to be considered as having a concurrent jurisdiction over questions of marriage with the spiritual court; and that if they are concurrent, the inference from the determined cases, which chiefly depends on the supposition of a peculiar jurisdiction, wholly fails; and then it will only remain to shew, that the sentence would not conclude a spiritual court of concurrent jurisdiction.

Having set forth his reasons for thinking that the preceding objections are invalid, Mr. Hargrave terminates this branch of his investigation thus:

"The only other objection, which occurs to

Then the Lord High Steward returned back to the chair.

Lord Pres. of the Council. My lords, I move your lordships to adjourn to the Chamber of Parliament.—*Lords.* Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the same order they came down, except the Lord High Steward, who walked after his royal highness the duke of Cumberland; and, the House being thus resumed, resolved to proceed further in the trial of Elizabeth duchess-dowager of Kingston, in Westminster-hall, to-morrow at ten of the clock in the morning.

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me, against the operation of the sentence as conclusive, arises from some few cases, which I observe to have been heretofore cited for that purpose; though I do not see that they in any degree apply.

"One is the case of Hinks and Harris, in which a prohibition, to stay suit in the ecclesiastical court against one for incest in marrying his first wife's sister, was granted *quoad* annulling the marriage; because the second wife was dead, and there was issue of the marriage, and consequently bastardising the issue would have been contradicting a rule of our law, that a marriage *de facto* shall not be avoided after the death of either party. See Carth. 271. See too Co. Litt. 33 a. & b. But this case only proves a right to controul the spiritual courts, where they proceed in opposition to the common law in a point in which it predominates over the law ecclesiastical.—Another case is Hilliard and Phaly, in which the then lord chief justice of the King's-bench on an issue from Chancery to try a marriage refused even to receive as evidence a sentence against the supposed husband for fornication with the supposed wife, and his payment of money in commutation for the penance enjoined. But this case is a single one against all the other authorities, and is unsupported by any reasoning; and the rejection of the evidence was greatly disapproved of by lord chancellor King, when the matter came before him again, though it is not mentioned whether he granted a new trial. See 8 Mod. 180.—As to Emmerton and Hide, which was before lord Holt, and is cited in Comberb. 72, and Skinn. 455, but most fully in 3 Mod. 164, it only proves, that in an ejectment the temporal court may incidentally try the lawfulness of marriage, which is not denied. —The case of Pride and the earl of Bath in 3 Lev. 410, is liable to the same observation."

But though Mr. Hargrave thought that, supposing the sentence in the case in question to have been pronounced in a suit really adverse, such sentence was conclusive; yet he thought that proof of collusion between the parties would take from the sentence its whole effect. As to his discussion of this point, see his treatise.

THE SECOND DAY.

Tuesday, April 16.

The Lords and others came from the Chamber of Parliament in the same order as on Monday, except the Lord High Steward, who walked after his royal highness the duke of Cumberland, and the Peers were there seated, and the Lord High Steward in his chair.

L. H. S. My lords, the House is resumed. Is it your lordships' pleasure that the judges may be covered?—*Lords.* Ay, ay.

Then the Serjeant at Arms made proclamation for silence as usual; and the duchess of Kingston being conducted to the bar,

L. H. S. Mr. Attorney General, you may proceed.

Att. Gen. My lords, I find myself engaged in a very singular debate; upon a point perfectly new in experience, analogous to no known rule of proceeding in similar cases, founded on no principle, none at least which has been stated.

The prisoner, being arraigned upon an indictment for felony, pleaded not guilty; upon which, issue was joined. In this state of the business she hath moved your lordships, that no evidence shall be given or stated to prove that guilt upon her, which she hath denied and put in issue.

The only case cited in support of so extraordinary a motion, that of Jones and Bow, Carth. 295, bears no relation or proportion to it. In the trial of an ejectment, the defendant, admitting the plaintiff's title to be otherwise clear, avoided it by a sentence against the pretended matrimony of his mother with sir Robert Carr; after which both parties married with other persons; a sentence, unimpeached in form of substance, against his own mother, from whom he was to derive title to his estate; decisive consequently as a fine with non-claim or any other perfect bar, and submitted to accordingly; for the plaintiff was called, and did not appear. Here, if the sentence should ever come properly under examination, it will appear to differ in all those respects.

In the mean time, instead of defending, this motion is only putting questions to your lordships, hypothetically, for opinion and advice how to order the defence. If this sentence be, as they argue it, a definitive and preclusive objection to all enquiry, the prisoner ought to have pleaded it in bar, and to have put the prosecutor upon dealing with her plea as he should be advised; or she may still rely upon it in evidence of not guilty. But without placing any such confidence in it themselves, they call upon your lordships to make it the foundation of an order to stop the trial.

My lords, to say that this is wholly unprecedented, goes a great way to conclude against it. To say that such a rule would be inconsistent with the plea, and repugnant to the record as it now stands, seems decisive. After putting herself for trial upon God and your

lordships, she beseeches you not to hear her tried. But I shall not content myself with this answer; because, as your lordships have thought proper to hear counsel in support of this extraordinary motion, I am bound to suppose it a fit subject for argument, and to lay before your lordships my thoughts upon it as they occur.

Before I go into particular topics, I cannot help observing with some astonishment, the general ground which is given us to debate upon. Every species and colour of guilt, within the compass of the indictment, is necessarily admitted. So much more prudent it is thought to leave the worst to be imagined, than even to hear the actual state of her offence. Your lordships will therefore take the crime to be proved in the broadest extent of it, with every base and hateful aggravation it may admit; the first marriage solemnly celebrated, perfectly consummated; the second wickedly brought about by practising a concerted fraud upon a court of justice, to obtain a collusive sentence against the first; a circumstance of great aggravation. When Farr and Chadwick defended a burglarious breaking and entering, under a pretence of an execution, upon a judgment fraudulently obtained against the casual ejector, it was thought to aggravate their crime, and they suffered accordingly. I allude to the case in Kelyng, 43.

My lords, I take the ground so given me with this reserve, not that I wish to have her crime implied, from the conduct she is advised to hold here, to all purposes and conclusions; but that the necessity of the argument obliges me to assume it, as plainly and distinctly confessed, while this sentence is urged as an irrefragable bar to the trial, whatever may be the degree of her guilt, however such a sentence may have been obtained, and whether it tends to aggravate that guilt, or to extenuate it. The proposition looks so enormous, that it requires great abilities to give it any countenance, and the most irrefragable argument to force the conclusion.

I must also remind your lordships again, that the sentence has been read in this stage of the proceeding, by the consent of the prosecutor, and under the express reservation of his right to object to the competence of it, as evidence on the issue joined, unless he should think fit to make it part of his own cause; at present it stands admitted merely as the ground of this previous motion. The sentence being collusive is a nullity. If fair, it could not be admitted against the king, who was no party to the suit. If admitted, it could not conclude in this sort of suit, which puts both marriages in issue. The objections arise from the general nature of the sentence propounded, which is never final; from the parties, who could not, by their act, bind any but themselves, or those who are represented by them, or at most those who might have intervened in the suit; from the nature of the present indictment, which puts the marriage directly in issue; from the circumstances peculiar to this sentence, which prove it to be collusive.

Without adverting much to those particulars, the learned counsel for the prisoner affected to lay down an universal proposition, that all sentences of peculiar jurisdictions are not only admissible, but conclusive evidence; and referred to many cases, of which I shall controvert nothing but the application.

The case of Burroughs and Jamineau, 2 Str. 733, is nothing to this purpose. That was a supposed contract by accepting a bill of exchange at Leghorn; which acceptance was void by the peculiar laws of that country, because the drawer had failed without assets in the hands of the acceptor; and was pronounced to be so by a competent court in Leghorn. The plaintiff insisted upon it, because, if the acceptance had been made here, it would have bound; but, according to the law of the place where it was made, the acceptance did not constitute a contract. The plaintiff might, if he had been advised otherwise, have defended that suit; he acquiesced in the decision.

Courts of Admiralty sit between nation and nation. They proceed *in rem*, and they bind the property, not only against the apparent possessor, but all the world; or else the very existence of the Court would be subverted. Any body may claim; and proper monitions issue for that purpose: therefore, in the case of Hughes and Cornelius, the plaintiff failed in his action of trover; although the *verdict* found his property, and consequently the sentence of the French Admiralty erroneous; because the Court had no such jurisdiction over that sentence. For the same reason, in Green and Waller, the sentence of the Admiralty could not be gain-said. There is no appeal but to the sword.

The same principle governs as to seizures in the Exchequer; where any person may come in and claim; which if they neglect they tacitly assent to the condemnation. So of seizures tried before the commissioners of Excise.

So in the case of Moody and Thurston, 1 Str. 481, where an act of parliament gave an action (on a certificate of commissioners that money was due from an agent to officers of the army) the agent could not defend, by controverting the truth of the certificate. It was contrary to the act, and he might have been heard before the commissioners.

Where a soldier had complained of his major for undue correction to a court-martial, which dismissed his petition, he could not maintain an action, for he had been heard in a court competent and final to that purpose.

No temporal remedy lies to recover possession of a benefice forfeited by deprivation, while the sentence of a court competent to declare the forfeiture remains in force.

The same rule holds as to derivative claims. Therefore the judgment of ouster against a mayor is good evidence against the corporator, who claims under him.

Those who enter into collegiate establishments agree to submit themselves to the laws and magistrates appointed by the founder; and consequently cannot reclaim against them. This was all which was determined in the King and New-College, and many other cases which might have been referred to under the same head. In most, if not all the cases cited, the parties had actually been heard before the proper tribunal.

The office of granting probate and committing administration is a special authority committed to the Ecclesiastical Courts, where all, who claim interest, may be heard; so there can be no defect of justice. Therefore, in a vast abundance of cases from Noel and Wells soon after the Restoration, to Barnesley and Powell in lord Hardwick's time, the temporal courts have refused to take cognizance of the right of personal representation. All the cases under this head prove no more.

Cases were also cited to prove, that issues joined upon the lawfulness of marriage, profession, general bastardy, and so forth, must be tried by the bishop, and to infer that his jurisdiction is exclusive; and the statute of 9 H. 6, c. 11, was cited to prove, that it is final not only to parties and privies, but to strangers. The effect of that statute is rather to prove, that all the world are, or may be, parties or privies. The only public object of it is to provide sufficient notoriety to make them privy in fact, as well as in law. It provides a great variety of proclamations to the end "that all persons, pretending any interest to object against the party which pretendeth himself to be mulier, may sue to the ordinary, to whom the writ of certificate is or shall be directed, to make their allegations and objections against the party which pretendeth him to be mulier, as the law of holy church requireth." For the rest, the statute seems to have been an act of violence and fraud, by the powerful pretenders against lady Audley. The mischief, they affected to dread, could not happen. A certificate is utterly void, unless made upon process, at the instance of the parties. The certificate of mulierty binds the parties to the suit (as in all reason it ought, while such a trial is tolerated) but nobody else: and so it had been often decided before; and yet the statute provided that every such writ and certificate at the suit of lady Audley should be void. On the other hand, no such issue as profession, bastardy, or lawful matrimony, could be tried by the bishop between strangers; and when tried by the country, it bound only those who were parties to the trial and attaint. Nor was an infant bound to answer a plea of general bastardy. But whether the conclusion was too extensive or not in these cases, still it was only in respect to a civil right, and tried by a competent jurisdiction, sitting for the express purpose of deciding upon it, the jurisdiction being created and established by the writ.

Sentences, which are given by the bishop or his official of his own mere authority in matrimonial causes, have the least pretence of all others to bind or influence any question which may arise afterwards in judicature. Such causes punish no crime, try no right, proceed to no civil effect. They proceed 'pro salute animæ rei,' to reform some enormity or neglect in religious life; 'in quo' (says Covarrovias in his epitome of the 4th book of the Decretals, par. 2, c. 8, s. 12, n. 1,) 'de maximo sacramento agendum est.' The process is, 'simpliciter, de plano, sine strepitu et figurâ judicii.' Clement, lib. 2, t. 1, s. 2. From the very nature of such a cause, it must follow, that the judgment cannot be final. No consent of parties, or omission to appeal, or repeated affirmation of the same judgment, gives it any force. "Quia sententia illa transiens in rem judicatam foveret peccatum, separando veros conjuges, vel uniendo eos qui tales esse nequeunt. At nullum vinculum, quantulumcunque multiplicatum, potest firmare actum, ex quo peccatum consurgit." Sanch. de Matrim. lib. 9, disputat. 100. In the same disputation Sanchez says, "potest etiam judex, ex officio, parte invitâ, procedere ad retractandam hujusmodi sententiam; imo ad id teneri judicem probat textus; quia sui interest peccata auferre. Hinc deducitur, certâ regulâ prescribi minime posse, quoties audiendus sit volens predictam sententiam impugnare." He illustrates the doctrine, by observing, that in costs, which is a civil interest, a matrimonial sentence is binding. "Ratio est aperta: sententia enim matrimonii ideo non transit in rem judicatam, ne foveretur peccatum, sustinendo matrimonium irritum, aut dissolvendo validum; quæ ratio in expensarum condemnatione cessat; et ideo sortitur naturam aliarum sententiarum, quæ in rem judicatam transeunt." Gaill, in his Observat. 107, and Obs. 112, holds exactly the same language.

The same rule obtains, for the same reasons, in all sentences 'pro salute animæ.' A sentence is inconclusive (says Valtetus in his treatise de Judiciis, lib. 3, c. 12, s. 38,) "ex qualitate causæ; puta, quod est matrimonialis, vel alia quæcunque, in quâ animæ periculum versatur." Scaccia, a very authoritative writer on the effect of sentences, in his book de Sententiâ, gloss. 14, quest. 2, n. 44, observes as a general rule, "sententia, in quâ vertitur animæ periculum, nunquam transit in rem judicatam." The sum of their maxims is given by Oughton, tit. 305, which is taken almost literally from Consett, and by him extracted from the books of practice.—"Although, generally, witnesses are not admitted after publication, yet in a matrimonial cause they are, even without oath, that they are come to the knowledge of the parties after publication. And, suppose that sentence has passed against the plaintiff, that he has failed in proof of his libel, and the defendant is acquitted; yet the plaintiff may either in the same cause, or in another, raise a new suit against the same person, not only on a new or second contract, but on the former, and produce proofs known or unknown

to him before: and he is not bound by the 'exceptio rei judicatæ,' or that the former sentence has passed 'in rem judicatam;' because a sentence given in a matrimonial cause never passes 'in rem judicatam,' and has many privileges. When the church is deceived in promulging sentence against matrimony, the sentence may be revoked by new proofs, and even by the same; and the reason is, to eschew sin and danger to the soul, if a wrong sentence should prevail."

'So far as it appears to us' is therefore no idle form of words, but an express reservation of a necessary power to alter the sentence whenever it shall appear to the bishop that a different rule of life is necessary 'pro salute animæ rei.'

The mistake seem to have arisen from considering the bishop as a court of civil judicature, and his sentence as pronounced upon the trial of a civil right. In this perverse view, those maxims are absurd, and those rules merely vexatious, which, tried by the real nature and end of a matrimonial suit, are founded in piety and zeal for the discipline of religion. In all civil causes the maxim is universal, 'expedit reipublicæ, ut finis aliquis sit litium.' In proceedings 'pro salute animæ,' the reason of the thing is altogether on the other side.

Even in the moment of stating these sentences to be conclusive, one of the learned counsel could not forbear to give your lordships a lively representation of the frivolousness of their proceedings and the vanity of their decrees. The doctors have been at the pains to write (says my learned friend) some waggon-loads of volumes to prove, that these matrimonial causes proceed to no end, and terminate in nothing. All parties, all privies to the suit, all who have interest in the matter of it, may prevent its effect by intervention, by citation to hear the decree reversed by original libel. The sketch was drawn with a great deal of humour, bordering upon ridicule: a vivacity natural enough within the walls of their own college. 'Vetus illud Catonis admodum scitum est; qui mirari se aiebat, quod non rideret Haruspex, Haruspicem cum vidisset.' Yet it seemed rather astonishing, that so very judicious an advocate should think this picture of futility the best recommendation of the sentence to your lordships as an absolute conclusion upon all your proceedings. Here all the world shall be bound by that judgment, which the Court, who pronounced it, hold for no judgment, and will suffer to bind nobody. But such was the necessity of the argument, to give it any effect, they were forced to assume, that this sort of sentence is the judgment of a civil judicature upon a civil subject, which is not true; and to give it effect, against others than parties, they were forced to admit, that such others may set it aside; which is true, only because it is no such judgment.

In support of this loose proposition, they cited from our own books several cases, in which the temporal courts suffered themselves to be concluded by such sentences.

If it were necessary or allowable at this day to reason against so many authorities, I should incline to think, that those cases proceeded upon the mistake I mentioned before, namely, that the Ecclesiastical Court try and pronounce upon the civil right of marriage, or ever mean to do so, except when authorised by writ of the king's courts. But for the purpose of the argument, I will suppose that they do; even then the effect of all the cases will amount to no more than this. First, the ecclesiastical jurisdiction has (exclusively) conusance of the right of marriage. Secondly, the secular jurisdiction has conusance of the temporal interests which are incident to marriage, and, in order to decide upon them, must try the fact of marriage, as part of the question. Thirdly, but the judgment of the ecclesiastical jurisdiction on the principal, viz. the right of marriage, wherever it occurs, is final upon the trial of the incident. Fourthly, this conclusion extends to all who were parties or privies, or who, in notion of law, have committed laches in not intervening or reclaiming. This I take to be the utmost extent of the cases cited.

The earliest case referred to was Corbett's, Fitz. tit. Consultation, pl. 5. Sir Robert Corbett had issue Roger by his wife Matilda; in whose life he married Letitia, and had issue Robert. Roger sued in the Court Christian to avoid the second marriage, but was prohibited, for that court had no original jurisdiction. "Otherwise," says Cateby's Justice, "if my father and mother were divorced, married to others, had issue, and died, then I grant well, that I shall have my suit originally in the Court Christian, because I cannot have my action in the temporal law, as heir, during the divorce; and also the divorce is a spiritual judgment, which shall be reformed in the spiritual courts." So it was doubted, whether "the brother of a monk, who abandoned his habit and vows, could, as heir, libel to try his brother's profession, and hold him to obedience; for he might have his action by the temporal law, and object his profession." But it was agreed, "that if the monk had been deraigned for false or unjust cause, the brother might have citation to revoke his deraignment." If this proves the effect which a spiritual sentence upon the principal matter, the right of marriage, or profession, has in cases where these come incidentally into question, it also confines the extent of that effect to those persons who may rescind the principal sentence; and proves the reason of it, namely, that they are not wronged by the conclusion, because they may always be heard against it.

The next case was Bunting and Leppingwell, 4 Co. 29, a, and Moor 169; which was thus found by special verdict. Thomas Twede married, *de facto*, Agnes Adinghall, but under the impediment of a pre-contract between her and John Bunting. Bunting sued in the Court Christian on this pre-contract, obtained sentence for celebration 'in facie ecclesiæ,' married her, and had issue two sons, Charles and Robert

Richard the father of John, gave lands to Robert, for life only. Robert, mistaking his title, settled them on Emma his wife, and died. Charles brought an ejectment, as heir to Richard, his grandfather. It was objected that Twede had been no party to the suit in the Court Christian. But Twede might have intervened, or reclaimed, all his life long. So might Emma, if it could have availed her to prove her husband illegitimate, which would have destroyed her title. But Twede had abandoned his pretensions. The sentence was submitted to by Agnes. The marriage was solemnly celebrated, and remained uninterrupted during life. The question was between two issues. It required little argument to sustain the legitimacy.

The next was Kenn's case, 7 Co. 68, Cro. Ja. 186. An English bill was brought in the court of Wards, praying leave to traverse an office, whereby Elizabeth was found the infant heir of Christopher Kenn, and whereupon the wardship had been granted to Florence, the mother of the infant. Christopher Kenn had married Elizabeth Stowell, by whom he had issue Martha, who left issue Elizabeth the plaintiff, his heir at law, if the marriage had stood; but in the 1st and 2nd of Philip and Mary, the court of Audience pronounced the marriage void for want of age, and gave sentence of divorce. Christopher Kenn married Elizabeth Beckwith, in the 5th of Elizabeth. She libelled him for jactitation before the commissioners for ecclesiastical causes, alleging his former marriage. Elizabeth Stowell intervened for her interest. The first marriage was a second time pronounced void, and sentence followed 'ad exequenda conjugalia ob-'sequia.' After the death of Elizabeth Beckwith, Christopher married Florence, by whom he had the ward. This matter was referred to all the judges, who pronounced the sentence conclusive, so long as it should remain in force. And lord Coke relied upon Corbett's case, the doctrine of which has been explained before. The point had been twice tried with Elizabeth Stowell, the grandmother of the plaintiff, and the sentences remained open to litigation, but submitted to.

The case of Jones and Bow, Carth. 225, it has been observed before, was of exactly the same sort. The plaintiff claimed under the issue of sir Robert Carr by Isabella Jones, between whom a sentence had obtained against the pretence of marriage, which then stood unlitigated.

In Jessum and Collins, 2 Salk. 437, there was a sentence against the plaintiff in the Spiritual Court, at the suit of the defendant, on that very contract for which he brought his action on the case, without disputing the sentence.

The case of Hatfield and Hatfield was also cited; a judgment of your lordships in the year 1725. No authority is more conclusive than the judgment of such a court, when the point decided is well understood: but nothing is more uncertain than the state of a point drawn from the printed cases, where each party takes care to state, at least, a probable case; and in the multitude of the reasons, good perhaps in law, if they were true in fact, it is difficult to divine what the House went upon. If this judgment depended, as the counsel for the prisoner contended, upon the goodness of the marriage, it carries the matter no further than abundance of other cases; namely, that the sentence of a Court Christian, while nobody contests it, binds the right of marriage between parties disputing elsewhere an incidental interest under it. There was an attempt to make it prove a collusive sentence available, which I shall have occasion to examine hereafter.

In Cleeve and Bathurst, 2 Str. 960, and Annaly 11, the sentence was against the very plaintiff in the cause, and remained uncontroverted.

So Da Costa and Villa Real, 2 Str. 961, or Mendez and Villa Real, Annaly 18, was a sentence uncontroverted between the same parties.

The like observation occurs upon Mr. Hervey's case.

In Blackham's case, 1 Salk. 290, the sentence was not held to be conclusive; and as to lord Holt's doctrine, that must suppose the marriage put in issue between the same parties; for otherwise the sentence would not have concluded; the court, which grants administration, having no direct jurisdiction in matrimony.

In Millesent and Millesent, cited by Dr. Lee in lord Annaly 11, which I take to have been an appeal from the Prerogative Court, a sentence of the Consistory Court against a marriage was, while it remained unlitigated, a bar to the woman, who had been party to that sentence, from claiming administration as wife.

Upon all these cases I shall repeat but one observation; namely, that they bound only those who had been parties to the former sentence, or who derived under such parties. If they had extended to such as might have become parties by intervention or citation, the same principle would equally have borne them out. The general peace and happiness require, that there should be some resort to hear and determine upon rights; the same peace and happiness require, that litigation should have some end. The line seems to be fairly drawn, where every claim to every right has had the full opportunity of being heard. But, among all the cases cited or referred to, I believe none is to be found, where a sentence has been taken for conclusive against persons, who neither had, nor could possibly have agitated it.

It is not enough therefore to establish the proposition, that such sentences bind all who have or could have interposed, unless it had been shewn that the king could have interposed for the public good, in order to see that no fraud should be practised, which might tend to defeat the execution of his laws or police: but

it is not pretended that the king can interpose in such causes.

It is not enough that a court of exclusive civil jurisdiction, pronouncing upon the principal right, binds all the derivative or incidental interests. It should be shewn, that such a court binds also to criminal conclusions: now this I take to be impossible, because, on the very state of the proposition, the court has no criminal jurisdiction.

It has often been attempted in argument to shew, that their courts have no more than a censorial jurisdiction in their proceedings 'pro 'salute animæ, et reformatione morum;' and to infer from thence that their judgments ought not to bind in questions touching civil rights; as in Mendez and Villa Real in Annaly: but our courts have taken the fact to be otherwise, and considered their sentence as a judgment upon the civil right, which is the reason why it binds all incidental interests in other courts of civil jurisdiction. The true reason why such judgments have no effect in a criminal court, seems to be this: that there is nothing in common between the jurisdictions, so that they can never clash. A judgment in a civil suit will bind to all its consequences, although every fact, upon which it proceeded, should be evidently false; and though a criminal court should have found a crime upon an opposite state of the case. An action and an indictment for a trespass may have contrary issues, and yet both must stand: so it would be if the crime were assigned in the very falsehoods by which the civil court was deceived; as in indictments for perjury or forgery. A judgment upon a deed, after verdict on *non est factum* pleaded, is no bar to an indictment for forging or publishing, or swearing to the deed. The case would be the same in respect to a will of lands established by verdict, or to a will of personality after probate.

It was in this last instance they attempted to shew, that the authority of the Ecclesiastical Court had been interposed between public justice and the crime of forgery. For this purpose they have cited the case of the King and Vincent, 1 Str. 481. It is very short: "indictment for forging a will relating to personal estate; and on the trial the forgery was proved; but the defendant producing a probate, that was held conclusive evidence in support of the will." Now the support of the will was not in question. It was proved in common form, which is not binding, even in the Spiritual Court. 1 Ro. Rep. 21. More particulars of this case may probably be known to some of your lordships; but I cannot find any. Stated thus, it certainly requires a great deal of consideration, before it be admitted as law. Here the question was, not whether the sentence shall have credit in respect of the understanding which the spiritual judges have in the rules and course of their own law, but whether a probate, granted of course, on the oath of the very party charged with the forgery, shall be a full and conclusive bar to the prosecution. This is too monstrous to be left upon the authority of a short and single case, without condescending to explain what consistency with public justice, what respect to common sense, will allow the crime of forgery or perjury to be defended by the allegation of that very fraud which the indictment meant to punish; not stating any trial or judgment upon it, but merely that it had been practised. If the pretended executor had repelled the objection of forgery, even in that court, it would have borne some countenance at least; but the fraud passed without examination, where, in the nature of the proceeding, none could be had.

The other case, in 1 Str. 703, of the King and Rhodes, proves nothing, for it was merely a question of direction, whether the court would proceed to try the forgery of an instrument, while the property to be affected by it remained *sub judice*.

This is a matter of great consequence to public justice; at the same time, it is the sort of case which must happen frequently. The fraud was commonly practised in the late war upon the sailors; and, if this rule had existed, could never have been punished: but it was frequently punished; and although, where no point of law arose, it is difficult to recover cases at the Old-Bailey or on circuits; yet an accidental publication of cases in the Old-Bailey, without any apparent selection, has produced three or four instances. One Stirling was convicted and hanged for forging a will; and, so little were either prosecutor or court apprised of this notion of law, the probate made part of the evidence against him. He had registered it (as it was necessary) in the South-sea-house. I am not anxious to state these cases with more particularity; because I cannot bring myself to imagine it will be entertained as a serious opinion, that the mere perpetration of a crime may be pleaded in bar to a prosecution for it. This is certainly not for the interest of justice, nor for the honour of the Spiritual Court; because it would take away from that jurisdiction one guard against falsehood and fraud, of which every other is possessed.

Thus much concerning the general proposition, that sentences in the ecclesiastical courts, upon civil rights within their connusance, have conclusive force upon public prosecutions for crimes; although it be confessed withal, that the public has no means to intervene or review those sentences, and although the civil effect of such sentences is not touched by the event of such public prosecutions. If this ground fails, there is an end of the present motion: but there is another view, in which it has been urged upon your lordships, which seems to turn out more decisively against it.

Whatever may be said in the instances of forgery, perjury, and other frauds upon the spiritual court, where the criminal court may seem to impeach the foundation of their sentences, without assuming any jurisdiction in the matter of them; in this case it is impos-

sible to allege, that the criminal court is not fully competent to decide upon the whole matter of the indictment; particularly on both the marriages there stated as constituting the crime.

The learned gentleman who spoke second for the prisoner, informed your lordships, that this crime was formerly punished by the canon law, and in the Ecclesiastical Court; and insisted, that transferring the punishment of it from the ecclesiastical to the temporal jurisdiction should not prejudice any defences which the party might have set up in the first court.

In order to make that observation bear, some proof should have been added, that this sentence would have barred such a suit, however promoted, 'exceptione rei judicatæ.' Then, supposing this jurisdiction no better than concurrent, this court might have been barred, *pari ratione*. But your lordships have already had the trouble of hearing it established, but too much at length, from their books, that no such exception would lie in their law.

The same thing is no less true in our law, where the Court can, by any means, take cognisance of the right of marriage. Thus in dower, where the Common Pleas, by writing to the bishop, can well try the lawfulness of the marriage, a sentence is no plea. This was ruled in the case of Robins and Crutchley, 2 Wilson 118, 127. The demandant counted as of the endowment of Robins: the tenants pleaded, that she was not accoupled to Robins in lawful matrimony. The demandant replied, that on the 12th of February 1754, sir William Wolsely libelled her as his wife, in the bishop's court of Litchfield, for adultery with Robins; that she pleaded a marriage with Robins; that the cause was removed into the Arches; that Robins died; and that afterwards sentence passed for the marriage with Robins, which then remained in force. The tenants demurred; and had judgment. The demandant cited many of the cases your lordships have now heard, to prove, that a sentence, by a court of direct jurisdiction, ought to conclude another, which has but incidental cognisance of the same matter. But these were not thought sufficient to avoid another trial of the same marriage in a court, which, by writing to the bishop, might well decide upon the lawfulness of it. It is clear, that the sentence would not have concluded in the trial before the bishop.

Nay, the very statute, on which the indictment is framed, proves the same thing. It excepts the cases where the former marriage is dissolved, or declared void by sentence, or was contracted under age of consent; all which would otherwise have been triable under an indictment for felony.

In order to prove, that any sentence in the Ecclesiastical Court would bar an indictment upon the same matter, the case of Boyle and Boyle was cited. It is reported in 3 Mod. 164, and in Comberbatch 72. In that case a prohibition was awarded to stop the trial, in the Ecclesiastical Court, of a marriage there claimed by a woman, in answer to a suit of jactitation; which marriage had been found bad on an indictment for polygamy, for which the man was convicted and burnt in the hand. The reason assigned, here, for this judgment was, for fear the spiritual court should not take notice of the judgment pronounced in the temporal court. But this would have been extremely irregular; particularly if by the course of the spiritual court such a judgment would have been conclusive. Prohibition never goes upon an apprehension, that the spiritual court will do wrong; but where their rules of trial are contrary to the common law, as in prescription, or requiring two witnesses to a release; or when they exceed their jurisdiction, by holding plea of temporal matters, as debts, freehold, or temporal offences. The reason for granting this prohibition was, because the Court Christian could not take any cognisance of a matter adjudged in the temporal court; which thereupon became temporal. So in the case of Webb and Cook, Cro. James, 535, 625, prohibition went to the Court Christian at Norwich for entertaining a libel for defamation, in saying, that one had a bastard, who was adjudged the putative father: "for that judgment being under the authority of the statute law, shall not be impeached in the spiritual court, or elsewhere; and all are concluded to say the contrary." Upon the authority of this case, the same point was ruled again in Thornton and Pickering, 3 Keb. 200. The Ecclesiastical Court has no cognisance of crimes. In the case immediately before that of Boyle and Boyle, prohibition went to stop a suit there for writing a libel; because an indictment will lie for it. In Serle and Williams, Heb. 288, this matter is fully treated. The ordinary has no power, even over clergymen, in a crime or offence touching the crown. Purgation itself was by permission, and could not be administered, if the temporal court delivered 'absque purgatione faciendâ;' nor between the conviction and sentence; nor before it. In all these cases prohibition would lie. And in every other case, if after trial of a felon they prove or disprove any thing against a verdict, prohibition lies. So in Higgon and Coppinger, sir William Jones, 320, prohibition went to stop a libel for calling one a sodomite. "For as they cannot find the principal offence, it not being saved to them by the statute, they shall not hold plea of the defamation. And, where any thing determinable by the Ecclesiastical Court is made felony, or treason, and the power of the Ecclesiastical Court is not saved to it, there they shall not meddle with the offence, or the defamation, which arises out of it." The true reason therefore, why they were prohibited in the principal case, was, because the plea depending before them was out of their cognisance.

Another case was cited, where prohibition went to the Consistorial Court of Exeter, after acquittal upon an indictment for polygamy: but I have not been able to find it.

More perverse inferences were never extorted from any cases, than from these. A

court of Oyer and Terminer is to determine without hearing, for this special reason, that it will be final. A court of direct, complete, and exclusive jurisdiction, is to be bound and governed by one of no jurisdiction, either direct or indirect, on the matter. A court which decides once for ever, is to be bound by one which never decides. The sentence remains open for further examination; let it therefore be adopted without examination, in order that it may never be examined.

But, to confess the truth, all which I have hitherto said seems to have been unnecessary. This might have been pertinent argument, if there had really been a sentence to combat: but there is none. It has been virtually, if not expressly admitted, that, for the purpose of deciding upon the present motion, your lordships must take it for granted, that the sentence is collusive and fraudulent in every view, and to every degree, which imagination can represent: for your lordships will not put us, in this stage of the business, to take separate issues upon every suggestion which may be made for the prisoner. In truth, her counsel have argued it so; expressly contending, that a collusive sentence shall bind the judgment of the House.

But what kind of case has been made or attempted? What authority has been cited, that a collusive sentence shall prejudice others, than the parties to it? In every book I have seen, it is treated as a mere nullity. The only difference between no sentence, and a collusive one, is, that in the first case, you plead 'nul tiel record,' generally; in the last you plead, that it was obtained by covin; consequently it is waste paper. If the Court was informed of the covin, it would commit the parties for the contempt, and cancel the record. This could only be done upon the idea of the whole proceeding being a nullity.

In the 44 E. 3, 45, b. in assize of novel disseisin, by a dowress, the tenant admitted her title to dower; but disputed her assize, because she had been endowed by one, who abated upon his possession by covin with her. She argued, that the abator gained a fee-simple, whereby he might lawfully endow her; that recovery of dower against an abator is sufficient, and that endowment 'in pais,' to one who has right, is equal to recovery. The tenant replied, that such endowment was but disseisin; therefore his entry was congeable; and that the recovery would have been in the same plight. All the judges held clearly, that "if one has action to certain lands, and by his assent and covin the tenant is ousted, and he, who has the action, brings it against the disseisor, he, who is ousted, shall have assize; and the possession of him, who recovered, shall be adjudged by abatement, and not by recovery; because he was a disseisor. 'Et hoc adjudicabatur coram Knivet.'"

The same point is laid down in many books; and in 3 Co. 78, it is taken as a general rule, "that the common law so abhors fraud and covin, that all acts, as well judicial as others, and which of themselves are just and lawful, still, being mixed with fraud and deceit, are in judgment of law tortious and illegal." Nay, it takes away the privilege of coverture and infancy; for the act is merely void. In the case in Coke, the fine (a judicial act) was held for none, by reason of the covin. So Farr and Chadwick were both hanged for burglary, though they entered by an 'habere facias possessionem;' because it issued upon a fraudulent judgment. This was thought to heighten the offence.

The principle of the rule applies equally to the judgments of the Ecclesiastical Court; and so the rule was applied in Dyer 339, where a revocation of letters of administration was held void for covin. Thus too, in Garvan and Roach, 1 Ves. 157. Lord Hardwick says of sentences in the Ecclesiastical Court, that collusion will overturn the whole.

It would be idle affectation to cite all the cases on this head, which indexes would furnish. The books are full of them, from the annals of Edward the 2d to the Reports of sir James Burrow. Indeed there never was a period of time, in which this maxim was so continually in the mouth of the Court, as the last. Bright and Eynon, and abundance of cases more might be cited to prove this. The Court seems to have thought it the principal and most capital part of its duty, the 'nobile officium 'judicis,' to suppress and extinguish every species of fraud.

My lords, the language of the civilians and canonists is exactly the same. Scaccia, in his book de Sententiâ, Gloss. 14, Quest. 12, states this position, "ex vulgatâ regulâ, rem inter alios actam aliis non nocere." Upon this he makes many limitations; upon all of which he adds, amongst others, this sublimitation; "quando sententia esset lata per collusionem: fraus enim, et dolus nemini patrocinari debent, in alterius præjudicium; et ideo sententia, lata per collusionem, habetur pro non sententia; et aliis non nocet; quamvis, sublatâ collusione, noceret." The same thing is laid down by Covarruvias, in his Practical Questions, cap. 15, n. 2. He quotes this text of the Digest, "Si hæreditatis judex contra hæredem pronunciaverit non agentem causam, vel collusione agentem, nihil hoc nocebit legatariis." In Heraldus de re judicatâ, lib. 1, cap. 2, n. 1, the same rule is given upon the same authority.

Nay, their courts will receive an allegation against a judgment at common law, that it was by covin; and rightly too; for it is a nullity; and the authority of the Court, in which fraud is practised, is never in question. In Lloyd and Maddox, Moor 917. One sued in the Court Christian for a legacy. The executor pleaded recovery in debt, which exhausted assets. The legatee replied, that the recovery was by covin. This allegation was admitted; and the King's-bench refused to award prohibition. Here both courts agreed, that to allege a fraudulent judgment was to allege nothing; and the inferior jurisdiction was expressly per-

mitted to try this sort of nullity in the judgment of the superior.

There is a great abundance of cases more, which I shall have occasion to cite to your lordships, if the actual fraud of the present sentence should ever be disputed; cases, in which much weaker grounds of imputation, than those which occur here, have been thought sufficient to avoid a judgment.

But, my lords, what arguments have been used on the other side upon this part of the case?

First, it has been insinuated, that certain statutes, made against covin, account for the many judgments to be found in our books; and prove, that, without such statutes, they could not have obtained. But many of the cases were before the statutes referred to. The principle, avowed by the judges, is independent of them. They all provide either additional sanctions against fraud, or new precautions against the opportunity of practising it. And it would be a very mischievous construction, if a statute against a particular fraud were to protect every other.

Secondly, the fraudulent sentence must be sent back to the Court where the fraud was practised, in order to be corrected. Why so? If the thing alleged against a sentence were error, mis-judging either the law or the fact, it must be reversed in the same jurisdiction, original, or appellate. But the Court, in which the sentence is pleaded, must determine on the reality and application of that plea, just as it would on any other matter pleaded. Fraud is a fact. The conclusion is, that it puts a total end to the cause. The Court, in which such cause depends, must be as competent and perfect a judge of that fact, as the Court in which the fraud was perpetrated. I say as competent and perfect; because the Court, where the fraud has been practised, which has overlooked such circumstances as appear on the very face of these proceedings, does not seem to me the very place to which one would send a question of collusion to be tried. All the authorities referred to before, and the numerous instances of replying fraud to pleas of judgments by other courts, on which it was practised, contradict this notion. But cases are cited on the other side. Kean's case, it was said, proves, upon the state of it, that the sentence was fraudulent. The bill in the court of Wards stated, that the sentence was false, and with a deal of aggravation. But whoever referred to an English bill for the true state of any case? The question, referred to the judges, says nothing of the collusion. The case of Morris and Webber, in Moor 225, was also cited to prove, that collusion apparent in an ecclesiastical sentence did not hinder it from concluding in a court of common-law. A man divorced 'propter impotentiam,' married another woman, and had children. The last circumstance, it was said, disproved the cause of the divorce; and therefore the judgment was apparently collusive. But that circumstance did not even prove the judgment false; for one may be 'habilis quoad hanc.' The law presumes the children of a marriage legitimate: but that does not prove the fact of generation to any other purpose. If the ground of the sentence was false, it would not follow that it was collusive. Collusion was not even alleged in the case; and consequently makes no part of the judgment. In the same manner they referred to the appellant's printed case, in this House, in Hatfield and Hatfield, for an averment, that the sentence was fraudulent. But there, as it happens, the state of the case disproves the collusion: for Porter, the defendant in the Ecclesiastical Court, was in the appellant's power. They cited also the case of Prudham and Phillips, from a most inaccurate note in the margin of Strange, 961; who certainly knew nothing of the case he referred to. The case in truth was this: Prudham brought assumpsit against Constantia Phillips. She gave evidence of her marriage with Muilman. Prudham produced a sentence of the Ecclesiastical Court annulling that marriage, because she was already married to Delafield, who was then alive. She said, that sentence was fraudulent. But the Court, admitting that, the objection would have been good in the mouth of a stranger, would not suffer her to allege fraud in herself, for her own avail. The learned doctors also cited a case of a lady Mayo and a Mr. Brown, in the Prerogative Court. There, a sentence in a matrimonial cause being pleaded, the adverse party alleged, that it had been obtained by collusion. One learned gentleman said the allegation was repelled; the other, that it was not admitted. I am informed the last is nearest to accurate; for nothing was done in that matter. The cause is still depending. The first argument promised all that length of erudition, which your lordships were favoured with yesterday: in view to which the judge asked, whether they had not better agitate the question of fraud where it was committed; an issue more natural for the judge to wish, than proper for the Court to award. The most loose and unconsidered notion, escaping in any manner from that able and excellent judge, should be received with respect; and certainly will. But it is unfair to him to call this his judgment. If the question were my own, with the choice of my court, I should refer it to his decision.

Thirdly, among other reasons against holding plea of the collusion before your lordships, they insisted, that it was not worth while; their sentences are so open to repeal at the suit of any body, that whoever finds them objected, has nothing to complain of but his own remissness. Their proceedings are so frivolous and ineffectual, their judgments so inconclusive and harmless, that nullity, however established, makes no material difference in them.

Such were their particular arguments. In a more general way they pressed upon your lordships, with much earnestness, the consideration of the unhappy case, to which they

said we would drive the prisoner. The sentence has deprived her of all conjugal claims upon Mr. Hervey; and we acknowledge it to be conclusive upon her, while we insist that it is merely void against all the rest of the world. She is, therefore according to us, a wife, only for the purpose of being punished as a felon. This strange apology was not insinuated in mitigation of the punishment, or to the compassion of your lordships; but directly and confidently addressed to your justice. Do not proceed to try the crime, because the purpose of committing it is totally frustrated; and many other inconveniences have ensued. In other words, the crime has been detected. These disappointments, these inconvenient consequences of guilt, are the bars which God, and the order of nature, have set against it: but they have not been found sufficient. It demands the interposition of public authority, with severer checks, to restrain it. Why is she thus hampered with the sentence she fabricated? Because she fabricated it; because justice will not permit her to allege her own fraud, for her own behoof, nor hear her complain of a wrong done by herself.

In short, my lords, the motion is wholly inadmissible. It is inconsistent with all order and method of trial for us to debate imaginary topics of defence, before hearing the charge, and for the court to resolve abstract questions upon hypothetical grounds. Is a sentence pronounced between two certain persons admissible evidence against others? Is this species of sentence so? Is either admissible against the king—in any public prosecution—in this particular sort of prosecution?—Is such evidence probable only, or conclusive—against the parties to it—against strangers—against the king—and in what cases? What, if it were obtained by collusion? What, if by her collusion? Will it serve her? May she offer it safely? How much will it prove against her? What evidence will do to prove the collusion?—There is no end of such questions. At the same time, I was not solicitous to prevent any part of the argument. Were it possible for your lordships to stop this prosecution here, I have no desire to wound the mind of any person unnecessarily, or if so painful a duty may be dispensed with. But I have rather wondered to hear such hopes as these; thus far encouraged, or even entertained, on the part of the prisoner, with confidence enough to make it worth her while to avow, in this stage of the business, that she had rather have every thing presumed against her, than hear any thing proved; and to disclose to your lordships, not an anxiety to clear her injured innocence, but a dread of the enquiry: a wish to submit, in silence, to the charge. Was this her solicitude to bring the question here? Of what avail would it be to any body, in any condition, to appear in any court, and defend them? But, in such a court, before so venerable an audience, to hear nothing pleaded against a charge of infamy, but a frivolous objection to entering upon the enquiry;—unless topics stronger, more pertinent, and pointed could have been urged, I am exceedingly sorry, upon every account, that the time of your lordships has been thus taken up, and that we did not go directly into the examination of the matter before you.

Mr. Solicitor General *Wedderburn* (afterwards successively lord chief justice of the Common Pleas, and lord chancellor):

My lords;—There are two questions at present before your lordships: the one turns upon the effect of a sentence obtained from the Ecclesiastical Court in a case of jactitation of marriage, which the counsel for the prisoner have maintained to be a conclusive bar to the inquiry now instituted in a court of criminal justice: the other is, whether that argument ought to be admitted in this period of the proceeding.

My duty requires me, in the first place, to submit to your lordships some objections to admitting that sentence in anticipation of the charge, after a plea of Not Guilty to the indictment.

The plea, which is the defence upon the record, denies the charge; but the argument contends, that the charge ought neither to be stated or proved. To proceed first to consider the merits of a defence without a charge established either by proof or admission of the party, is at least a very great novelty in a criminal proceeding, and a very wide deviation from the ancient course of trials; and it is a presumption of some weight, that a mode of trial, which has prevailed for ages, is not founded in folly nor injustice.

In the regular and ordinary course, a prisoner who has any special matter to allege, which ought to bar the enquiry into the crime, must state it in the form of a plea of the indictment. Upon the plea of the party every court of criminal jurisdiction must form a judicial determination: a pardon, a former acquittal for the same charge, are defences which preclude an enquiry into the crime; but the party can only insist upon such defences by pleading them, the court can only take cognizance of them when pleaded.

The present proceeding would oblige the court to try the validity of the charge, by first hearing the defence; in the course of that hearing, not only the state of the charge is supposed, but a reply to the defence by new facts is also taken by supposition; and, should such a method be permitted, your lordships would be placed in a situation very different from the exercise of judicial authority: for courts of justice are not instituted to decide a disputation upon a thesis of law; their province is to decide upon real fact, not upon general or hypothetical propositions; nor can they pronounce the law, till the facts, from whence that law arises, are first established.

The counsel for the prisoner are obliged to state their argument thus: suppose, say they, the first marriage to have been solemnized, but

a suit to have been instituted to impeach that marriage; in that suit, a sentence pronounced against the marriage; suppose that suit and sentence to have been fraudulent, yet even such a sentence ought to be conclusive, and to bar all inquiry into the crime of a second marriage. The only answer, which I submit to your lordships such an argument at present demands, is, that a court of justice cannot suppose the fact of the marriage, nor the suit to impeach the legality of it; no supposition can be formed, whether the proceeding in that suit was fraudulent or was fair, the sentence real or colourable; the parties must agree upon the facts before the court can be asked to decide the law; if they do not admit the facts upon record, it remains for both parties to prove what they think material; then, and not till then, it is the duty of the court to pronounce the law.

No precedent has been quoted to shew, that a similar proceeding was ever admitted in a court of criminal jurisdiction. One case only was faintly alluded to, by the learned gentleman who spoke first yesterday. The case of Jones and Bow, cited from Carthew; where the reporter says, that, "by way of satisfaction to the evidence that the plaintiff was about to give, the defendant produced a sentence of the Ecclesiastical Court in a cause of jactitation; a debate arose upon the effect of that sentence, and the court being of opinion that the sentence was conclusive, the cause between the parties ended."

That cause was an action of ejectment to try the title to an estate. A proceeding by ejectment is well known to be entirely fictitious. In a suit founded upon a legal fiction to try a question of right, where the judgment is not conclusive on either party, there may be no mischief in pressing forward to the conclusion without an exact attention to forms. The case therefore does not prove, that in a civil action, where judgment is given upon the mere right, such proceeding could have been allowed: but a criminal proceeding requires still more precision than a civil suit, and a deviation from the forms would very seldom be favourable to the accused. If the prisoner is not confined to the defence pleaded, neither would the prosecutor be confined to the matter of the charge; the judge and the jury would mutually encroach upon each other: nor could there be a more dangerous source of error and confusion, than to permit a mixed consideration of law and of fact, of hypothesis and of argument, to be introduced into criminal trials. The only plea to the present indictment is, not guilty: the argument your lordships have heard supposes, that such a plea ought not to have been put in; that there is a more prudent and cautious method of defence which you are desired to hear upon suppositions, without the form or substance of a plea.

The counsel for the prosecution are bound to oppose this experiment. It would ill become them, acting in the character of a public accuser, to advance any doctrine which they did not believe to be founded in law, or to suppress an objection to a proceeding which, as it is novel, cannot pass into a precedent without great danger and mischief. Should that objection prove, that the argument, which in this stage of the business the counsel in defence have been permitted to urge, is inadmissible, your lordships will however have no reason to regret the delay it has occasioned, nor to deem that time mis-spent, which has been employed in the present enquiry, since the object of it, though fruitless, has been directed to the relief of a party accused. Supposing then the debate upon the effect of the sentence urged in bar of the trial to be proper at this time, I shall proceed to the consideration of the argument. —The proposition advanced is this; that in an indictment upon the statute of James 1, for marrying a second husband, living the first, a sentence of an ecclesiastical court, in a cause of jactitation of marriage, pronouncing, that it does not as yet appear to that court that there hath been a first marriage, is a conclusive evidence that no such marriage ever was had.

In order to make out this proposition, the counsel contend, first, that it is an universal rule, that the decrees of courts, having competent jurisdiction, bind all persons, and conclude in all cases, in any manner touching the matter decided: secondly, they maintain, that the sentence of the Ecclesiastical Court in question is a decision: they urge in the third place, that the rule first laid down admits of no exceptions, but applies with more force to criminal, than to civil cases. In the last place they insist, that supposing this sentence to be the effect of fraud, collusion, and agreement between the parties to the supposed suit in the spiritual court, it is notwithstanding conclusive upon all other courts, and the fraud can only be examined in that court whose justice has been thus ensnared.*

My lords, I have stated fairly the argument on the other side, which rests on these four

* Mr. Chitty (Treatise on the Law relative to Apprentices, &c. chap. 4, p. 165), in treating of the operation of an order by four justices to discharge an apprentice, says, "No case has occurred in which the settlement has depended upon the validity of such an order of discharge. The power of a quarter sessions over it when trying a question of settlement is therefore undecided. But it may perhaps be concluded from analogy to the proceedings of ecclesiastical [4 Co. 29. Carth. 225,] and admiralty courts [3 Bos. and Pul. 490; 5 East 156] that being a direct judgment upon the fact by a court not only of competent but exclusive jurisdiction, it is conclusive of the question between contending parishes although they are not immediately parties to the sentence, unless it has been obtained by fraud [Amb. 769] or appears altogether void. [Sir T. Raym. 405. 8 Term. Rep. 266. Case of the Fund Oyen ib. 270, n. a. 1 Robinson's Admy. Rep. 185.]

propositions; and, were I only engaged in a disputation with the learned gentlemen upon a mere thesis in law, I should be inclined by a denial to insist upon better proofs than have been offered in support of these propositions. I feel myself however under a very different impression of duty, as one of the counsel for the prosecution. The prisoner may take every advantage that the law will allow; from us your lordships have a right to expect every concession that justice requires. I shall therefore admit (as far as in my conscience I think them admissible) the several propositions urged by the opposite side, state with as much fidelity as I can the true limitations of the doctrines advanced, and assert no point but what I hold to be clear law, supported by undoubted authority.

It is contended, in the first place, to be a universal rule, that sentences of courts of competent jurisdiction are binding upon all other judicatures, in which any inquiry arises into the matter determined: that proposition I conceive to be much too largely stated. The rules and principles that I have learnt upon that subject, I will very briefly submit to your lordships, not meaning to argue, but only to state them.

It is a general maxim of law, that the sentence of a competent court binds the parties, and all persons deriving any right under them; as to third persons, it neither prejudices nor benefits them.

Another maxim, equally true, is, that a sentence of a court having competent jurisdiction, if it comes collaterally before another court in another suit, shall be presumed just till the contrary appears. One court has no authority to direct the judgment of another; but it is a fair presumption, that what hath been decided, hath been justly decided; it is, however, but a presumption, and in most cases it obtains only till the contrary is proved.

I admit at the same time, that there are cases, in which that presumption may amount to a conclusion. Where the sentence has been pronounced *in rem*, by a judicature having a peculiar and exclusive jurisdiction over the subject-matter of the cause, the effect of such a decision is not to be controverted in any other civil suit.† These propositions are founded in the consent of all lawyers, who have treated of general law, and are proved by a series of judicial authorities: to quote them would lead into an unnecessary detail upon a part of the argument, which does not immediately apply to the decision of the point in question.

The cases cited on the other side agree with the distinction I have mentioned. A sentence of a court of Admiralty upon the forfeiture of a ship; the judgment of the court of Exchequer condemning goods as forfeited; are each of them conclusive upon this principle, that the sentence is *in rem*, the court has pronounced upon the property itself. The cases quoted of sentences of an ecclesiastical court, are all in matters of which that court has the peculiar and exclusive cognizance. The Ecclesiastical Court has the sole jurisdiction of cases testamentary, and of cases matrimonial, to a certain effect; if therefore a question arises, who is entitled to the personal estate of a man deceased with or without a testament, the probate of the will, or a grant of administration, gives the title to the property in question; the effect of it cannot be contested in other courts collaterally and incidentally, because no other court has power to controvert the act, no other authority can confer the title to the thing in dispute. Such sentences are *in rem*.

The case is very different, where the decision is upon a personal contract, or any matter arising out of the various civil relations of persons, in which the original cognizance of the cause might have come before the court. Where that decision is offered as an evidence of right, there the judgment of the foreign court can only have effect so far as it is just; no authority belongs to it but from its internal justice; for the court in which it is produced owes no obedience to the court which pronounced it, and is equally competent to give the law to the parties. The effect of the sentence is beneficial, however, for the party who has obtained it; because the justice of it is presumed, the truth of the facts on which it proceeded is admitted without proof, and the adverse party is obliged to demonstrate the falsehood or iniquity of it.

In support of this distinction, I will only mention to your lordships one authority of a late date, which I select from a multitude of cases, not merely because it is a determination in the last resort, but because the rule of law is stated in the judgment. The case I allude to was decided by your lordships on the 4th of March 1771, upon appeal from the Court of Session in Scotland, by Sinclair against Fraser.*

† Peake's Law of Evidence, pt. 1, c. 2, s. 2, p. 80. Note.

* See Dougl. Rep. 4, (Note to 2nd ed. 8vo.) and a brief account of the cases of Crawford v. Whittal, and Plaistow v. Van Uxem, in the same Note. How far a judgment of a foreign court having competent jurisdiction is evidence of a right, was discussed in the cases noticed by Mr. Peake in his Law of Evidence, chap. 2, § 2, and lately (A. D. 1810,) in Scotland, in the case of Kinloch and Sons, attornies of Cherapa Arnachella Chitty against Inverarity, see Sessions Papers, and Dictionary of Decisions. From Mr. Douglas's report of Walker v. Whitter, and his Notes to it (it is the first case in the volume) a difference appears between the opinions upon this point of lord Mansfield and Mr. Just. Buller, and of lord Kenyon. In an action on a foreign judgment our courts will examine into the judgment, and for that purpose receive evidence of what the law of the foreign state is, and whether it warrants the judgment. *Per* Eyre, Ch. Just. C. B. 2 H. Blackst. 409, cit. Peake's Law of Evidence, part 1, c. 2, § 2, which see for more on the subject. See also, § 1, of the same chapter. Qu. Would

The question there was, what should be the effect of a judgment obtained by the appellant in Jamaica? The person, against whom that judgment was directed, was sued upon it in Scotland. It happened, that the Court of Session refused to give any effect to it, and held the party bound to prove the ground, the nature, the extent of his demand. From that determination an appeal was taken to your lordships, the judgment of the Court of Session was reversed, and the words of the order of reversal were, "that the judgment complained of be reversed;" and declare "that the judgment of the court of Jamaica ought to be received as evidence *primâ facie* of the debt, and that it lies on the defendant to impeach the justice of it, or to shew that it was irregularly and unduly obtained."

My lords, the authority that I quote to your lordships will have considerable effect in a subsequent part of the argument: at present, I only urge it as a proof, that though in cases where the sentence is *in rem*, where the Court has a peculiar and exclusive jurisdiction to determine the title to the thing in question, the presumption in favour of the judgment is admitted to be conclusive; yet where the judgment is applied to personal rights, to matters of which other courts have equal cognizance, the party against whom it is urged is at liberty to impeach it, to shew that it is not just, or that it has been irregularly and unduly obtained.

This being the distinction in civil cases, the question arises, how far these rules are applicable to criminal suits? what effect ought the sentence of any civil court to have as a bar to the justice of the state in the trial and punishment of crimes?

The counsel for the prisoner argue, that if the civil right is destroyed by the sentence of a competent court, to examine into the crime is an absurd inquiry; where there is no relation, there is no duty, and there can be no breach of it. Is this so? Is it then competent to a party by any act, destructive of the civil relation, to abolish the duties of that relation? Persons may deprive themselves of the benefit of any civil right, may dispense with the advantages of any relation of life, may be intitled to claim neither as wife, mother, nor child; but can

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foreign lawyers be permitted to give testimony that a decision made in their country by judges having competent jurisdiction was not agreeable to the law of such country?

Under what circumstances and to what extent a judgment given by a court of competent jurisdiction in one suit shall be conclusive as a bar or as evidence in another suit, was much debated in the case of Maingay *v.* Gahan, Ireland 1793, in which the court of Exchequer Chamber (lord Clonmell, C. J. K. B. lord Carleton, C. J. C. B. and lord Fitzgibbon lord chancellor) decided (in opposition to a judgment of the court of Exchequer) that evidence of a condemnation of excuseable goods pronounced by sub-commissioners of excise and affirmed by commissioners of appeal, is conclusive in an action of trespass brought against the seizing officer for taking such goods. Ridgeway, Lapp and Schoales's Irish Term Reports, vol. 1, p. 1. In this case of Maingay *v.* Gahan, great use was made of Mr. Hargrave's Treatise, to which I have so frequently referred, and of the cases and other authorities cited by him, particularly of the contradictory decisions in Roberts *v.* Fortune, and Henshaw *v.* Plaisance. Of these the former is reported by Mr. Just. Blackstone, vol. 2, p. 1174; and the latter is thus given by Mr. Hargrave from Mr. Ford's MS. Note.

"In trover for 54lb. of tea; it appeared in evidence, that plaintiff sent the tea for one Lloyd, with a permit; but the porter in his way called at the house of one Rocheliffe, where having set down his burthen, the defendant, who was an excise officer, seized it as forfeited on being brought to Rocheliffe's house for R's use, without a permit to that place, according to the 10th Geo. 1, c. 10, § 16. Upon Not Guilty pleaded, defendant, to shew the property was out of the plaintiff, produced a condemnation by the commissioners of excise upon an information against Rocheliffe for receiving this tea without a permit, which it was insisted was conclusive evidence of that fact, being a judgment before a proper jurisdiction. On the other side it was insisted, that plaintiff was no party to the suit; that Rocheliffe had nothing to do with the tea; and that if she made a feigned defence, or, as the case was, made default, yet plaintiff ought not to be affected by that, but should shew this was such a case as no forfeiture arose.—But *per* Lee, chief justice, the judgment of forfeiture is a judgment on the thing itself. How the tea came to Rocheliffe's house was a matter proper for the consideration of the commissioners; and if Mrs. Roberts, the plaintiff, was willing to have defended the suit, she might have come in *pro interesse suo*, which not doing, her property is bound; and that there is no more in this than the common case, viz. that courts of law pay such deference to the judgments of each other in matters within their jurisdiction, that the first determination by a proper authority ought to prevail. So then the tea being forfeited, the property could not be in the plaintiff, who was therefore nonsuited.—Roberts against Fortune at sittings after Easter term at Guildhall, 1742." And Mr. Hargrave refers to Bull. N. P. ed. of 1775, p. 244.

Upon a libel in the Consistorial Court for disturbance in the plaintiff's right to a pew, the Court adjudged the right to be in the plaintiff, and admonished the defendant not to sit in the pew; the Court of Arches reversed that sentence, but admonished the defendant not to use the pew again; these sentences were held not to be conclusive evidence of the plaintiff's right in an action for a disturbance between the same parties. Cross *v.* Salter, Pasch. 30 Geo. 3. 3 Term Rep. 639.

they absolve themselves from the duties that belong to the natural relation? Can they, by their own act, absolve themselves from the sacred duties of those civil relations which, in a state of society, are natural relations?

My lords, the proposition I contend for is so far from absurd, that the contrary of that proposition would involve in it the most manifest absurdity: the civil interest is important only to the parties themselves. Whether an estate belongs to one person or another, whether a party is entitled to rank and distinction, to whom related, whose wife she is? the question is of great indifference to society: but if the estate, the relation, the rank, is obtained by criminal means; if the situation which a person chuses to relinquish is attended with duties, the advantage, but not the duties, may be waved; the peace and order of society must be maintained, and no violation of them can pass with impunity.

If there is an universal proposition of law, I take this to be so, that no determination between party and party can preclude public justice from enquiring into the criminal tendency of their actions. Daily experience proves this in the most trivial instances. An action is brought for an assault, the party fails in it, there is a verdict against him; it does not prevent a prosecution by indictment, upon the very same fact, against the very same party. In such an indictment was it ever pleaded, that an action had been brought against the party for that alledged trespass and beating, and that he had been acquitted upon that action? The learned and reverend judges will inform your lordships, that there is not a sitting or an assize without some instance of this sort. A question may arise in an action upon property, to which of two persons a thing, a horse for example, belongs. It is decided to belong to A and not to B.: would that decision bar an indictment against A for stealing the horse? It is no answer to public justice, that he has acquired that property, when the object of the criminal enquiry is, whether he has committed a crime in acquiring it.

The proposition advanced on the other side, that a sentence in a civil suit is conclusive in a criminal proceeding, was not so much pressed upon any deduction of argument, as asserted on the authority of a case cited from Strange's Reports; in which it was said to have been determined, that the grant of the probate of a will by the Ecclesiastical Court was a bar to an indictment for felony in forging that will.

In the first place, your lordships will give me leave to ask, does it enter into the imagination of any lawyer, that the same rule would take place with regard to a will of real estate? Had such a will been produced in judgment, the witnesses to it examined, the validity of it canvassed, a judgment in favour of it, even a decree of the court of Chancery establishing it, I do presume it will not be maintained, that all those proceedings would prevent a prosecution for the forgery of that will. The same thing might happen in the case of a deed; a deed may have been established by a decree; the property of an estate settled by it, irretrievably perhaps; would there be no punishment for the crime, if it should be discovered afterwards, that that deed was a manifest forgery? The estate might be held indefeasibly by the party who had obtained it; but I do not conceive that his having got possession of that estate, having obtained an advantage of which human laws could not deprive him, would be an answer to human justice why he should not be punished for the crime by which he had gained that advantage.

It is supposed, however, that there has been a decision, that a probate of a will of personal estate bars an indictment for forging that will. Is the grant of a probate then an act of so high a nature, requiring so much judicial accuracy, that it is not to be questioned? A probate in common form is not even a judicial act, it is merely official; there is no litigation, no enquiry; the conscience of the judge is not engaged in it. What is the purpose of forging a will of personal estate? To obtain a probate; for without it there might be a criminal intention, but no prejudice could arise to any person from that intention: shall it be said then, that the accomplishment of the crime is to afford protection for itself? The authority relied on is a note in sir John Strange's Reports, under the name of the King and Vincent; that a person being indicted for forging of a will, upon producing a probate, a probate in the common form was held a bar to the proof of the forgery, and he was by the judge acquitted. This is the whole note. It is a great misfortune that notes, very often taken upon loose information, are given to the world under respectable names. The collections of a lawyer, made only for his own use, must abound with errors; in publishing such collections many of these will escape; and this is not the only instance of mistake in that collection. I conceive it to be impossible at any period, at any time of the day, by the negligence of any judge who might happen to be present at the Old Bailey, that a prisoner could have been acquitted of a charge of forgery upon such a defence. I say this with confidence; because, in the inquiry that hath been made into the cases determined, many have been found, where parties have been tried and convicted for forging a will of personal estate, and the evidence to prove the publication of the forged will has been the probate, produced by the officer of the Court, and his testimony that the prisoner was the person who obtained the probate.

Mr. Attorney-General quoted to your lordships the case of the King and Murphy. The prisoner there had the double villainy to turn the charge upon his prosecutor. The trial was attended by counsel who do not usually go to the Old-Bailey; it is stated very fully by a short-hand writer in the State Trials.[a] The

[a] See it, vol. 19, p. 693.

case of the King and Sterling was also mentioned; it is very manifest that that unfortunate person was unjustly hanged, if the case in Strange is law. Sterling's case was this: he was indicted for having forged a will, of which will he had obtained a probate, and under that title had transferred some stock. The person whose will he said it was, was alive, and produced as the witness against him, and of course to impeach the probate of her own will. Absurd as it may seem to doubt whether that evidence was competent, if the case of the King and Vincent was law, undoubtedly that witness ought not to have been permitted to prove her own existence; she was dead by irrefragable legal argument; but the event was different, and Mr. Sterling, notwithstanding the probate, suffered for his crime.

Besides these cases, there was another in no very remote period, in which a party was tried for the forgery of a will, in September sessions 1765, at the Old-Bailey. One Richardson and one Carr were indicted for having forged a receipt for the payment of money, with intent to defraud a particular person, who was a seaman, entitled to wages: the common cases of forgery of wills have been in the case of seamen. Upon the trial it appeared, that the receipt was given in the name of Jane Steward, who was the supposed executrix of a will of this seaman, which had been proved by the defendant Carr, upon the oath of the other defendant Richardson. The learned judge, Mr. Baron Perrot, who tried them, was of opinion, that the prisoners ought to be acquitted of the charge of forging a receipt for the money; but, being satisfied from the evidence that Richardson had forged the will, notwithstanding it had appeared in the trial before him that a probate had been granted of that will, he remanded Richardson to gaol to take his trial for the forgery of the will. Richardson was accordingly tried in October sessions 1765, for forging the will of John Steward, a mariner: the officer of the Prerogative Court proved upon that trial, that the will was brought to his office by Richardson, and a probate of that will granted; and upon that proof he was convicted, and executed. The first learned judge had remanded him to prison to take his trial at the ensuing sessions for the forgery of a will, the probate of which was then in court; and upon the second indictment, which was tried by the noble lord who presides in the court of King's-bench, the prisoner was convicted notwithstanding the will had been proved. Other cases have been mentioned to your lordships to the same effect with these, which sufficiently refute that singular case of the King and Vincent, the only authority to support the argument, that the sentence of an Ecclesiastical Court is a bar to an indictment.

Having thus removed the only obstacle to the proposition I meant to rely upon, that in a criminal matter a sentence of a civil court ought not to be conclusive against a public accusation, I now proceed to a more limited and close enquiry, what effect the sentence of jactitation ought to have in this proceeding, an indictment for bigamy?

It is of no importance to the present enquiry to investigate, by what means the cognizance of causes matrimonial and testamentary belongs not to the sovereign of the state, but is given to an order of men dedicated to the service of religion. The fact is, that in the jurisprudence of this country, causes matrimonial and testamentary are of ecclesiastical cognizance. The right to try them is not derived from the king as the fountain of justice, nor exercised by the king's court; but wherever the royal authority interposes, it is not as sovereign of the state, but as supreme head of the church. The law did not even interfere to punish the violation of the matrimonial rights, and adultery, which in most countries of Europe is treated as a crime, but was not considered in England as an offence punishable by the magistrate, but left to the correction of ecclesiastical censure. At length however the violation of conjugal duty, accompanied with the circumstance of an open attack upon the order of society, by a second marriage, was, by special statute, made a crime: when I say made a crime, I do not mean it was made more immoral; but it was made a subject of criminal cognizance by the magistrate. The learned counsel who spoke second yesterday contended, that this statute gave no jurisdiction to the temporal courts to pronounce upon the legality of the marriage; but that the jurisdiction of the Ecclesiastical Court, as to the trial of the marriage, remained still absolute. It was necessary for his cause to attempt this argument; but to maintain this proposition is a very difficult task. The legislature, fifty years after the Reformation, has declared that the crime of bigamy shall be punishable as a felony by the magistrate. To convict a person of that crime, must not the magistrate try him? Has he not the power to acquit or condemn him? Has he only an authority to inflict the punishment, as in old times, when the church delivered over the offender to the secular arm? and is the sentence of the spiritual court to guide the conscience of the judge and jury in the criminal court? The sentence of the Ecclesiastical Court in the present case is said to be against the first marriage, and therefore it is urged the prisoner ought to be protected by it; but, if the argument is just, it must hold equally where the sentence is for the marriage: it sounds less harsh to contend that a party, declared not to be married in the first instance by the Spiritual Court, shall not be questioned for the second marriage. But by the same rule we must conclude, that if the Spiritual Court had determined for the marriage in the first instance, and the fact of a second marriage had been proved, it would not have been competent for the prisoner in an indictment for bigamy, so circumstanced, to have made any defence: he is concluded by the sentence, the judge and jury are bound to believe it, and, upon that

sentence, without examination, to convict and to punish.

The effect of the statute I take to be very different: it has created a new offence, and for the trial of that offence the cognizance of the lawfulness of marriage is given to the temporal courts. As to all criminal consequences, that court has cognizance to determine, as well as the Ecclesiastical Court, what is and what is not a legal marriage between the parties. That it has so, the case of Boyle and Boyle, quoted to your lordships for another purpose, is a clear proof: that was a prohibition issued to the Ecclesiastical Court to enter into an examination into that cause of marriage, which the Court, in trying the indictment, had determined. The other case mentioned by the learned doctor is to the same effect. The two cases differ only in this, that in one the party was convicted, in the other acquitted; but the Court was of opinion in both, that the Ecclesiastical Court could not interfere.

It is unnecessary however to have recourse to authorities, for the statute itself has decided this question. The legislature seems to have had it in view, that a jurisdiction being newly given to the temporal courts in the trial of marriage, questions might arise, as between concurrent jurisdictions, what should be the effect of sentences pronounced by the Ecclesiastical Court. It was a wise foresight in those who compiled the statute, to define in what cases the sentences of the ecclesiastical courts ought to preclude any enquiry for the crime; and it is defined in the words of the exception, "that this act shall not extend to any persons divorced by the sentence of the Ecclesiastical Court, nor to any persons where the former marriage has been by the Ecclesiastical Court declared void and null." There are two cases then put by the statute, in which the sentence of the Ecclesiastical Court protects the party against a criminal enquiry; sentence of divorce, and sentence of nullity of marriage: if therefore the Ecclesiastical Court, having competent jurisdiction, has either divorced the parties, or if it has pronounced sentence of nullity of marriage, the sentence in these two instances is conclusive: but the statute has no exception in favour of a sentence in a cause of jactitation. There is no pretence to argue, that a sentence in a cause of jactitation is either a sentence of divorce, or that sentence which makes the marriage void and of no effect: no lawyer, no civilian can make that mistake. What then does the exception prove? Two sentences of the Ecclesiastical Court are recited in it, the third is omitted; and it is a general rule of law, that wherever a statute excepts particular cases, the exception of those cases extends the statute to all cases not excepted. That proposition is too clear to require authorities to be cited in support of it. The law therefore, which says the trial of polygamy shall proceed in all cases, except where a sentence of divorce, and except where a sentence of nullity of marriage, has intervened, does virtually say, that a sentence in a cause of jactitation of marriage, which is neither of divorce nor of nullity, shall not bar the trial. I conceive therefore the statute to have decided this question.

The argument on the other side is put in a more plausible form, by stating the defence to be founded upon a fact, of which the sentence of the Ecclesiastical Court is the best evidence: there can be no double marriage, it is said, because the sentence disproves the first marriage. This mode of stating the argument makes it necessary to examine the nature of a suit for jactitation of marriage, in order to see what credit is due to the sentence when offered as evidence to disprove the first marriage.

A suit for jactitation of marriage is, from beginning to end, totally singular. Some writers on the canon law derive its origin from the doctrine of pre-contracts, which, by the ecclesiastical law, constituted a marriage: and till that very mischievous prejudice was destroyed by the late Marriage Act, it is not surprising that any attempt to lessen the evil should meet with encouragement. The form of the suit is this: the supposed husband or wife complains to the ecclesiastical judge, that he or she is a person free from all matrimonial contracts or engagements with the adverse party, and so esteemed by all neighbours, friends, and acquaintance; that the adverse party, notwithstanding the knowledge of this, has falsely and maliciously boasted of a marriage with the party complaining; it concludes then, by such false assertions an injury is committed, and prays that right may be done by declaring the party free from all matrimonial engagements with the other, and by enjoining that party perpetual silence. The party defendant may either say, I have not boasted, I deny that fact; or, if he admits that he has boasted, he is then to go on and allege circumstantially a marriage, which the other party denies, under the circumstances alleged. If the marriage is not proved, then the court pronounces, that so far as yet appears, the party complaining is free from matrimonial contract with the other party, and enjoins perpetual silence.

After this sentence, so gravely pronounced, your lordships are told by all the learned doctors, and all the books of practice agree, that this injunction of perpetual silence continues no longer than till the party chuses to talk again; and the person, to whom he may with the most perfect safety repeat his assertions, is the judge who enjoined him silence; for, it is agreed on all hands, that the party may at any time inform the court, that though it did not appear formerly that he was married, he can make it appear now; and such proof is admissible.

The forms of all courts had probably a good original, and this suit may have been introduced to prevent a greater mischief; but it is impossible to avoid collusion in such a proceeding, which has no avowed object, but to correct the indiscretion of a supposed dis-

course: and which, as the learned doctors on the other side truly state, has no termination; and between the parties themselves never obtains the best effect of a judgment, to put an end to litigation. In modern times, such suits have seldom been commenced but to favour some indirect purpose; and were the sentences allowed to have the effect that is now contended for, were they to be a bar to all criminal enquiry, it might be expected that suits, which, as the learned doctors state, may be carried on without end, would very frequently spring up.

Nothing can be further from the temper of my mind upon the present occasion, than to use a ludicrous argument: but when the uncontrolable effect of such sentences as these, so contrived and framed for fraud, was urged yesterday; and while to lessen the objection to them, it was gravely argued, that no great mischief could happen from the decision, because you may reverse this sentence to-morrow, that the next day, and a third after that, and that the suit was in its nature eternal; an ingenious person among the bystanders was calculating, how many wives a man that had a taste for polygamy, might marry with impunity; and I think he made it out, according to the probable duration of such a suit, that a man between twenty-one and thirty-five might, with good industry, marry seventy-five wives by sentences of the Ecclesiastical Court, each sentence standing good till reversed, and all reversible by that judicature.

My lords, the argument is serious, though it presents a ludicrous idea, for one consequence would probably attend a decision in support of the authority of such a sentence. The Marriage Act put an end to that terrible disgrace of a civilized country, Fleet marriages:* while they subsisted, it was a common practice for indigent women of easy virtue to get a Fleet husband to protect them from their debts. If a sentence of the Ecclesiastical Court is to have effect against all but the parties, a cause of jactitation will supply the place of a Fleet marriage, and furnish an husband by sentence, whom the lady may remove whenever he proves inconvenient. This is but one instance, and in the lowest class of the evils, that would follow from allowing such sentences to be interposed against public justice, or the rights of third persons. What guard can there be against uncertain issue, uncertain rank, and all the numerous mischiefs that arise from doubt and collusion, introduced in the relations that form the bonds of society?

Were all considerations of the consequences attending such a decision to be laid aside, the very form of the sentence argues against its being conclusive. What says the Ecclesiastical Court in that sentence? "As far as yet appears, no marriage is proved." The verdict upon an indictment will say, "it does now appear, that a marriage is proved." The two propositions do not clash with each other; there is no contradiction in them: to the party it is said, You have not proved the marriage; a public accuser does prove the marriage; the justice of the country has brought out the evidence of that fact, which the party either did not incline, or was not able to produce. There is no repugnance in the different propositions, no incongruity in supposing that the sentence may stand as between the parties, and yet shall have no conclusion either as to the public, or as to third persons.

The argument in favour of the sentence was supported by this dilemma. What becomes of this sentence, if the indictment for bigamy goes on? Is it null, or has it any effect? Is the party a wife, or no wife? I answer, to all civil effects no wife; the party has bereaved herself of any right to benefit by the relation; to all criminal effects a wife, because that relation, the duties consequent upon it, and the responsibility for the breach of those duties, cannot be destroyed by the act of the party. I could quote to your lordships other cases, where the party takes no benefit from his act, where he holds the situation only to make himself amenable to the justice of his country. I refer to a known case: a man had committed an act of bankruptcy by collusion with a creditor, and a commission of bankruptcy was taken out against him, the object of which was, to procure a discharge from his debts. He chose to conceal a part of his effects, for which he was indicted upon the statute making it a capital felony for a bankrupt to be guilty of any wilful concealment: it came out clear as the light, that he was no bankrupt, that is, no bankrupt to any civil effect; he could not avail himself of that commission of bankruptcy against any creditor that had a mind to dispute it, except the creditor who had colluded with him; but though he was in fact no bankrupt, he was tried and convicted as such.

My lords, after the indulgence with which your lordships have been so good as to hear me so long upon this subject, I am sorry to be obliged still to trespass a little longer upon your patience, when I consider the fourth proposition, which certainly is not the least material; that is, that a sentence, infected with fraud, to which collusion may be objected, is no bar in any cause. My lords, upon that head the principle is so plain, that the illustration of it will not run into much length, and the authorities are so decisive, that I shall only state, and not argue upon them.

A sentence obtained by fraud and collusion is no sentence. What is a sentence? It is not an instrument with a bit of wax and the seal of a court put to it; it is not an instrument with the signature of a person calling himself a register; it is not such a quantity of ink bestowed upon such a quantity of stamped paper: a sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled: in order to make a sentence, there must be a real interest, a real argu-

* See something concerning them in vol. 14, p. 1307.

ment, a real prosecution, a real defence, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit: there is no judge; but a person, invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him: there is no party litigating, there is no party defendant, no real interest brought into question; and, to use the words of a very sensible civilian on this point, "fabula, non judicium, hoc est; in scenâ, non in foro, res agitur."

The ground then upon which I contend, that a collusive sentence is no bar, is shortly this; that such a sentence is a mere nullity. But it is insisted, that the court which pronounced the sentence can alone declare the nullity of it, and, till repealed, it must stand good and valid. The authorities to which I mean to refer upon this head, will refute that argument, at the same time that they prove the general doctrine.

The first is my lord Coke's reasoning in Fermor's case, 3 Coke 77: he concludes the resolution of the case in this manner: "Thereupon it was concluded, that if a recovery in dower, or other real action, if a remitter to a feme-covert or an infant, if a warranty, if a sale in market overt, if letters patent of the king, if presentations and admittances, that is to say, if all acts temporal and spiritual should be avoided by covin, for the same reason a fine in the principal case levied by fraud and covin shall not bind." Nothing can be more explicit than these words to shew, that there is no necessity that the covin should be prosecuted in the court in which the judgment was obtained. The case of Lloyd and Maddocks in Moore, 947, is a direct and a plain authority: there a fraudulent judgment was set up against a plea of a legatee in the Spiritual Court. The question in the court of King's-bench was, whether the Spiritual Court should be prohibited to enter into the consideration of the fraud of the judgment, which is certainly not a matter of ecclesiastical cognisance; but the Court was of opinion, that the covin was aptly examinable in a court Christian to that effect, and therefore the prohibition was denied.

My lords, the other authorities are more modern, though not more decisive upon the point than this. The first I mention to your lordships is the case of Prudham and Phillips: there is a very bad and a very inaccurate note of it in sir John Strange: the note, from which I cite it, is a manuscript note of Mr. Ford.* In that case it was determined by lord chief justice Willes, that a fraudulent and collusive sentence against Mrs. Constantia Phillips was binding upon her; but he concludes it was binding upon no other party: the fraud was a matter of fact, which if used in obtaining judgment was a deceit upon the court, a fraud upon strangers, who as they could not come in to reverse it, they could only allege it was fraudulent. He said in that case, that any creditor of hers might reply that it was fraudulent, and avoid the effect of it. The other cases I refer to are, my lord Hardwicke's authority in the case of Roach and Garvin, 1st Vezey 159; and in the case of Brownsword and Edwards, 2d Vezey 246. In the case of Roach and Garvin, the question was upon the effect of a marriage, said to be established by the sentence of a court in France. Lord Hardwicke enters into the consideration of it thus: "The question is, whether this is a proper sentence, in a proper cause, and between proper parties; whether a marriage is had in fact, or any contract *in præsenti*, as a sentence in the Ecclesiastical Court would be conclusive, unless there be collusion, which would overturn the whole." In the other case the ground is exactly the same.

From these cases, I conclude it to have been the uniform opinion of all the great judges

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* Which is thus printed by Mr. Hargrave, in his Discourse mentioned in a Note at the beginning of this Report:

"Assumpsit brought against defendant, who gave in evidence a marriage with one Mr. Muilman. Plaintiff shewed a sentence in the Spiritual Court annulling that marriage, for that at the time of solemnizing it, defendant was married to one Delafield, alias Duval, which the plaintiff's counsel relied upon as conclusive evidence of the nullity of such pretended marriage. And so it was agreed unless defendant could be admitted to shew great fraud in obtaining the sentence, and so avoid it, as judgments are daily avoided by replications of fraud.—Resolved on great debate, that the ecclesiastical law was part of the law of the land, and sentences by their judges were therefore in matters of spiritual jurisdiction, of equal and the same force with judgments in courts of record, or in courts of equity. Whatever objections, therefore, would avoid a judgment in a court of common law, would be sufficient to overturn a sentence in the spiritual court, but none others: that fraud was a matter of fact, and if used in obtaining judgments was a deceit on the Court and hurtful to strangers, who, as they could not come in to reverse or set aside the judgment, must of necessity be admitted to aver it was fraudulent; and this was the reason why executors might have such averments. But who ever knew a defendant plead, that a judgment obtained against him was fraudulent? He must apply to the Court, and if both parties colluded in the cheat upon the Court, it was never known that either of them could vacate the judgment. Here defendant was party to the sentence, and whether she was imposed upon, or she joined in deceiving the Court, this is not the time or place for her to redress herself. She may if she has occasion appeal, or apply otherwise, to the proper judge. Note. Delafield died about six months before action brought.—Prudam et al. v. Com. Phillips, alias Muilman alias Delafield, coram Willes chief justice, sittings in Middlesex, for C. B. after Michaelmas term, 1737."

who sat in Westminster-hall, from the time of lord Coke down to the present time (and the courts were never more ably filled) that fraud and collusion not only vitiates, but absolutely annuls; and that a sentence obtained by fraud is, literally, no sentence at all; therefore the objection of such an instrument, of so much paper and writing, is the objection of a mere nullity, and can have no effect either in a civil or in a criminal suit. Having troubled your lordships so very long, I will take up no more of your time, even to recapitulate the heads of the argument, but hasten to return my humble thanks for the great indulgence I have already experienced.

Mr. *Dunning*. My lords, I purpose to give your lordships very little trouble: indeed, I should be without an apology, if I had thought of giving you much, finding, in the station which I hold in this cause, the subject completely exhausted; and I cannot but suppose your lordships' attention in a great measure tired, notwithstanding the occasional relief which the entertaining parts of the cause have afforded, has given you. I have the less inclination to give your lordships much trouble, as I feel a degree of surprize, that it should have been thought necessary for the counsel on the part of the prosecution to give your lordships any.

My lords, the subject for immediate consideration is, the competency of obtruding this sentence, in this stage of the cause, to stop the cause here, and to require of your lordships to decide it, without any regard to the truth or the justice of the case: such however it is contended is the effect of this paper, that is offered to your lordships under the name of a sentence of the Ecclesiastical Court.

The novelty of the attempt it is not my intention to expatiate upon: it has been truly observed to your lordships, that some prejudice at least may be expected in the minds of your lordships against an attempt so novel; for though I am not so blind an admirer of antiquity as to take for granted, that every thing that is new is therefore wrong; sure I am, I am warranted in expecting your lordships' concurrence in thinking, that those, who propose at this time of day to introduce into the judicature of this country a new practice, ought to be prepared with such reasons as should compel your lordships' assent. This I think may be fairly insisted, upon the head of novelty.

My lords, the gentlemen undertake to maintain, first, that this evidence is competent and admissible; secondly, that it is conclusive; and thirdly, they insist on this conclusion, not only upon the supposition, that it is a sentence fairly obtained between real parties, after an adverse agitation of the question, which it is supposed to have decided; but though all these circumstances should be totally wanting, and though the contrary of them all should be the truth of the case, the sentence is insisted on as equally conclusive. In that extent it is, that the gentlemen have undertaken to maintain this proposition; and a very considerable task it seems to me they have undertaken. My lords, I consider the sentence as read only *de bene esse*, merely that your lordships may know what the contents of it are, that you may have the assistance of that knowledge in judging not only of the ultimate effect of it, but of the propriety of receiving it at all in this stage of the business. At the first blush, to be sure it seems a little absurd, that your lordships should be to decide the cause before you have the smallest knowledge of what the case is, that is to be stated upon the part of the prosecution. It is certainly necessary for those that are to judge of this paper, to know what it is. It is a sentence in a court, of which your lordships heard yesterday abundant commendation. It was observable that those who were most lavish in that commendation, were least acquainted with the practice of that court. The first of the learned doctors spoke with a very becoming modesty of the court in which he practises. The other explained to your lordships the nature of a jactitation suit as concluding nothing, being to be revived at any time, and consequently having no end. It was contended by all the gentlemen, that this court was entitled not only to what on the part of the prosecutor we should have had no difficulty perhaps to have admitted, to co-equality with the courts of temporal jurisdiction, but to something superior; it was contended that there was something in the nature of this subject that made it peculiarly the province of that court to judge of and decide upon: not that they have better means of information, not that they have better rules of decision; but from something unexplained in the constitution of the court, it was rather assumed than attempted to be proved, that to that court exclusively belong matrimonial questions, questions on the rights of marriage, and even of the facts of marriage. I am persuaded your lordships all go before me in feeling a conviction, that there is not in that extent a foundation for that claim: yet this peculiarity of jurisdiction, and the consequential necessity, in order to get rid of the sentence, to resort again to that jurisdiction, appeared to me to be the points principally insisted on. Neither of them, I trust, your lordships will think are made out at present. I am considering the first. That to certain purposes, and with a view to certain consequences, the Spiritual Court is the only court in which questions of matrimony can be agitated, is most true. There alone it is, that the party deprived of, and complaining of the want of conjugal rights, must resort to seek them: there it is, where the party supposed to be injured by a false claim of a marriage, when none exists, can obtain redress for that injury: but, to other purposes, and various are those purposes in which the question of marriage arises, whether it is to be examined into with a view to temporal or spiritual advantage; whe-

ther it is to be examined into with a view to rights derived from it, or punishments for crimes committed in relation to it, to the temporal and not to the spiritual courts belongs, I conceive, this question of marriage. My lords, to suppose otherwise would be to deny in fact, that your lordships sit here with any jurisdiction at all; for if it were true in the extent in which it was contended, that to the Spiritual Court exclusively belongs the consideration and decision of the question, marriage or no marriage, it will follow by a necessary consequence, that if there were no such sentence as the present to be thrust in our way, and to create this temporary difficulty, for such I trust it will prove to be, if there had been no decision in the Spiritual Court at all, your lordships would only have been in the possession of this cause for the purpose of writing to the bishop to know how the fact stood, and from his certificate to take your ideas of the question which you are to decide upon. The gentlemen must maintain not only that there was not at the common law any thing like a jurisdiction, but that this statute, which means in terms to give a jurisdiction, has not in point of effect given any. I am at a loss to find a way, consistent with what the gentlemen have maintained, to deliver them from that consequence. If they insist, that no temporal court has a power to enquire into a question of marriage, it will go to that extent. They have made a distinction between those cases, in which the question is the point of the cause, and in which it arises incidentally. The question does not arise at all, unless it arises materially: if there be any thing in the distinction, let us see a little how it will help this argument. Was the marriage the gist of this cause in the Spiritual Court? No: the lady applies to the Spiritual Court, assuming that there was no marriage, complaining of an injury, which consists in the circumstance of a man who was not her husband taking to himself and boasting (as a man would be apt to boast in such circumstances) of the honour of bearing that relation to her.

This cause is not in its nature a question of marriage, but of defamation. If that, which the lady suggested, had been admitted to be the truth of the case, he would have been to excuse or extenuate his offence, just as the nature of his case would enable him to do, by either denying that he had boasted, or stating what had led him into it: but this defendant says, No: I have held that language, which you call boasting: I will not dispute with you the propriety of that appellation: I have called this lady my wife; because, whether it be my good or ill fortune, she is my wife. It is for that reason, and that reason alone, that I have held this language, which is imputed to me as a crime: I am no criminal in holding this language, for that is my situation, and this is my defence. Thus it is, that the question of marriage is introduced into the cause: it is insisted upon as a defence; as a matter material to her defence it is that the question of marriage in this cause arises. Is it less incidental or more direct than the same question arising in the ordinary way, in which it arises in temporal courts? A person, claiming to be the legitimate son of his father, commences an ejectment, in which the question of legitimacy turns out to be the only question in the cause: it is essential to his supporting his claim, that the court, who are to judge of it, and the jury that are to decide upon it, should be satisfied of the facts, that the claimant is the eldest and the legitimate son of the father. The point of marriage is not the point of the suit directly, immediately, ostensibly, and upon the face of the record in that cause; but incidentally, materially, and necessarily that point becomes a point in the cause. Just thus, in my apprehension, this cause stands; and, as applied to this cause, the gentlemen cannot avail themselves of the distinction between the jurisdiction to be exercised incidentally, and to be exercised directly, upon the subject of marriage. One of the learned doctors represented his ideas of this jurisdiction exercised in the Spiritual Court, as if it was a jurisdiction to decide upon an abstract question. I am persuaded the learned doctor in the use of that word meant only to say, that in their forms of proceeding, and in some of those causes which are instituted in their courts, the right of marriage, in contradistinction to the fact of marriage, was more immediately pertinent than in some of the proceedings in temporal courts; which to be sure it is. In any other sense of the word, the learned doctor used it inaccurately; for that court, any more than this or any court, has no jurisdiction to try abstract questions of any sort. No question ought to be agitated in any court whatever, unless it be a real question springing from a real interest, and between real parties. To agitate any other question is an insult to the Court. There is a sense in which the Court may be said to have agitated this, in the nature of an abstract question; for it is certainly true, if our instructions have any foundation in truth, no one circumstance of the actual case of the parties was before the Court, or made any part of their enquiry. I trust, I shall be thought to have done enough at least for the Ecclesiastical Court in admitting, that their sentences are equal to our judgments; that they are not entitled to more, I may safely contend, when I am admitting, that they are entitled to as much attention as is due to a decree of a court of equity or a judgment of a court of law. In such an admission, at one time I should have been thought to have gone much too far: I trust, the learned doctors will forgive me, if I cannot carry my civility any farther. God be thanked we live at a time, when a better understanding of the subject, and a more liberal way of thinking upon every subject, has so far abolished the ancient differences between the different judicatures in this country, that we and the learned doctors may meet together without quarrelling. Their proceedings

in cases in which it is competent to them to proceed, deserve the same attention and faith as those of temporal courts. This appears to me to reduce the claim, upon the part of those that are to support this sentence, precisely to this situation; and it is impossible to carry it one jot farther: it is an opinion of a court, not having superior or exclusive, but having a concurrent jurisdiction of this question; having competent power to decide, and having no powers to exclude another decision elsewhere, where, for other purposes, criminal or civil, it may come to be discussed, according to the forms which those different judicatures usually observe in their proceedings, totally unobstructed or assisted by any attention to what has passed in any other judicature: this, I trust, will be your lordships' judgment upon the question agitated between us, if it should be material.

My lords, I laid in my claim to object to the admissibility of this piece of evidence, upon which, if I should have the good fortune to have your lordships' concurrence, the subsequent consideration of the effects of it, if admitted, will become totally immaterial. I deny, that this is admissible in a court like this, a court of the highest criminal jurisdiction in this country.

My lords, it is so familiar, that it would be impertinent to that part of the Court to which I have the honour to address myself, which is more particularly conversant in the forms of proceeding in courts of justice, to be labouring to prove, that when a subject is examined into in the course of a criminal enquiry, under the form of an indictment, or of an information, what has passed or may pass in the course of a civil enquiry upon the same subject and the same question, is not only not regarded, but is not admitted. In the instance that was put, and many others that may occur to some of your lordships, it is perfectly notorious, and therefore neither requires argument nor proof, that the practice is certainly so. Let a man be acquitted in a court of criminal jurisdiction, it does not preclude a party, complaining of an injury arising from that act, which in a criminal court has been presented as a crime, from seeking redress for the civil injury; and *vice versa*, the fate of such an action cannot be enquired into, much less cannot it preclude the proceedings in a subsequent criminal enquiry, taking its rise from the same act. It has been enquired into in a court of one description, it is now enquiring into in a court of another description.

My lords, one reason (there are others, but) one reason why courts of criminal jurisdiction do not admit any account of what has passed upon the agitation of the question in a court of civil jurisdiction may be, the liability to fraud and collusion. I am not now arguing upon the fact of collusion in this case: but it is obvious that if this would do, if the sentence of a court of such jurisdiction, whether ecclesiastical or temporal, will preclude a criminal enquiry, the receipt is of ample use; and all men may, if they please, cover themselves against the penal consequences of their crimes by instituting a friendly suit. Some such we have known to have been so conducted as to escape the attention of the judges, who have not found out, till after the cause has been decided, that the cause has been collusive. Cases of this sort are so open to fraud and collusion, that for this reason, if there were no other, the courts of criminal jurisdiction will always reject such evidence. I do not know that case has yet existed, where any person has done so strange a thing, as to put it in the power of the Court to receive or reject by offering such evidence. Your lordships have had cited to you a case, which, having been treated as it deserves, need not be repeated by me; the case of the King and Vincent. If it were possible to suppose that case could be law, that supposition is removed, when your lordships are told that a different opinion upon the same point has been held by the judges that have succeeded in the same court, and to whose knowledge or ability nobody, that knows who they are, would, I believe, object. The last of these cases, the King and Stirling,* I am aware, may be attempted to be distinguished, and for what I know the first of them may, by saying that the question did not occur, the objection was not taken in either of these cases; but your lordships knowing before whom those criminals were tried, will believe that no such objection would have escaped these judges, if it had been founded in law, although no counsel objected to it, or although the criminals perhaps had not the assistance of counsel; therefore I consider that case as fairly dismissed, and the subsequent cases as carrying an authority upon our side that more than overturns it: but I do not conceive, that even this was wanting; for the instrument in the case of the King and Vincent has no resemblance to the sentence now offered; it was an official instrument, necessary to give sanction to a legal right. Letters of administration, or a probate, may be admissible; but it does not by any means follow, that a sentence like this is admissible here: if it be, it must be equally admissible on all sides. The gentlemen argue, that your lordships should receive it, should act upon it, should conclude upon it. Why? Because it is a sentence rescinding the marriage, declaring that there was no marriage; that is the import of this sentence, and therefore it operates in their favour, and therefore it happens that they produce it. Let me invert the case; let me suppose, that when this lady instituted that suit, the party, who was the object of it, had supported that defence, as we conceive he was very well able

* See this case in Leach's Cr. Cases. And note the remark adopted by him from Dr. Calvert's argument, *infra*, p. 532, that in that case the probate had not at the time of the trial been recalled. See, also, East's Pl. Cr. ch. 19, s. 43.

to have done, and that in consequence the cause had ended in a declaration or a sentence, that there was a marriage: in that case, would it have been evidence upon the part of the prosecutor? Would it have been attended with those consequences which they are claiming for it now upon the part of the person prosecuted? Would your lordships have endured, that the prosecutor should have come here to support this indictment by no other evidence, than the production of a sentence in a suit like this in the Spiritual Court, by which that court had determined Mr. Hervey and the lady he had married were husband and wife? Can I possibly state it to any mind that comprehends it, that does not at the same time revolt at the apparent hardship and injustice of such an idea? And yet is there any thing more true, than that a record cannot be evidence of one side, which would not, if it had imported the reverse, have been evidence, and with equal force, of the other? I conceive it to be one of the fundamental rules to determine what evidence of this nature is or is not admissible, that if it could not have been admitted on behalf of the party objecting to it, supposing its import had been favourable to him, so neither shall it be admitted on the part of the person proposing it. I trust I may be warranted in presuming that your lordships think as I do; that in order to support this indictment something more than such a sentence would be required from us; and that the legislature in making this new provision meant, that the fact should be enquired into, as all other facts are enquired into; that the relation should be proved by those who were witnesses to it, by those who can prove the confession of the parties to it, or by those who can give such other evidence as courts of criminal jurisdiction are authorised to act upon. Can any thing then be more obviously unsuitable to any ideas of justice, than that the enquiry should be precluded by a record in favour of one of the parties, which might have been as favourable to the other party, and which, if it had been, would not have been regarded?

If your lordships think fit to admit this evidence, and by so doing to raise a question upon the effects of it, the gentlemen argue with some appearance of triumph, that this kind of sentence is conclusive, for that there are various instances, in which sentences of these courts, in which judgments of other courts, have been held conclusive. For this purpose your lordships are furnished with a great string of cases, some of condemnations in the court of Exchequer, some even from boards of Excise, some from courts of Admiralty, some from domestic and some from foreign courts. There has existed, and fitly existed, such a comity in the practice of one court towards the proceedings of another, that, whether the court be foreign or domestic, the courts presume, that what is done is rightly done, that there has been no collusion, that there has been no fraud, that the judgment and decree is what it ought to be, the effect of an adverse suit between adverse parties. Presuming the effect of such sentences, such decrees and judgments, in civil causes to have been what it has been stated to be, it must have been upon the supposition and upon the presumption that the sentence or the decree has been fairly and rightly obtained; but if this degree of conclusiveness were allowed to it in criminal cases, if such a sentence were allowed to be conclusive, where the parties are unprepared in point of evidence to impeach it, and if such were allowed to be the effect of it in such a case in courts of criminal jurisdiction, it would obstruct the course of justice in a thousand instances, and in effect operate to the repeal of this and many other wholesome laws. In this instance the mischief would be too great if the policy of this law be questionable, if that which we call a crime is an innocent action. If there is no impropriety in the practice now brought under your lordships' consideration, if polygamy deserves encouragement instead of a check, then in another character your lordships will do well to repeal the act; but do not do it in your judicial character.

My lords, cases may be supposed, and we are in a situation that authorizes us, nay, not only authorizes but requires us to suppose, the grossest cases that our imaginations can furnish. It is not difficult to suppose a case, in which the directest fraud upon the Court may be practised by means of the grossest perjury, and yet through the collusion of the parties it may be managed with so much dexterity, that it would be impossible to get at them; and in all these instances the effect I am now deprecating would be of course let in upon the criminal jurisdiction of this country.

My lords, I am persuaded your lordships will not do this. In what I have said upon this point, I have anticipated in part the question which I stated as the third in the order, in which I purposed to consider the argument on the part of the lady at the bar. All her counsel have attempted to contend for the conclusiveness of this sentence; and they all mean, I presume, to insist upon it as precluding an enquiry into the mode of obtaining it. The other learned gentlemen will excuse me, if I seem to have been less attentive to what fell from them, than to the second counsel on the part of the lady. The fact is, I heard him more distinctly than those who preceded or followed him. He chose to consider this act as not having created a new offence, but as having simply varied the punishment and mode of trial of a known offence, which existed as the law stood then. I am at a loss to comprehend, in what sense this can be considered as having not created a new offence. This act declares something to be a felony, which before was no felony. This act creates that to be a felony, enquirable into in the way in which other felonies are by law enquirable into, in a case that was before only cognizable as an offence against the canon law, and enquirable into in a suit which had nothing for its object but the spiritual interest of

the party. I conceive it to be a new offence in the same sense, in which almost all the statutable offences in this country are new offences. This act has not only created a new offence, but, as I conceive, abolished an old one; for I doubt whether it be now competent for an ecclesiastical court to proceed to enquire into offences of this sort, if it were (as has been supposed) their practice before this act. By the custom of London, a certain species of defamation is actionable there; and upon that ground the temporal courts proceed in granting prohibitions to stay proceedings of the Spiritual Court in such cases; so I apprehend the courts would do here, if the Spiritual Court proceeded 'pro salute animæ' in a case of polygamy. My learned friend assumed, that this sentence would stop the proceeding of such a cause in the Ecclesiastical Court, but referred to the learned doctors to make it out; which the learned doctors, I presume, not liking the reference, forgot to attempt: so it stands as a point assumed, but not proved, that the Spiritual Court would at this time entertain such a suit, and that its progress would be stopped by such a sentence. Your lordships heard a very pathetic description of the melancholy situation in which the lady will stand under this sentence, if this prosecution proceeds, and in consequence of it she should be treated in the disagreeable way to which the act exposes her. She will nevertheless, it has been said, after having been punished as a married woman, be totally destitute of any advantage in present or future of that marriage; she can never claim any conjugal rights, nor (if her circumstances did not preclude the necessity of her seeking it) could she compel any maintenance from this gentleman during his life-time, nor can she, if she survives this supposed husband, support any claim to his fortune.

My lords, the husband is in the same lamentable situation: it is equally incompetent to him, while this sentence stands, to derive any advantage in point of comfort during her life-time, or in point of succession upon the death of the lady. It may be so; but if it is so, it will not be the effect of the judgment your lordships will be to pronounce: it is the effect of those practices between the parties which have produced this sentence, and which have made this their situation and their state.

My lords, it will be time enough to consider this question, when the case arises. If ever this lady should re-assume an inclination to establish that relation, which in this suit she has thought good to disclaim; or if it should ever be the pleasure of the earl of Bristol to connect himself again with this lady under the relation of an husband; it will then be time enough to enquire, what they can or cannot make of such a claim, or what the impediments are, which they will have to remove in order to establish that claim. As neither of these cases are very likely to arise, it is immaterial to go further into the enquiry of what may probably or possibly be the consequence of them. It occurred to the learned gentleman to consider, that it was very possible he might be led by this train of reasoning into the consideration of the effect of the collusion. Your lordships will permit me to remark, that the learned gentleman who spoke first upon that side of the question, chose to be perfectly silent upon this head. He did not seem to know that it would be likely to occur to us in the consideration of this sentence to suggest, that it was collusive; for unless it were by an allusion to the case of Hatfield and Hatfield, the notion of collusion, as making a part of this question, did not seem to have occurred to him. Mr. Mansfield saw the certainty of the collusion being introduced into the argument: to obviate it, he used three cases, two that had been mentioned before, and a third he introduced for the purpose. The first, in the order of time, was the case of Kenn in my lord Coke, which whoever reads, will see that the only point determined, and the only point to be determined in that case, was, that it was not competent for the party to traverse an offence that had been found against him: all the rest is that sort of lucubration which adorns, and in many instances improves, the reports of that learned judge of the decisions of his own time. And this is the use that is attempted to be made of this part of the argument; that it was founded in falshood, and therefore was upon the face of it collusive. The falshood was, that the party was in a condition, as it turned out by subsequent enquiry, to have made a better case than he did make; and from thence it is to be taken for granted, that of purpose and design he abstained from making that case that he did not make. Your lordships know better the nature of business, than from such a circumstance to infer a fraud: the best-bottomed causes often miscarry for want of that evidence, without which they cannot be supported. The next case, that of Morris and Webber, from Moore's Reports, seems to me to be still less material or useful to the purpose for which it is produced: that was the case of a divorce 'propter impotentiam viri.' The parties marrying afterwards, fruit of each of these marriages was the birth of children. Perhaps it may occur, that that circumstance did not afford a very decisive and conclusive proof of the negative of the ground upon which that decree was pronounced: it is not an impossible case, that what had happened might happen, although the divorce was perfectly well founded in point of fact. But suppose it were taken for granted, that the child must of necessity be the issue of a man who had been divorced 'propter impotentiam;' yet that it must of necessity be inferred from thence, that this sentence was collusively obtained, remains to be made out. I conceive that this case, any more than the one that preceded it, does not afford a colour to say, that the question of collusion and the competency of going into the question of collusion occurred to the court in either

of these two cases. In the case of Hatfield and Hatfield, a man, who, under colour of being the husband of the woman, had taken upon him to release some interest which she was entitled to, and he claimed to be entitled to in her right, and the question turned upon the effect of that notion: there was afterwards a sentence between the parties against the marriage; whether the means to obtain it were fair or foul, fraudulent or otherwise, we are left to guess at. Your lordships will not, I presume, adopt all the printed reasons, good, bad, or indifferent, that are offered to your lordships at the close of your printed cases. Your lordships' predecessors in that case could do no otherwise than they did: they saw, that the decision in the court below was right, and upon that ground they affirmed the decree. Now, what was the thing decreed, and the point in controversy between the parties? The man, while he passed for this lady's husband, took upon him to release an interest, which it was not competent for him to release, whether he had or not that character, the subject of the release being a legacy, left to her under a will, in such terms as operated to give her in equity a separate interest. I need not contend, that in a separate interest of the wife the husband cannot controul or deprive the wife of it by any release of his. A court of equity had decided against the party claiming under the release, which, according to the settled doctrine of courts of equity, it was equally bound to do, whether the party releasing had or had not married the woman whose interests were to be affected by it; and the question (husband or no husband) was just as foreign to the merits of that decision, as any thing that could be talked about in the cause. Totally therefore laying out of the question all that had been said upon the subject that was not necessary to the decision of the case, the House of Lords affirmed the decree of the court, because they saw it had rightly decided the only point in controversy between the parties. These then are the cases, upon the ground of which, and upon the ground of which alone, (for I have not been able to collect a fourth) your lordships are desired to decline doing that in this instance, which we contend your lordships are bound in justice to do; that is, to let us into the enquiry by what means this sentence was obtained. The gentleman, particularly, who made this use of these three cases, could not forget the familiar practice, which he is a witness to every day of the year, of impeaching the judgments of the courts of law, whenever they are impeachable upon the foundation of fraud and covin. It never occurred to a court in which such a question arises to refer the party who makes a complaint of a judgment so obtained, to the court in which it was obtained, or to direct him to institute a suit to get rid of it; he impeaches it just when it affects him, and not further than as it affects him; beyond that, it is a matter of perfect indifference to him, whether it stands or falls; for the purpose of doing that, which alone he is interested in doing, the party, who would otherwise be prejudiced by such a judgment, is constantly and daily permitted to say, that this was a judgment obtained by covin: this allegation is usually formed into an issue, and if that issue is determined in his favour, though the judgment stands as to every other person, *quoad* him it is avoided in the manner we are ready to avoid this sentence. It was said, that the reason why creditors are permitted so to avoid judgments set up to their prejudice by executors or administrators, who seek to cover effects in their possession by false judgments, is, because these people cannot be relieved in any other form; it cannot be referred to any other court. I am perfectly content to take that as the principle; then it remains in order to support this distinction, for the learned gentlemen among them to make out, that it is competent to his majesty to make himself a party to this suit in the Spiritual Court, or to institute there by his proper officer, a new suit to get rid of this sentence. The gentlemen have not attempted it; it would be ridiculous; and I fancy I may presume it will not be attempted: it is not competent, much less necessary, for the king or his law-officers to go into that court for a purpose so idle as this. Taking this then to be the reason why it is admitted in civil causes to creditors to get rid of judgments, by which they are attempted to be injured, by shewing that they were collusive and fraudulent, does it not follow by parity of reason, that it is equally proper that the same thing should be done here, supposing that your lordships should for a moment forget this to be in a criminal cause, in which the reasons for so doing are so much the stronger? Another distinction between this case and that was attempted. It was said, this is not the case of a third person complaining of an injury arising by a sentence, and wishing to avoid it so far only as it affects him; but it is a suit instituted for overturning the sentence. I apprehend it is not so; we contend for nothing but to lay this sentence out of our way, as applied to the present subject; just as you lay out of the way a judgment between A and B where it is attempted to be used to the prejudice of C. After your lordships have convicted this lady, if in the result of the enquiry it should be proved, that such is the justice of the case, I do not know that the verdict or the judgment in this case will be evidence upon an enquiry into the same facts for another purpose. If the result of the present enquiry is understood to establish the marriage, and to nullify the sentence, it is because the sentence is in its nature, when it comes to be enquired into, really and truly null and void: not because that such is the effect of any operative power and force that belong to your lordships' conviction. This is not a prosecution for the annulling of that sentence; this is a prosecution to subject the party to the punishment which is by law due to the offence upon her: it cannot be attended with any other possible consequence. Upon the same ground

that the sentence is attempted to be impeached here, it may be impeached every where, except by the parties, who may perhaps have precluded themselves by their conduct from impeaching it.

My lords, as there are no authorities on the one side, it remains for a moment only to observe, that there are authorities on the other side: as applied to civil cases, two have been mentioned. The good sense of both the authorities, particularly of one, I should apprehend establishes this proposition clear of all controversy; for, when in the case of the action against Constantia Phillips, of famous memory, it was determined, that whatever objections would avoid a judgment in a court of common law, would be sufficient to overturn a sentence in the Spiritual Court, but none other; one should have imagined that the proposition carried with it so much good sense, that all the world should feel it and adopt it. The Scotch case is by the highest authority, and there the true use that is to be made of a judgment in another court is ascertained and limited; it is evidence; it is strong evidence; but it remains to be explained; and still more, it remains to be laid out of the case in a cause like this, and in a case like that of Phillips, where there existed a ground to impute collusion and fraud to it. In Phillips's case, it was not permitted to her to avail herself of that collusion and that fraud. Why? Because it was a fraud of her own. But the learned judge, when he refused to permit her to impeach that sentence, which she had obtained by collusion and fraud, adds, according to Mr. Ford's manuscript note, that, "as against all others, whatever objections would avoid a judgment in a court of law, would be sufficient to overturn a sentence in the Ecclesiastical Court." We desire to overturn this sentence upon no other grounds, than sentences and judgments in courts of law are every day overturned by: they must continue to be so overturned in future, as long as there continues to be any attention to truth and justice, in the decisions of courts of judicature. I do apprehend, that your lordships will not think, that I take an improper freedom with the sentence, or the Court whose sentence it is, by desiring that your lordships will by-and-by form an opinion of the purity of their proceedings by the specimen that we shall give you of them, when we come to state and prove the means by which this sentence was procured; and then perhaps your lordships will see no reason for raising it above the level of other courts, on which we are content to leave it. With your lordships' permission, I would supply an omission I meant to have stated in its proper place; the case of Robins and Crutchley. A Mrs. Robins commenced an action of dower, claiming a share of the succession to her supposed husband Mr. Robins: this lady had been claimed to be the wife of a sir William Wolseley. Sir William, upon the supposition that she was his wife, had instituted a suit in the Spiritual Court, probably with an intention to get rid of her, charging her with having committed adultery with Robins: in the course of that enquiry in the Spiritual Court, it came out to the satisfaction of the Court, that she was the wife of Robins and not of sir William. This sentence was introduced in pleading in this cause of dower for the purpose of repelling a denial on the part of the heirs of Mr. Robins, that she bore any relation to them or to their ancestor. To that replication there was a demurrer, which brought under consideration of the court of Common Pleas the effect of this sentence so pleaded. The opinion of the court of Common Pleas was to allow that demurrer; and though the point decided may perhaps be only this, that that sentence could not avail the party in that form of pleading; yet I conceive that point must be very erroneously decided, if the sentence were of the description which has been attempted to be passed upon your lordships: for if it had been understood to be conclusive and preclusive of all further enquiry, most undoubtedly it would have been a proper subject to be introduced in pleading as a bar to any farther enquiry. Your lordships, by looking into the only report in print of that case (Mr. Serjeant Wilson's) will find, that the learned judges of the Common Pleas, who decided it, seemed to be agreed in thinking, that it was very far from an established point, that this sentence was conclusive, that the question could only be tried upon the issue *ne unques accouple*, which your lordships know to be the only proper issue in a question of dower, and that issue must be determined by the bishop's certificate. Now we are told that this sentence is just equivalent to the certificate of a bishop: this was so far from being the opinion of that court, that they leave to the bishop to judge for himself, what regard he would pay to that sentence on the point which he was to certify.

Dr. *Harris.* My lords; It would ill become me at this time, after the points which have been proposed have been so fully discussed by the gentlemen who have gone before me, to take up much of your lordships' time.

There are two questions, as I understand, before your lordships.

The first of them is, whether a sentence in a cause of jactitation can be given in evidence, as an absolute bar to a prosecution by the king? and the other is, whether, on supposition that a sentence in a cause of jactitation can be given in evidence, it will afford a complete defence, so that no proofs whatever can be admitted afterwards in order to counteract and impeach that sentence?

How these questions come before your lordships, whether properly or improperly, is not for me to argue. It is out of my profession to say any thing about them; but as the gentlemen on the other side have been permitted to state them and argue on them, it is certainly necessary that they should also be discussed by the counsel for the prosecution.

In regard to the first question, I shall not trouble your lordships long, because the discussion of it relates principally to the practice of courts of law, but shall more particularly attach myself to the consideration of the second; as I shall in so doing have an opportunity to say a word or two in answer to what the gentlemen have urged on the other side, who are of the same profession, and practise in the same courts where I have the honour to attend.

In respect to the first question, whether a sentence of jactitation is an absolute bar, and can be offered as such to a suit at the prosecution of the king, it is to be observed, that anciently the whole cognizance of marriage, with that of the crimes attending it, was vested in the ecclesiastical courts: but those courts being either remiss in the exertion of their jurisdictions, or, more probably, wanting power to inflict an adequate punishment sufficient to stop the growth of the increasing evil, and the legislature, for constitutional reasons, being both unwilling and unable to invest them with more authority than they then had, the aid of parliament became absolutely necessary; and the statute of James the 1st, on which the prisoner stands indicted, was according made; by which it was enacted, that if any person being married shall marry another, the former husband or wife being alive, the offence shall be felony.

Before this statute, the ecclesiastical courts had the cognizance of the crime of taking a second wife, or a second husband, whilst the first wife or first husband was living: but the statute, as I understand, takes that branch of the jurisdiction, namely, the power of inflicting any punishment whatever on a person guilty of polygamy, entirely from the ecclesiastical courts; insomuch, that, if at this time a process was to issue from an Ecclesiastical Court in order to call any person to account for bigamy or polygamy (whichever it may be termed,) the party cited might obtain a prohibition from the judges of the temporal courts to stop such a suit, in the same manner as a prohibition may be obtained in case of a prosecution in an Ecclesiastical Court for perjury not committed in that court, or for any other crime punishable by a statute. Now, my lords, it is evident, that the one court has lost what the other has gained, in respect to the offence of bigamy; so that the temporal court, or rather your lordships, are able to judge of bigamy, and of every ecclesiastical matter incident to that branch of spiritual jurisdiction. It may here be observed, that a jactitation cause is described in our books of practice to be a *quasi* defamatory suit; and most certainly it is so, and nothing more, when a person libelled against in jactitation confesses the boasting; as, when a man cites a woman for boasting, and she acknowledges the jactitation; for the cause ends here, and is strictly of a defamatory nature. But I do not mean to deny, when the defendant undertakes to justify, that the cause then becomes truly matrimonial; for the sentence will then necessarily be, either that the parties are man and wife, or that the plaintiff's or party agent is free from all matrimonial contracts, 'quantum nobis constare potuit,' or as far as to us as yet appears. But though a sentence in these words may have frequently been adjudged [as in Jones and Bow, Carthew 225—and in Clews and Bathurst, Strange 960,] to be binding on the temporal courts in cases of property, till reversed; yet it by no means follows, that such a sentence can amount to an acquittal of the plaintiff from having any farther evidence brought against him, the very words, 'as far as to us yet appears,' implying the contrary, and evincing that farther proofs may legally be adduced in the proper court. The words of the sentence speak sufficiently for themselves: there is no occasion to have recourse to authorities from books. Let it be supposed for a moment, that the ancient jurisdiction remained in the ecclesiastical courts, and that they possessed their former power; is it possible to conceive, that a sentence like the present, pronouncing a woman to be a spinster, as far as to the court as yet appears, could be a bar to a suit in the same or in another ecclesiastical court against the same woman for polygamy? If it could be a bar, it would amount to an acquittal, till the sentence in the civil suit had been reversed; which would be subversive of justice, by making the commission of an undiscovered crime in one court a shelter against the punishment of that very crime in another. If the doctrine now contended for should prevail, that the offering of a sentence in jactitation, pronouncing the party agent free from matrimony as far as yet appears, is an absolute bar to a criminal prosecution there would be an opportunity on every indictment for polygamy to defeat the statute: for in the case of a woman marrying two husbands, if the first husband should consent to a collusive suit, the wife would have nothing to do but to cite the first husband into an ecclesiastical court for jactitation, if she apprehended a prosecution on the statute; and then, either on confession of the boasting by the first husband, or on his failing to prove his marriage, if he undertook the proof, a sentence would be obtained, which would intirely defeat the statute. That this House should give a countenance to a doctrine of such tendency, is not to be imagined. It would be so far to restore the ecclesiastical courts to their former authority, as to put it in the power of evil disposed persons to use those courts to the defeazance of the statute, without giving back to the ecclesiastical courts a jurisdiction to punish the crime of polygamy, which would thus go unpunished: it would be to render those courts in this respect hurtful, without affording them an opportunity of being useful; and it would in effect be to destroy a law in your lordships' judicial capacity, which had formerly on the maturest consideration been established in this House as a part of the legislature.

It would now be improper for me to detain your lordships any longer on this question, which has been so ably and fully discussed already; and I shall trust, that your lordships cannot be prevailed on to declare the sentence in jactitation conclusive upon this high court, or to suffer it to be read judicially as a stop to any evidence which may be brought as a proof of the marriage of the lady at the bar with Mr. Hervey, now earl of Bristol.

But on supposition that the sentence may be permitted to be judicially read, it may be necessary for me, in contradiction to what the gentlemen of my own profession have asserted, to trouble your lordships with a word or two in the briefest manner I am able, in order to shew, that evidence of a particular kind may be given in all courts, and at all times, to rebut a sentence in jactitation in disfavour of matrimony, for the purpose of relieving an injured party and of punishing the guilty.

It is a general rule, which is not to be denied, that respect is due from one court in England to the decisions of another, and that comity is due to the decisions of all foreign courts; and it might be more accurate and more strictly true to say in general, that one court in England is bound by the judgments and sentences of another; but the generality of this rule does not exclude an exception, which in reality affords a proof of its generality: for, under circumstances, evidence of every sort, parole as well as instrumental, may be received in one court to affect a sentence in another. Fraud in a single person, and collusion, where there are two or more, may be given in evidence in the same court in a different suit, or in another court, to affect the parties to a sentence; and of course to affect the sentence or judgment itself in some degree.

It is true, that by the ecclesiastical law, a sentence in any case obtained by collusion may be declared void in the same court in which it was pronounced, by means of a special suit for that purpose; and most certainly at the suit of a person having an interest, who could not even have intervened at the time when the suit was pending; and such was the case of lady Frances Meadows, who had no interest in the years 1768 and 1769, when the suit of jactitation was pending: but it does not follow, because a sentence obtained by collusion may be annulled in the same court where it was pronounced, that such sentence may not be impeached by any means whatever in another court.

I shall not, in proof of what I have advanced, detain your lordships with a repetition of the particulars of Fermor's case, as reported in the third part of Coke's Reports. I shall only observe, that it was a case depending in the Court of Chancery, in the 44th of Elizabeth, before sir Thomas Egerton, the then lord-keeper, in which Richard Fermor complained, that Thomas Smith the defendant was his tenant, and had levied a fine with proclamations, in order to bar him of his inheritance, by covin and practice. The lord-keeper, considering on one side the mischiefs which might arise from such practice, and on the other side considering that fines and proclamations are the general assurances of the realm, referred the case to the two chief justices, Popham and Anderson, who, after a conference, thought it necessary, that all the justices of England and barons of the Exchequer should be assembled: they assembled accordingly, and it was at length resolved by the two chief justices and barons of the Exchequer, except two, that Richard Fermor was not barred by the fine with proclamations. The lord-keeper, sir Thomas Egerton, commended the resolution of the judges, and agreed with them in opinion.

The precedents and reasons, on which the above-mentioned opinion was formed, have already been ably related, and are well known to some of your lordships: it may suffice on my part to add, that a fine, the most deliberate (for it is five years in completing) and of course the most solemn of all judgments, was not deemed, in the opinion of the lord-keeper and ten of the judges, to be of weight sufficient to protect a colluding party; but was suffered to be impeached by the admission of evidence in another court than that where the fine was levied, in order to afford relief to an injured man.

It is said by lord Coke in the same Report, that all acts ecclesiastical as well as temporal shall be avoided by fraud and covin. And indeed if one temporal court is bound in justice and law to pay no regard to the judgment of another temporal court under the circumstances above described, can any reason be given, why the sentence of an ecclesiastical court in such a case should be treated with more respect by the temporal judges, than they are obliged to pay to the judgments of their own courts?

But to the honour of the temporal courts it must be said, that, as far as it is in their power, they lend their aid to the ecclesiastical courts in case of covin and collusion, by permitting the ecclesiastical courts to try such fraud, even when committed in the temporal courts, as incidental matter.

The case alluded to is in Moore's Reports, page 917, Lloyd and Maddox.

Mr. Lloyd a legatee sued Maddox the executor of the deceased in the Spiritual Court for his legacy. The executor alleged, that all the testator's effects had been recovered from him the executor, in a court of common law, by a creditor of the testator. The legatee alleged in his turn, and undertook to prove in the ecclesiastical court, that the recovery at common law was in consequence of collusion or covin between a pretended creditor and the executor. And, upon the admission of this plea in the ecclesiastical court, the executor applied to the temporal court for a prohibition, which was denied.

And from this it is evident by necessary inference, that the temporal courts must have deemed themselves competent to judge incidentally of covin or collusion committed in

spiritual court, in order to relieve an injured party or suitor in a temporal court.

When this liberty taken by one court with the apparent judgment of another, under circumstances, comes to be considered, it seems to be founded on the strongest reason: for when a judgment has been procured by a collusion of parties, though it must stand on record, and may not, I grant, be actually expunged or taken from the file, but by the court in which it was given; yet it is certainly a mere nothing to those, who, not being privies, can shew it false and covinous. It is a sentence in which the judge had never an opportunity of doing real justice—and is undoubtedly, what it has been justly stiled by a writer on the civil law, a stage-play, a profane mockery, or any thing but a judgment. It is not to the disrepute, but to the honour of a court, as well as to the benefit of the public, that such a fraud should be detected. The upright judge must of all things wish it.—And confident I am, that to discover such a profligate proceeding (from which no human wisdom can protect the greatest judicial abilities) could never be construed into a breach of comity between one judicature and another; but, on the contrary, must be construed by the deceived court as a vindication of its purity, and a rescue from an attempt to load it with discredit.

I must now own, my lords, when I was informed that doctors of the civil law were, by the permission of your lordships, to attend on the part of the lady at the bar, and a brief was given to me on the part of the prosecutor on that account, that I was apprehensive of what might be quoted from such miscellaneous books, as the digests, the code, and the decretals, in favour of collusion, and to shew how honestly it might be practised under particular circumstances. Nothing however of this kind has been urged; and I have not myself, from any inspection of the titles and text of the civil and canon law, *de collusione detegendâ*, which treat principally of collusive causes between masters and slaves, and between certain of the clergy in order to defraud the laity, been able to gather any other idea than that collusion between parties to a suit is a very high offence; and such a one, I make no doubt, for which colluding parties might now be articled against in the ecclesiastical court, where the insult was offered, and be punished at discretion by ecclesiastical censures. But a particular discussion of the nature of the offence committed by parties colluding in a cause, how that collusion is to be treated when discovered, and what operation the discovered collusion will have upon the sentence, is rather to be expected from later writers, and such authors as Menochius in his Consilia, or Scaccia de re judicatâ, than from the laws in the text of the civil and canon law.

And these authors agree in general in saying, 'quod lata sententia per collusionem habenda 'est pro non-sententia, et quod aliis non nocet, 'quamvis, sublatâ collusione, noceret. Nam 'facto collusione cum adversario [says Scaccia] 'sententia non prodest adversus tertium; vel 'quia tertius erat citandus, et tunc victori non 'prodest sententia, etiamsi eam obtinuisset 'sincerè.'

And when an executor [for example] desirous of proving his testator's will, omits to cite one among others of the next of kin; for in that case the omitted person may, if he thinks it for his interest, oblige the executors to prove the will *de novo* at a subsequent time, the sentence establishing the will under the process, by which one of the next of kin was omitted, being as to him in the true sense of the expression, 'Res inter alios acta.'

The same author proceeds by adding,

'Vel non erat citandus, quia causa agebatur 'cum legitimo contradictore; et tunc licet, si 'sententia fuisset lata sine collusione, tertio 'noceret; tamen, si fuerit lata per collusionem, 'non nocebit.'

This may be explained by the following supposed case: if an executor to prove his testator's will should cite all the next of kin regularly, but should collude with that next of kin to whom the management of the suit was intrusted, and prevail on him to feintplead, and not put forth his strength on account of some private bargain, and by this covin establish the will; yet, though the sentence in this case would have bound the legal contradictors, who had been all called, and also all other persons whatever, if there had been no collusion, it shall nevertheless not bind the injured part of the legal contradictors, on a proof made of the concerted fraud.

It must be allowed, that these writers have not (as far as I have been able to observe) made mention of the place or court where a sentence collusively obtained is to be set aside; and if an actual setting aside or total reversal is meant, there is no doubt but that this must be done in the same court where the parties colluded, and in no other.

But if it is only asked, where and in what court evidence is to be received to relieve an injured person, who was not a party to the collusion? My answer is, that it is plain from these writers, as well as from reason, that it is to be received in every court.

The courts of civil law, known to these writers, hear in the same court and under the same jurisdiction causes of property, and also accusations which affect the life of the accused, exactly in the same manner as our Admiralty-courts in England did before the 27th of Henry 8. And therefore when Scaccia and other writers, who entertain the idea of the same court having both civil and criminal jurisdiction, say that a sentence obtained by collusion is to be regarded 'pro non sententia,' their meaning fairly taken must be, that such a sentence would be effectually avoidable, or rather disregarded every where, on a proper proof made of the fraud by which it was obtained.

I am aware that the case of Mayo and Brown was quoted by the advocates on the other side, as a late instance, in which the present judge

of the Prerogative Court, sir George Hay, whose decrees will always have great weight, was of opinion, that he could not in his court receive evidence of a sentence having been obtained by collusion in the court of the bishop of London.

The case, in brief, was as follows:

One Mrs. Ailmer died intestate, and Mr. Brown, as her husband, obtained the administration of her effects. Lady Mayo had proved herself to be the daughter of Mrs. Ailmer, and had cited Brown to bring in the administration, and shew cause why it should not be revoked, as unfairly obtained. Brown proved his marriage to Mrs. Ailmer beyond a doubt; but lady Mayo then alleged, that Brown had been married to one Ellen Cutts, who was living at the time of the fact of the marriage of Brown with Ailmer. Brown answered, that Ellen Cutts did once make pretensions to him; but that in a suit of jactitation, brought by him against her in the court of the bishop of London in 1732, she was enjoined silence by sentence; and he was pronounced free from any matrimonial connexion with her. To this lady Mayo replied by plea, that the sentence had been obtained by collusion between Brown and Cutts, and desired to be suffered to prove her allegation.

Many of the arguments were then used which have been made use of on the present occasion; but the judge did not, as I understand, reject the distinction between receiving evidence in favour of an injured person, and being able to annul the sentence, and absolutely deny his authority to admit lady Mayo's allegation, but only appeared to make choice of the method of stopping the cause in the Prerogative Court till lady Mayo had applied to the bishop of London's court for relief: and in so doing he laid great stress on the note in the margin of Strange's Reports, page 981, where it is said, that the chief justice of the Common-Pleas, in the case of Prudham and Phillips, held a sentence in the Ecclesiastical Court to be conclusive, and would not receive evidence of fraud or collusion in obtaining it. But it is evident from the very able manuscript note of the case of Prudham and Phillips by the late Mr. Ford, whose learning and accuracy are too well known to stand in need of any encomium, that the only reason why chief justice Willes refused to suffer Mrs. Phillips to relieve herself by giving a proof of collusion in the bishop of London's court, was, because Mrs. Phillips herself was a party to that suit in the Ecclesiastical Court: so that in truth and fact the decree made in the Prerogative Court in Mayo and Brown, appears to have been founded more on the uncertain authority of the note in the margin of sir John Strange's Reports, than on any other precedent.

Now if a suggestion of fraud in a single person, or collusion between many, affords a foundation for a court, in which causes of property only are decided, to receive evidence that such fraud or collusion was used in obtaining a sentence in another court which has juri in cases of property, it becomes neces *fortiori*, that a court, held for the pun of criminals, should admit evidence that a fraud of forgery has been comm a court of civil jurisdiction: and th strong instances in the law of England t that civil judgments have been regar only as of no weight to exculpate in c prosecutions, but on the contrary as a tions.

The case of Farr in Kelyng's Report of many strongly to this purpose.

Richard Farr, having an intention to house of Mrs. Stanier, told an attorn Mrs. Stanier was his tenant, and he co make her quit his house: the attorn ceeded regularly in a cause of ejectmer one Eleanor Chadwick, an accompli Farr, having sworn falsely that she had Stanier with a copy of a declaration, juc was obtained, a writ issued, the wom ejected, and her house was robbed by F. Chadwick, who had got legal possession and Chadwick were afterwards indicted Old-Bailey; and on proofs given of the it was agreed by lord chief justice Hy John Kelyng, and Mr. Justice Wild though the prisoners made use of th and the officers of the law, yet as th done 'in fraudem legis,' the course th taken was so far from excusing the m that it heightened the offence by abusi law. Kelyng's Reports, p. 43, 44.

There is a single case on the other sid King against Vincent, reported in St 481, where it is said, that Vincent was i for forging a will of a personal estate, a the forgery was proved at the trial, bu Vincent having produced the probate, held to be conclusive in support of the w

This opinion is said to have been given 8th year of George 1, and no subsequen has been quoted in support of it; but no of other cases have been quoted by the c against the lady at the bar, where the u nate prisoners have been found guilty o ing wills, in part upon the same ev (namely, the probate) on which the ver tunate Mr. Vincent was acquitted.

Among others cited from the State Tri Session-papers, the case of one Stirlin been mentioned; and a stronger to she absurdity of the doctrine held in the Kin Vincent could not well be imagined.—On Shutter, being known to have money funds, Stirling forged a will for her. He considerable legacies to several, but to h he gave 30*l.* only as executor; for it was cient for his purpose to get possession, in to make her whole fortune his own. H tained a probate from the Prerogative and endeavoured to receive her stock South-Sea-house, but was discovered i attempt, and indicted for the forgery. probate was produced in court, and acc to the doctrine in the King and Vincen

sight of the probate should have instantly occasioned the acquittal of the prisoner; for though Mrs. Shutter herself was alive, and appeared in the court, yet witnesses must have been necessarily produced to prove her identity; and such evidence, according to the doctrine in the King against Vincent, ought not to have been admitted against the probate, which ought to have been conclusive. The prisoner however was convicted.

But admitting for a moment, that the case of the King and Vincent was legally determined, it does not seem to apply in the present instance, unless it could be shewed, that the prosecutor offered to give evidence of collusion in obtaining it, and was not permitted so to do; for it was said by one of the civilians, that the probate issued in that case by a decree of the Ecclesiastical Court, and not in common form. If it did so issue, it is to be presumed, that such decree was made between parties duly adverse, till the contrary is made to appear; and the contrary was not attempted to be proved. And it must be confessed, if the parties to the suit in the Prerogative Court were truly adverse, that then the fraud either was or might have been in proof before the original proper court: and this might have afforded some colour for saying, the man shall not be put twice upon his trial for the same offence; though such an argument could only have been specious; for when the question in a court of civil jurisdiction is, will or no will, deed or no deed, and a forgery is detected, the person who committed that forgery must be tried for it in another court and by another proceeding, or he will never be punished as the law of England directs.

It may be here proper to observe, that no one case has been mentioned by the gentlemen on the other side, where, in any court of civil or criminal jurisdiction, a proof of collusion in another court had been offered by a proper person, and not received or rejected. The case of Hatfield and Hatfield in the House of Lords, in the year 1727, has been answered by all the counsel who have preceded me, by shewing that collusion was not at issue in that case. And in the case of Kenn, 7 Coke, so much insisted on by doctor Wynne, there is no mention nor the least hint given of fraud, covin, or collusion. In that case, Christopher Kenn had issue Martha by Elizabeth Stowell; but he afterwards obtained a sentence in cause of nullity against Elizabeth Stowell, as having been married to her 'infra nubiles annos;' and the marriage was pronounced void in an Ecclesiastical Court.

Martha, the daughter of that marriage, in order to make good her title to her father's estate, was afterwards permitted, and probably through some mistake or haste in the court of Wards, and without hearing counsel, to give evidence that Kenn and Stowell her father and mother were not 'infra nubiles annos' when they intermarried. But according to lord Coke's Report, the court of Wards agreed, that as the ecclesiastical judge had decreed the marriage to be void, his judgment should be credited, although the parties were proved to have been of the age of consent, and although the foundation was false on which the sentence had been grounded; inasmuch as the court of Wards would not examine into the cause or reasons of the sentence, whether true or false.

From all which nothing farther is to be collected, than that a sentence in the Ecclesiastical Court is to have full credit given to it as long as it subsists unrepealed; and that it is not to be overturned in the same court where it was given, or by any other, on account of error and mistake in law or fact; and this is certain law: but it is to be observed, that the parties divorced had been long dead before the suit was commenced, and that there is not the remotest hint or suggestion through the whole case, that the Ecclesiastical Court had been deceived by any fraud or collusion between the parties litigant.

As to the case of Prudham and Phillips, the counsel for the lady at the bar were certainly led into a mistake by the note which I have already mentioned, inserted in the margin of Strange's Reports, page 961, and were not aware of the note in Mr. Ford's manuscript, which is of undoubted authority, and from which it appears that one Mr. Prudham, as a creditor, brought an action of debt in 1737, against the well-known Mrs. Teresia Constantia Phillips.

Mrs. Phillips gave in evidence her marriage with Mr. Muilman.

Mr. Prudham produced a sentence annulling that marriage, in a cause of nullity, on account of a prior marriage with one Delafield; and this Mr. Prudham's counsel relied upon as conclusive evidence of the nullity of the marriage with Muilman;—and so it was agreed, unless the defendant Phillips might be admitted to shew fraud in obtaining the sentence, and so to avoid it, as judgments are daily avoided, by replications of fraud.

"Resolved, on great debate, that the ecclesiastical law was part of the law of the land, and that sentences by their judges were in matters of spiritual jurisdiction of equal force with judgments in courts of record and in courts of equity: but that whatever objections would avoid a judgment, the same would be sufficient to overturn a sentence in the Spiritual Court, but none other. That fraud used in obtaining judgments was a deceit on the Court, and hurtful to strangers, who, as they could not come in to reverse or set aside the judgment, must of necessity be admitted to aver it was fraudulent.

"But that Mrs. Phillips had been a party in the cause in the Ecclesiastical Court, and whether she was imposed upon, or joined in deceiving the Ecclesiastical Court, this is not a time or place for her to redress herself."

Now, although Mrs. Phillips was not in this case allowed to allege, that the suit in the

Ecclesiastical Court annulling her marriage was collusive, yet the reason on which the Court refused to allow her so to do, namely, her having been a party to the collusive suit, amounts to a full proof, when joined with the other doctrine laid down by the Court and related in the case, that any person not having been a party would at all times be permitted in a court of common law or equity to allege fraud or collusion to have been practised to his injury in an ecclesiastical court.

On the whole therefore it appears beyond a doubt, from the instances which have been given, that in civil cases a stranger is admitted in one court to allege and prove in his defence that a sentence to his prejudice has been pronounced in another court by means of fraud and collusion; and that a prosecutor in a criminal prosecution is constantly permitted to do the same.

Taking it then for granted, that this in general must be conceded, it only remains to enquire, why evidence, if necessary, should not be admitted to destroy the force of the sentence in the present case, in favour of the crown and of the public, who were not parties to the jactitation suit between Mr. Hervey and the lady at the bar, and yet are interested, if it is a crime to marry a second husband whilst the first is living; or, in other terms, to enquire why a sentence of jactitation of all sentences should be so highly distinguished on account of its worth and stability, as to be held forth as an exception to the general rule, and as the only species of sentence which ought to be so favoured and honoured by being regarded as conclusive.

That the proceedings in the Ecclesiastical Court are often rather of longer duration than could be wished, is not to be denied; and that this principally arises from the number of possible appeals under particular circumstances from the first hearing of a cause to what in general cases may be termed the last, is equally true.

When a sentence [for example] given in a cause of jactitation, in which marriage was at issue, has passed through all the stages of appeal, the cause is still liable to be opened *de novo* in favour of matrimony, as if nothing had been done. Was this possible prolixity of proceeding, and were these opportunities of appealing, an impediment and safeguard against collusion (as one of the doctors has gravely alleged them to be) I do not deny that a cause of jactitation must of all causes stand fairest to be the most immaculate and most free from the stain of fraud. But, when it answers the purpose of parties to collude, is it to be presumed that those, who could begin a cause collusively, would scruple to carry it on from one court to another, till they came to the end of their journey, if it was necessary so to do to obtain their end? The truth however is, that several appeals are not absolutely necessary; and that, when there is collusion in a cause, there is either no appeal, or an ostensible one only, which is always subducted within a convenient time; and the gentlemen best know, whether an appeal from the sentence relied on in the present case was subducted or not. A sentence in jactitation pronounced in disfavour of matrimony is defined to be transitory, and not final; and this definition seems to be founded, as absurdities sometimes are, on a tenet of religion. The religion I mean is that, which after having been received in this kingdom for a long series of years, was afterwards and now is with reason protested against. In this religion it is maintained, among other condemned doctrines, that marriage is a sacrament, and not to be dissolved: and although it nearly amounts to a certainty, that the rites of matrimony are not now quite so strictly regarded in England as they have been heretofore, and that his majesty's subjects of almost every description, from the lowest to the highest, have shewed an utter abhorrence of this doctrine of the church of Rome; yet it is not to be wondered at, that the ancient canonists, who were to a man of the religion I have just mentioned, and had the framing of the code ecclesiastical, should so fabricate or bend the law, as to render it the support of marriage by every possible method, and should lay it down as a maxim, that a sentence in a marriage cause should never, in their language, pass into *rem judicatam*, or become a final judgment, but be eternally open and liable to revision and reversal, notwithstanding it may have been established by appeal upon appeal, and even by the judges of the common law in a court of Delegates under the king's special commission, and afterwards by the lord-chancellor, who may have refused a commission of review. Clarke's Praxis, title 205.

To render the privilege of a jactitation cause, in which the proof of marriage has been attempted but not perfected, still more extensive, the general safeguard against perjury has been entirely taken away in this species of suit; for the publication of the depositions is no obstacle to fresh examinations, and new witnesses may continually be admitted in favour of matrimony, even after the former depositions have been inspected, and without any proof made that such witnesses are lately come to the knowledge of the producer; which is a proof expected and required in all other causes whatever, and a rule never departed from.

Clarke, in his book of Practice, is express to this purpose, and uses the following words: "licet generaliter non admittuntur testes post publicationem, admittuntur tamen in causâ matrimoniali sine juramento, quod testes noviter ad notitiam pervenerunt." Tit. 205. It is allowed too in this species of cause, that not only the party silenced, but that any other person, interested to establish the matrimony, may take up the cause in the state in which it was left in the same court, and proceed, as I apprehend, in another court, and invocate or illate the proceedings.

The 'pars citata,' or defendant, is also at

liberty to go into another court in a new matrimonial cause; as for example, in a cause of restitution of conjugal rights: 'licere parti citatæ aut in eodem judicio, aut coram alio judice (non obstante quod citatio emanavit in causâ jactitationis) contra actorem instituere causam matrimonialem.' See Clarke's Praxis, tit. 195. 205.

This ambulatory, indeterminate, state of a sentence in jactitation must certainly, in the apprehension of any man not a lawyer, be a very improper circumstance to be urged in order to render this species of sentence given in one cause an absolute bar to proceeding to judgment in another cause of a civil nature, and more particularly to make it a bar in a cause of a criminal nature in another kind of jurisdiction. Taking things therefore as they are, and having proved the law respecting this extraordinary species of sentence from the books of practice which describe it, can any good reason be assigned why such a sentence should be conclusive in the present case, and should not be revised and revoked, if occasion should require it, in the high court before which we now are?

This sentence never passes into a *rem judicatam*, or final judgment—it is subject to be revised in any other court, having jurisdiction, than that in which it was first given. The act of James 1, by which the marrying of a second husband or second wife, whilst the first is living, is made felony, has, by creating the felony, plainly transferred that branch of the ecclesiastical jurisdiction, which before punished polygamy, to those courts where criminals are tried; and to remove even the appearance of any difficulty which might have arisen on the right of the prosecutor to offer the sentence, the counsel for the lady have themselves desired leave on her part to bring it before the court, and have actually introduced it: can it therefore be possible that this high court should not think themselves authorized by a complete jurisdiction in every respect, spiritual as well as temporal, to give the prosecutor, on the part of the crown and of the public, the liberty, under all the circumstances of this case, of offering a proof of the nullity of the sentence, by pointing out from the proceedings themselves, if necessity should require it, the marks of fraud with which they abound; or, what is rather to be expected, to give the prosecutor the liberty of adducing evidence in a more direct manner, both oral and instrumental, to prove the marriage of the lady at the bar with Mr. Hervey, the present earl of Bristol; by which the collusive proceedings before the Ecclesiastical Court, and the truth of the principal accusation, will at one and the same time be plainly demonstrated?

Lord President of the Council. My lords, I move your lordships to adjourn to the Chamber of Parliament.—*Lords.* Ay, ay.

Lord High Steward. This House is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the same order they came down; and the House, being thus resumed, resolved to proceed further in the Trial of Elizabeth duchess dowager of Kingston, in Westminster-hall, on Friday next, at ten o'clock in the morning.

THE THIRD DAY.

Friday, April 19.

The Lords and others came from the Chamber of Parliament in the same order as on Tuesday; and the Peers being seated, and the Lord High Steward in his chair,

Lord High Steward. My lords, the House is resumed. Is it your lordships' pleasure the judges may be covered?—*Lords.* Ay, ay.

Then the Serjeant at Arms made proclamation for silence; and the duchess of Kingston was conducted to the bar.

L. H. S. Mr. Wallace, you may proceed with your reply.

Mr. *Wallace.* My lords, I must bespeak your lordships' indulgence to examine and discuss the great variety of arguments and considerations, which the counsel on the part of the prosecution have thought proper to enter into, and submit to your lordships. I ought in the first place to take some notice of the charge of novelty imputed to myself, and those who assist me, in the attempt to introduce the sentence of the Ecclesiastical Court, before the cause has been opened, or the evidence on the part of the prosecution stated to your lordships.

It might perhaps be thought a sufficient answer to observe, that no indictment ever yet has been preferred on this statute, where the Ecclesiastical Court had given a sentence upon the subject. The prosecutor of this indictment has had the boldness to set at defiance the proceedings in the Ecclesiastical Court; and, in direct opposition to a sentence pronounced there, to prefer in a court of criminal jurisdiction a charge of felony; for although criminal prosecutions are and must be in the name of the crown, yet in both cases they are carried on by private individuals; and your lordships particularly know, in the present case, there is a private prosecutor, and one who might have applied on the score of interest to the Ecclesiastical Court, to have had that sentence re-examined.

With respect to the novelty of the proceedings, the counsel for the noble lady at the bar would have found themselves standing much in need of your lordships' pardon, if they had not interposed the sentence at the time it was offered. If they had permitted a cause of this kind to have proceeded into evidence, (which, from the accounts we have heard, is to be laid before the Court by a number of witnesses, and of course must have taken up your lordships many days in the examination), and after

all, the sentence had been produced and attended with the effect which we hope it will have, what would have been the situation of counsel, who had suffered so much of your lordships' time to have been mis-spent in the examination of parole evidence to facts which could not be admitted against the decision offered to your lordships?

But in truth it is not new in practice: the case alluded to is not only, as it had been termed, a colour, but a justification for what has been done. It is true, it was an ejectment, which the gentlemen have properly called a fictitious proceeding. It was for that reason the sentence was not interposed, till the evidence was opened; for till then the defendant is ignorant in what manner the plaintiff inteuds to make out his claim: but as soon as it was stated, that he derived through a marriage, which had been examined and decided in the Ecclesiastical Court, the counsel immediately, without suffering evidence to be given, interposed the sentence. In this case there is no occasion to wait for the opening of counsel; for upon the face of the indictment the supposed marriage with Mr. Hervey is stated as the ground of the offence: the crime in the indictment charged is a marriage with his grace the duke of Kingston, during the life of Mr. Hervey, to whom the noble prisoner at the bar is alleged to have been before married; and consequently upon the validity of that marriage the question depends. The marriage with the duke of Kingston was notorious in the face of the church, under the sanction of a licence from the archbishop of Canterbury, and in the presence of many witnesses. The supposed marriage with Mr. Hervey was the sole question in the Ecclesiastical Court: that court has decided against it; and as long as that sentence remains in force, the relation of the parties as husband and wife is at least suspended, if not absolutely gone.

The practice every day, where one is in possession under a fine, and no claim has been made for five years, is to interpose it immediately. I ventured to do it not long ago in the court of King's-bench at a trial at bar where the claimant came out of Wales with as long a pedigree as that country could furnish. When I heard it stated, and understanding that a great number of witnesses must be called to support it, I offered the fine to the court, before a witness was called; which instantly put an end to the cause. I did not by that incur any censure from the court, or blame from the counsel. I thought myself called upon in duty to inform the court of it; and a cause, which would have lasted three or four days, was ended in less than ten minutes.

I trust, a conduct designed to prevent your time being mis-spent upon a fruitless enquiry, (for whatever should be the result, yet this sentence, if it has the effect we contend for, must render it totally nugatory and immaterial) will not be the subject of your lordships' animadversion.

Enough, I hope, has been said in defence of the attempt against the charge of novelty; but an observation was made, to create a prejudice against the case of the noble lady at the bar, from the conduct of her counsel in this stage of the proceedings to prevent an examination of witnesses, as a proof of their opinion upon the merits of the cause. God forbid that any impression should be made against the noble prisoner at the bar from the conduct of her counsel! Your lordships know, that in the forms of proceeding she must throw herself upon her counsel, and submit to their management; and no mistake of theirs will, I trust, ever turn to her prejudice. I feel a happiness in speaking to a court incapable of receiving impressions from an insinuation of that kind.

An observation was made upon the form of the sentence, which seemed to strike many of your lordships, that as far as it appeared to the Ecclesiastical Court, the parties were free from all matrimonial contracts and espousals; not positively that they were so; and therefore as far as the evidence went in that court, and no farther, ought the sentence to be regarded. Your lordships have heard from those that practise in the courts of ecclesiastical law, from the counsel on both sides of that description, that it is the constant uniform method of drawing up sentences in causes of this kind; that it is a sentence of validity; that it is considered by them as such; but that it is open to further proceedings in that court; that it falls within the maxim which was cited to your lordships upon the other side, which is not denied here, but admitted, nay mentioned in the very opening of this business, that 'sententia contra matrimonium nunquam transit in rem judicatam;' this sentence, being against a marriage, never passes into a definitive judgment of that court: but does it follow, because it is open to further examination, because other suits may be instituted which may contradict this sentence, that whilst it remains unimpeached, till other suits are instituted, and till a different judgment is given, that the sentence has no effect; that it is the words of the judge, without having any sort of consequence attending them?

My lords, it is too ridiculous to suppose a suit instituted in the Ecclesiastical Court, where the prosecutor of the suit (or the promoter, in the language of that court) has obtained the sentence of the court in his favour, that it means nothing at all; that it is mere waste paper; that he might as well never have commenced the suit. Is it possible, in a country where the least idea of justice prevails, that this should be the case? On the contrary, the sentence of every court of competent jurisdiction has been considered in the same, and every other court where it has become the subject of debate, till impeached, set aside, reversed, or repealed by the court that gave the sentence, or by the authority of a court of appellant jurisdiction, to be conclusive.

Your lordships have heard from the doctors

of the civil law the effect of a sentence in a suit of jactitation of marriage. I took the liberty of stating to your lordships many cases referring, where the same doctrine had been adopted by the judges of the common law, and constantly acted upon without an exception. The proceeding is not, as has been contended, in the nature of an action for words or of slander; it has ever been instituted upon some serious claim of marriage, which calls upon the party for an explanation.

Would it be no objection with a lady to a gentleman paying his addresses to her, that somebody claimed a marriage with him? I believe, my lords, it would at least create a pause in the treaty, if it did not absolutely put an end to it. He certainly would be called upon by the lady or her friends to satisfy them, that there did not exist a ground for such report. There is no legal course to be taken, but by commencing a suit of jactitation in the Ecclesiastical Court. The proceeding calls in form upon the party who has made the claim to justify it. If a marriage be insisted on, the parties instantly change situations; the defendant becomes the plaintiff or actor, and the original plaintiff becomes the defendant, and is called upon to answer that claim made in the Ecclesiastical Court of marriage, not only to answer it in form, but upon oath: the original plaintiff is obliged on oath to declare, whether the allegations of the party respecting the marriage are true or false. The proofs are first made by the party insisting upon the marriage; and the judge gives sentence upon them. The suit in truth becomes, and is admitted by the learned doctor on the other side to be, to all intents and purposes, a matrimonal cause; and the judgment is upon the validity and lawfulness of the marriage. In that light the proceeding in the ecclesiastical courts has ever been received and treated.

But suppose the sentence has been received and considered as conclusive evidence, it is contended by the counsel for the prosecution to be only in particular cases, namely, where the person against whom the sentence has been given, or one deriving under such person, has been a party in the suit, in which the sentence has been offered in evidence; which is not the present case, as the crown was no party to the suit in the Ecclesiastical Court.

The distinction may be thought ingenious and plausible; but there is no foundation in law to support it. In the great number of authorities cited to your lordships, there is not the least hint of such a distinction: the rule is laid down in the most general terms, and without an exception, in the case of Hatfield and Hatfield before the House of Lords. The person against whom the sentence was given in evidence, was not a party, nor claimed under any party, to the suit in the Ecclesiastical Court.

No notice was taken of another case which I mentioned to your lordships, where the person against whom the sentence was given in evidence was no party to the proceedings in the Ecclesiastical Court. It was an action against Mr. Thomas Hervey for a debt contracted by his wife. Mr. Hervey had a judgment in that suit against him: but in a subsequent suit, after a proceeding had in the Ecclesiastical Court, in which it was declared that Mr. Hervey, as far as appeared to the court, was free from all matrimonial contracts (just as it is in the present case) the sentence was received as conclusive evidence upon the fact of the marriage, and defeated the plaintiff.

I am not contending that such sentences are to be used as instruments of frauds upon creditors. No; if there is no real marriage, but a man holds out to the world a woman for his wife, and she gets a credit upon that score, he shall never be permitted to say they are not married: yet where the persons live separate, where no act of his gives a countenance to the demand, there a creditor trusts the wife upon the ground of a legal marriage; there the Ecclesiastical Court deciding upon the marriage is conclusive evidence. That case was acquiesced in; no application was made to the court; and I believe all that heard it approved of the decision.

A learned friend of mine on the other side, after he had as I thought closed his argument and sat down, rose again to mention a case to your lordships of Crutchley and Robins.

It must have struck him that it would appear a little extraordinary, after so full a discussion, no case had been cited to your lordships to warrant or give a colour to the distinction attempted.

That case, when stated, and the reasons given by the Court which pronounced the judgment considered, will appear not to have the least application to the present. It was a claim of dower by Mrs. Robins upon the estate of Mr. Robins deceased, in Staffordshire. The defendant in that case, the heir of Mr. Robins, pleaded to that claim, that she never was lawfully married to Mr. Robins. The only legal mode of trying that fact is by a certificate from the bishop of the diocese: the pleading between the parties is brought to an issue; it is the office of the Court to direct a writ to the bishop to certify whether there was a marriage or not; and upon the certificate the judgment is given. Instead of suffering the Court to issue a writ to the bishop, Mrs. Robins replied to that plea a sentence in the Ecclesiastical Court, in a suit wherein she was by the judgment of that court pronounced the wife of Mr. Robins; the defendant put in a demurrer, insisting the replication was not admissible: and that was the question before the court of Common Pleas.

Did the court of Common Pleas decide, that such a sentence is not evidence? No: the court of Common Pleas determined, that by law they could receive no other evidence of the fact than the bishop's certificate; it was the sole proof which the law in that particular case has required for the decision of the cause, and they could not depart from it. But they

went farther in that cause: they told Mrs. Robins that the sentence, though it could not be received there, might be laid before the bishop, who was to certify to them the marriage. That is the language of the court of Common Pleas upon the case: the bishop must certify the marriage; the sentence must be laid before him, and not before this Court. Did the court of Common Pleas decide, as contended, that it was no evidence? No such thing is to be found in the case. All the Court did, or meant to do, was to inform the plaintiff, that she had mistaken the time and place to make use of that evidence; that the law had in that case appointed a certain specific proof to be given to the Court, and they could receive no other: the bishop, who was to examine into the matter, might or might not be concluded by the sentence; the Court must be determined by his certificate.

My lords, if the bishop had rejected the sentence, he would have done what no bishop ever did before; yet the Court must be concluded by his certificate; they could not examine into the proofs: nay, if the bishop by fraud had certified a marriage, the Court would have been concluded. So much for that case which has been cited; and which is the only case the industry of the gentlemen on the other side could produce upon this part of the argument.

Your lordships have been told, that by the general rules of evidence in civil cases, no sentence or judgment can be received, unless in a cause between the same parties, or who derive under them. The candour of the gentlemen on the other side has admitted two exceptions to the rule: first, sentences or judgments where the proceeding is *in rem*; and secondly, in causes where the Court has exclusive jurisdiction.

I will not state to your lordships other exceptions to the rule; the two admitted are sufficient; the present case falls within both exceptions, though either would be enough.

In the first place, it is a proceeding *in rem*; marriage or no marriage is the point to be determined. It does not come collaterally or incidentally, but directly, in question; and the decision of which was the sole object of the suit.

In the next place it is a sentence of a court having exclusive jurisdiction upon the subject. It is admitted that the Ecclesiastical Courts have exclusive jurisdictions in probates of wills, in all testamentary disputes respecting personal estates; and having decided the question, whether right or wrong, upon true or upon false grounds, it is not competent to any other court, unless in a legal way by appeal, to enter into the matter; but faith and credit is to be given to the decision of the Ecclesiastical Court. It is also admitted, that, till the statute upon which the present indictment is founded, the Ecclesiastical Courts had the sole and exclusive jurisdiction in matrimonial causes.

But it is contended, that a concurrent jurisdiction is given by this act to the king's temporal courts: where is the ground of this notion to be found? Was it the intention of the legislature to give to the temporal courts a concurrent jurisdiction with the ecclesiastical? The intention must be collected from the act itself. In my own apprehension, nothing is more clear than that the legislature, at the time of passing this act, meant to guard and secure the jurisdiction of the ecclesiastical courts against innovation from the temporal.

The act is general; that whoever shall marry a second husband or wife, living the former, shall be deemed a felon, and suffer the pains of death. Yet that general enacting clause is restrained by a proviso, which demonstrates the intention of the legislature, that the proceedings in ecclesiastical courts should remain untouched, and the temporal courts have no jurisdiction in the case. The exception runs thus:—'Nothing herein contained shall extend to any person or persons, that shall at any time of such marriage be divorced by any sentence had or shall be hereafter had in ecclesiastical courts; nor to any person or persons——'

These provisions shew an anxiety in the legislature to preserve the privilege of the Ecclesiastical Court, and save their judgments from an examination; and so far from giving a jurisdiction to the temporal courts in such cases, the act expressly declares, that where the ecclesiastical courts have given a decision, the temporal courts must stop. The case is not within the law; it is not permitted to be examined into.—It is pretty extraordinary that history gives no account of this act, or the immediate occasion for passing it. The preamble states, 'that evil disposed persons being married, run out of one county into another, to places where they are not known, and marry there.' If this was the evil meant to be redressed, the case of a person of rank, obtaining a sentence in the Ecclesiastical Court, and acting under the faith of it, can never fall within the description in the act.

The Journals of neither House furnish any lights upon this subject. The act was brought into the House of Commons in April, received some amendments in a committee there, and sent to the House of Lords: it there also received amendments; and was returned to the House of Commons again in June: but what the amendments were, or whether the provisoes were inserted by the guardians of the rights of the church, as is most probable, or came from the House of Commons, cannot be discovered. Suppose a sentence of divorce pronounced in the Ecclesiastical Court; would it be permitted to any court, under pretence of fraud, to examine for the purpose of making the parties criminals, when the act has declared such a sentence shall not be meddled with; and the parties under such sentences are excepted in terms out of the act?

Where a sentence of nullity of marriage is given, it is equally open to future examination in the ecclesiastical courts with a sentence of jactitation. If this be doubted, your lordships,

from the abilities and integrity of the gentlemen who assist us, though counsel in the cause, will receive satisfactory information.

A sentence of nullity of marriage is excepted by the words of the act: and would it not seem extremely inconsistent and harsh, that, where a marriage is doubtful, and the ecclesiastical courts have declared it null, neither party can by a subsequent marriage be in the predicament of a felon; and yet a person, who is by the sentence of that court declared never to have been married at all, and to be free from all matrimonial espousals, is to be a felon? Such a construction on a penal law would be monstrous.

The intention of the legislature is to me as clear as language can make it, that matrimonial causes should be still within the sole jurisdiction of the ecclesiastical courts, and that the temporal courts should have no authority to examine into their decisions, by declaring, that wheresoever these sentences obtain, the party marrying whilst they are in force, shall not be a felon; and yet the former marriage, if it were a legal one, is not done away: it is capable of being revived, and a second marriage would be null and void. And upon another proceeding, if the sentence should be in favour of the marriage, either party may commence a suit for restitution of conjugal rights; the first marriage would be established, and a second marriage, pending the sentence, void; yet the party would not be in the predicament of a felon. This is clear from the act of parliament; and in this sense your lordships will give me leave to use it, as shewing beyond a possibility of doubt the intention of the legislature. Where then are the arguments we have heard, that the legislature meant in this case to give the common law courts such concurrent jurisdiction, as to disregard the sentences of the ecclesiastical courts? Has the legislature said so? Has not the legislature said the contrary in express terms? Wherever a sentence is pronounced, that person is not to be tried in the temporal courts. Is it competent to any temporal court? Is it competent to your lordships, the supreme temporal court in the kingdom? Awful and great as this court is, give me leave to say, that the rules of construction are the same as in the most inferior court of criminal jurisdiction. There is not one law for Peers, and another for Commons, in this country: the law is the same for both; it only varies in the circumstances of the trial: the evidence to prove the guilt or innocence of the party is the same in all.

There is no doubt, but the temporal courts may try marriages upon this act, where no sentence has been given in the Ecclesiastical Court; as they do every day upon titles to lands on ejectments: but where a sentence has been obtained against, or in favour of, a marriage in the Ecclesiastical Court, the temporal courts are concluded by it.

The concurrent jurisdiction which they contend for, if I understand them right, is this: the ecclesiastical courts, say they, it is true, have a right to try a marriage; but the temporal courts have also a right to try a marriage under this act of parliament. The sentence of the Ecclesiastical Court will not satisfy them; they will have the evidence; and if they are satisfied with the evidence that the ecclesiastical courts have thought insufficient, they will pronounce the crime, and punish the offender. Can there be any such position warranted by the act of parliament?

If the legislature could have foreseen, that in any period it should enter into the head of any man to set at nothing the jurisdiction of the ecclesiastical courts, they could not in more positive terms have guarded against it.

If the gentlemen should be able to establish a concurrent jurisdiction in the ecclesiastical and temporal courts, they then beg leave to advance a step further, and lay down a rule, which they hope your lordships will adopt to entitle them to enter into evidence, that judgments only bind in courts of concurrent jurisdiction, where they are just.

I deny the rule in the extent it has been laid down. Have not the courts of King's-bench, Common Pleas, and Exchequer, a concurrent jurisdiction in civil causes? and was it ever heard, when a judgment of one of the courts is pleaded in another, that the propriety and rectitude of the judgment can be examined into? Certainly not: the party is permitted only to deny the existence of the judgment. The case of Sinclair and Fraser,* lately determined by your lordships upon an appeal from Scotland, was cited as an authority for this purpose; in which your lordships ruled, that a judgment in the court of Jamaica should not be enforced unless it was just; that is, if the defendant in the cause could shew it was unjust, no court ought to lend its aid to carry it into execution. —My lords, nothing is more right or just; but does it apply to the case before your lordships?

Wherever the aid of a superior court is wanted to give effect to a judgment of an inferior court, or of a court which cannot carry into execution its own judgments, from the parties being locally out of its jurisdiction, that court whose aid is prayed ought not to give it, if the defendant can shew the judgment to be unjust: —they will give so much credit to the sentence of every court as to presume it right, unless the defendant can shew the contrary. Not long ago, an application was made to the court of King's-bench to inforce the judgment of the justices at the quarter-sessions in Lancashire. An act of parliament passed for the inclosure of a common. By that act the public roads are directed to be 60 feet wide, the common was small, situate in a very remote part of the country, where very few people came but those interested in the lands, and they thought that roads of less breadth would very well suffice for the occasions of the country; the commis-

* See this Case cit. Dougl. pp. 4 and 5, and in a Note to p. 6.

sioners under that act of parliament assigned, in the name of private roads, what in truth had before been public, and allotted half the dimensions required by the act. There was an application to the sessions, who had jurisdiction, by appeal; and they ordered the roads to be opened to the extent the act directed: but when they had done that, they were left without the power of enforcing their order: they could not compel a specific execution of it. If they had proceeded for a contempt against the commissioners by indictment, that would have been tedious and uncertain: the proper method was by an application to the supreme criminal court of the kingdom, in which the superintendance of all inferior jurisdictions is lodged. A mandamus was moved for in the King's-bench, to enforce the judgment of the sessions. The court of King's-bench told those who opposed the application, We think ourselves bound to enforce it, unless you can shew it to be unjust: convince the court that the sessions have done wrong, and we will not lend our aid. And on that occasion a case was cited by the learned lord at the head of the court, which happened in the time of lord Hardwicke. Upon a decree of the court of Grand Sessions of Wales, where a party had removed out of the jurisdiction of that court, a bill was filed in the court of Chancery to enforce the decree of the grand sessions; the defendant by his answer insisted, that the decree was unjust, and ought not to be carried into execution: lord Hardwicke was of opinion, that if the defendant could satisfy him that the decree was unjust, he would not lend his aid to enforce it.

Do we apply to your lordships for the aid of the court to carry the present sentence into execution? No; we ask no favour; we demand nothing but your justice: we produce the sentence: we do not ask for your assistance to carry it into execution; it comes in collaterally; and in such cases, whether in the courts of law or in the courts of equity, the sentences of the Ecclesiastical Court have been constantly attended to and been received as conclusive evidence.

But, my lords, though sentences of the ecclesiastical courts have been ever received as conclusive evidence in civil causes, yet it is contended, they are not admissible in criminal prosecutions. Is it the genius of this country to attend more to the punishment of crimes, than to the administration of justice between the parties in civil rights? Is the distinction founded in good sense or sound policy, that the sentences of ecclesiastical courts should not only be received, but be conclusive, in one case, and be no evidence at all in the other? Your lordships will expect very strong authorities before you listen to such a distinction.

Suppose in a criminal prosecution the property of goods should come in question, and a sentence of condemnation in the court of Exchequer was produced, is there a doubt of its being received? Where the proceeding is *in rem*, the sentence must of necessity be admissible and conclusive in all courts, between all parties, and on all occasions, and to all intents and purposes. Without it there would be contrariety of determinations upon the same question; which would be a reproach to the justice of the country.

I troubled your lordships with a case from sir John Strange's Reports to prove, that the sentence of the Ecclesiastical Court was admissible and conclusive in criminal cases: that doctrine is abundantly confirmed by a case in the King's-bench four years after; the King and Rhodes. What is the answer given to the case? The reporter was a young man, and therefore he is not to be credited; or, his notes of cases after his death came into the hands of his executors, who knew nothing of law, who publish every scrap of paper they can find, and give them to the world—to make a volume; so the authority is got rid of by an objection to the youth of the reporter, and the manner of the publication.

If your lordships were inclined to listen to objections of this kind, it would be a curious enquiry, at what period of a lawyer's life he can take a note fit to be reported. I confess, I am totally unacquainted with it. Should it be when he is at the bar, a young man, and attending to every thing that passes? Should it be, when he is advanced in business? and when the business he is concerned in engrosses his time? If the case had happened later, your lordships would have been told, sir John was then a man of business; he did not trouble himself about taking notes; they are very inaccurate. If it had been the note of a judge taken upon the bench, I do not know but it might be said of him, what was said of another judge,—judges are apt to sleep upon the bench.

I had the curiosity to enquire into the circumstances of the Report. The case happened when sir John Strange was about 24 or 25 years of age; he had been at the bar 4 years. A note so taken, and preserved to the time of his death, ought not to be slightly treated. The observation of the case being published by his executors would have been spared, had the gentlemen gone to the first page of sir John Strange's book; for they would have found by a preface written by sir John Strange himself, when between 50 and 60, that he had collected these cases, and meant the public should have the use of them; that he had been at the pains of selecting those that he thought fit for publication, and of putting them into order. It appears he had given some of his notes to a gentleman, whose servant had clandestinely copied and sold them to booksellers; and lest the cases so surreptitiously obtained should be imperfectly given to the public under the sanction of his name, he was at the expence of having his notes transcribed under his own eye: and he says, "if they should not be published in my life-time, they will come perfect into the hands of my executors; and of course to the public." He practised in the first criminal court of this country with the greatest honour and ability;

he had never heard in his time that the case had been over-ruled or impeached: if he had, his integrity was such, that the case never would have appeared in his book; or if he had inserted it, it would have been accompanied with a note, that damned it, or threw a doubt on its authority.

There was another objection to this case: that it must have been determined in the time of the dullest alderman that ever sat in that court. Who, my lords, determine cases of this kind at the Old-Bailey? Not the aldermen: they attend indeed; they are fine pictures, handsome furniture; they grace and adorn the court; very respectable, of considerable trade; but they do not deal in law. If they ever study law, it is to avoid it; in which they are not always successful. The judges of the common law, of the superior courts of Westminster-Hall, decide the questions which arise in trials there.

Your lordships have been also told, that the authority of this case, if ever it had any, was soon put an end to in the year 1753, in the case of the King and Murphy; where the probate of the Ecclesiastical Court was set at nought; it was nothing more than paper and wax, without any effect. The case of the King and Murphy was thrown in by name. A case, the king and such a one, shews it to have been a criminal cause; but it must be from a state of the facts that your lordships must discover the application.

I will let your lordships know the state of that case. It was an indictment for forging the will of one Wilkinson. Your lordships have many of you heard of the great successes of some privateers fitted out in the year 1746-7, called the Royal Family privateers: they were very successful; and they got very soon into many disputes in the court of Chancery and courts of law. Their wages and prize-money were considerable. Wicked men were tempted to endeavour to possess it. A sailor in a remote part of the world is a being not likely to give himself much trouble about money. Murphy, who was prosecuted at the Old-Bailey, knowing Wilkinson's title to the prize-money, had forged a will of Wilkinson, had got that will proved, and had received from one Noades, the agent, part of the prize-money of Wilkinson. All went off very well. Murphy spent the money. But in a few months after, Mr. Wilkinson was restored to life. He appeared before the agent, and demanded his money. Says the agent, We have paid your executor. Says he, That is pretty odd! I will satisfy you I have not been dead; and nobody can prove my will till I am dead: I insist upon my money. The fraud was detected; Murphy was apprehended, prosecuted, and convicted.

Would the gentlemen have had him set up the probate of the will at the Old-Bailey? Would they have told Wilkinson to go to the Ecclesiastical Court to repeal it? What would Wilkinson, ignorant as he was, say? I have heard of probates of wills of dead men, but never heard of probates of wills of living men before: the jurisdiction of the Ecclesiastical Court is to grant probates of the wills of the dead, not of the living; and therefore the question could not arise.

Another case of one Stirling was mentioned. Stirling found out that a Mrs. Shutter had property in the South-Sea stock, and his scheme to possess it was like Murphy's: he forged a will, got it proved, went to the South-Sea-house; there he exhibited the probate; they gave credit to the death of the party, and to his being the executor, and they paid the money. The woman, who had nothing else to live upon, came to receive her dividend. The clerk says, Your executor has proved your will; you must be the ghost of Mrs. Shutter, not Mrs. Shutter herself. She was not to be put off in that way. The company found out Stirling, and brought him to justice. He did not say to the court on his trial, Do not believe her; no law says you must take the evidence of a ghost: she must go into Doctors Commons and rescind this, before you believe her evidence. No court would bear such an insult. The jurisdiction of the Ecclesiastical Court does not attach, till the party is dead: there is no such thing as a will for the Prerogative Court to give effect to, whilst the testator is living. It was said, the crime consists in obtaining the probate. The will has no legal effect without it. It is not necessary, to constitute the crime of forgery, that the will should be proved. If the will is exhibited as a genuine will, and the officers of the court (what has happened in many instances) suspect a forgery, they stop the probate; and many have suffered without a probate being granted, the offer to prove the will being a publication of the forgery.

Two other cases, the King and Fitzgerald, and the King and Carr and Richardson, were also mentioned to your lordships. In neither of these cases was any probate produced or insisted upon by the prisoner. One of the gentlemen, who cited the cases, suggested that answer to them, which was too obvious to be overlooked.

I trust your lordships are satisfied, there is no ground in reason or authority for the distinction attempted between civil and criminal causes in the admissibility and effect of the sentence of the Ecclesiastical Court.

I am now, my lords, arrived at that point to which the whole artillery seems to be directed; that the sentence was obtained by collusion.—Your lordships have been told, that a judgment by collusion is *fabula non judicium;* wax, paper, ink, any thing that you will, but not a judgment: the judge does not act, the judge is imposed upon; it is of no effect whatever; in no court, in no light, upon no occasion, can the most ingenious imagination suggest a case, in which collusion does not affect the transaction; and being once proved, destroys it from the beginning, and as much annihilates it, as if

it had never existed. This your lordships have been told is the clear settled law of every court.

I must beg leave to deny the doctrine in the extent it is contended for, and to insist before your lordships, the collusion cannot be averred against this sentence, either upon the principles of the common law, or the provisions of any statute. By the common law of this country, proof of collusion in some instances was permitted to rescind transactions: the simplicity of the common law, calculated for more honest times, was not equal to all the arts of injustice which ingenious wickedness hath produced.

By the principles of the common law, the person permitted to rescind a transaction, on the score of fraud or collusion, must have an interest vested at the time. This is expressly laid down by the court in Twyne's case, reported by lord chief justice Coke. Where goods are unjustly taken, and sold in a market overt by fraud, to change the property, the true owner may retake them. So where a creditor prosecutes his debtor to judgment, and the debtor sells his goods to a person knowing of the judgment, with a view to defeat the execution, the goods may notwithstanding be taken by the creditor. In both cases an interest was vested at the time of the fraud.

Many statutes have been made to suppress fraud; in Henry the 4th's time, in the different reigns of the Edwards, and last of all in the time of queen Elizabeth; the main object of which was to enable persons who became interested subsequent to transactions founded in collusion and fraud, to impeach and rescind them.

It has not indeed been expressly insisted, that by the common law, independent of statutable provisions, all fraudulent judgments were void, and that it was competent to any person to defeat them: the authorities I have cited, and legislative declarations upon the subject, prove the contrary. The statute of 9th Henry 6, c. 11, has already been mentioned: from thence it is clear, the certificate of the bishop, however collusively or fraudulently obtained, was conclusive between the parties. And in the case of bastardy, a provision is made against such certificates in future: but in other cases, as in marriage, to this day, and also before the Reformation, upon the parties being of a religious order, the certificate was conclusive, notwithstanding any fraud or collusion.—Collusive judgments upon penal statutes to protect offenders frequently occur in practice; and when they are insisted on, the plaintiff has a right to aver such judgments to have been obtained by fraud and collusion. This does not arise from the provision of the common law, but from an act of parliament made in the 4th H. 7, c. 20. The whole statute is material to be attended to. The title of the act is, "actions popular prosecuted by collusion shall be no bar to those which be pursued with good faith." It recites, that if an action popular be commenced against an offender by good faith, then the same offender will delay the action either by non-appearance or by traverse; and hanging the same action, the same offender will cause like action popular to be brought against him by covin for the same cause and offence that the first action was sued: and then by covin of the plaintiff in that second action, he will be condemned either by confession, feigned trial, or release; which condemnation and release so had by collusion and covin pleaded by the said offender, shall bar the plaintiff in the action sued in good faith: it is therefore enacted, that in future the plaintiff suing in good faith may aver the former recovery to have been by covin and collusion; but no such averment is to be received after a trial on the point of the action, or on the covin or collusion.

Here your lordships find the origin of averments, that judgments on penal statutes were obtained by collusion. This act affirms the principle of the common law, that none but persons interested were entitled to rescind judgments on the ground of collusion. A penalty given to a common informer is not vested in any individual, till he commences the action; and consequently he could not aver collusion in a former judgment: such judgment was not then *fabula*, or waste parchment, but of such effect and conclusion as called for an act of parliament to remedy the mischief.

There can be no greater authority to prove the common law of the land, than a parliamentary declaration upon the subject: this act furnishes a most explicit and satisfactory one. Your lordships will not suppose an act was made to remedy a mischief, or supply a defect, which did not exist. If your lordships refer to the acts of those days, you will find them drawn with great precision and accuracy, and with great knowledge of the subject: I will not say so much for the acts of the present time.

This act must evince to your lordships, that collusive judgments in courts of law bound in collateral suits. Is it then to be wondered at, that there was no provision by the commou law respecting fraudulent sentences in the ecclesiastical courts, which had the sole and exclusive jurisdiction in themselves? But it does not follow, that collusive practices are to have effect, or the parties go unpunished.

A power is incident to every court to prevent its proceedings from being made the instruments of fraud and iniquity, and to punish the persons concerned in the attempt. It may be done upon the information of one interested or not interested. The Court is called upon for its own honour to examine into the business.

Your lordships have been told, that the crown cannot get at the collusion; that the ecclesiastical courts will not attend to the application of the crown. If that were the case, it would not follow as a necessary consequence, that the crown should be admitted to allege collusion here. But has the attorney general surmised to the Ecclesiastical Court, that there has been such an imposition put upon them as is insinuated? Has the judge of the Ecclesias-

deal Court told the attorney general, I cannot attend to the suggestion; no application has been made to the Ecclesiastical Court, either on the part of the crown, or by the real prosecutor in this case, or any other person, though the duke of Kingston and the noble lady at the bar lived together five years under the sanction of a marriage solemnized with the archbishop's licence, in the presence of friends, and known to the world? Does the prosecutor say, he is actuated by motives of justice, and allege the supposed collusion newly discovered?

A case happened in the court of King's-bench, which is known to many of your lordships. Mrs. Phillips had married Mr. Muilman—Mr. Muilman had got rid of that marriage by a sentence in the Ecclesiastical Court, by proving a former marriage with one Delafield.—It was then the lady's turn. She meditates getting rid of Delafield's marriage, by proving that Delafield at the time he married her had another wife; and so the lady was to fix herself upon Mr. Muilman in order to give effect to her scheme. An action was brought for a real demand against her in the court of King's-bench by a brewer, who had got a note from her for a valuable consideration: the intent of this was to create a rumour that Muilman and she were married. They might have brought this and a thousand such actions, and no verdict given could be evidence against Mr. Muilman. But when Mr. Muilman heard of this proceeding, and the purpose of it, though it could not affect him, he applied to the court of King's-bench, not as a party in the cause, but informed the Court that such a proceeding was had by collusion, that it was an abuse of the Court, and ought to be rectified. Lord Hardwicke was then at the head of that court: he considered it as a high contempt of that court: he attended to the application of Muilman.' An objection had been made by counsel, that Muilman was not to be heard. What! said lord Hardwicke, to inform the Court of a contempt, is he not to be heard? Any person as *amicus curiæ* may inform the Court of a contempt that has been committed. The Court ordered the record to be taken off the file, and punished the parties. If the present sentence was by collusion, the Ecclesiastical Court would erase from their records the memorial of the transaction at the surmise of an *amicus curiæ*: and would not the Ecclesiastical Court have thought themselves honoured with such an *amicus curiæ* as his majesty's attorney-general?

Great, and perhaps deserved, commendation was bestowed upon the marriage-act, though, I really confess, I did not discover the application. Your lordships were told, that every woman of easy virtue and of indigent circumstances before that act had an immediate receipt for the payment of her debts by getting married at the Fleet. Has the marriage-act been attended with such beneficial consequences to make all women virtuous, and all women rich? If that be true, it has much greater merit than I conceived belonged to it. Did a Fleet marriage discharge the woman from her debts? The only change it made in her situation was this: when married, she goes to gaol in company with her husband; whereas if single, she must go alone, and trust to the company she meets there: and as to future debts, she was not liable, because she was a married woman; and at that time the marriage ceremony, if performed by a priest, was valid. But is there any thing in the marriage-act which says, that a woman who now marries shall not run into debt? It would be very happy for many husbands in this country, if there could have been an effectual provision of that kind. Before the marriage-act, a woman by her marriage in the Fleet was not liable to future debts; a woman now by her marriage in the church is not liable to future debts. Has the marriage-act made it a difficult matter in this country to be married? Are there many obstacles in the way? Is there any delicacy in surrogates in granting licences? In truth, it is as easy to get married in a church as before in the Fleet. Suppose a marriage by banns at a distance from London; the woman comes here and runs in debt; does any body in London know of her marriage, though it was in a church? She has as much power to run in debt since the marriage-act as before, and as exempt from the payment.

Your lordships are told, that a man and woman may to civil purposes and to civil duties, by a collusive sentence of this kind, become separated, and no longer husband and wife; but to all the public duties they are husband and wife: they cannot absolve themselves from public duties; there is no power upon earth can do it but the legislature of the kingdom; and that the noble lady at the bar is free to all civil purposes, but to all criminal purposes she is a wife.

I wish the gentleman, who used this argument, had explained himself upon the subject; for I protest to your lordships, I am to be informed that there are other public duties by husband and wife to be performed, but those in a state of cohabitation: I have no idea of any public duties which the state can exact from a husband and wife in any other situation: and yet, my lords, nothing is more clear, than if a man and woman cohabit together as husband and wife after a sentence like the present, and whilst it remains in force, they are punishable by ecclesiastical censures.

Are the public duties alluded to the injunctions found in the act of parliament, that no man shall take another wife, or any woman another husband, living the former? The act does not mean to punish all such acts: for in the first place the act says, that it is competent to any man, without becoming a felon or the object of punishment by the act, to marry a second wife, provided his first wife is beyond the seas for seven years together, though the husband knows she is living; and yet the second marriage is void, and the husband may be

punished in the ecclesiastical courts, but not in the temporal.

Suppose a gentleman from Ireland, for instance, should be civil enough to leave his wife, and reside seven years in England; though he hear from her by every packet, though he write to her by every packet, he may marry a woman in England without offending against the act of parliament. It would be the same, if a person living at Dover could prevail on his wife to go and reside at Calais for seven years: he might marry another woman at Dover without any peril from this law, though every vessel brought him accounts of her good health. Is this then that great public duty which the state so rigorously exacts, that none of its subjects shall marry a second husband or wife, living the first?

It is well known, that a divorce for adultery does not dissolve the bonds of matrimony; the relation of husband and wife still exists, and neither party can marry again; and yet the day after that divorce is pronounced, she can marry any man she pleases without offending against this law. It is not then in this act of parliament we are to find the public duties which the state exacts from a husband and wife; for in many cases a second marriage is not punished, or even condemned by it.

Possibly the gentleman may urge, that a wife's residing abroad for seven years may be by collusion to give the husband an opportunity of marrying again without committing felony: in short, if your lordships yield to this objection of collusion, it is impossible to foresee to what extravagant lengths you may be carried in support of the proposition, that the noble lady at the bar is to all civil purposes single, but to all criminal purposes a wife. The case of a person who committed a fraudulent act of bankruptcy, on which a commission issued, and for a concealment of part of his effects he was tried and executed, has been mentioned. The case, so far from maintaining the proposition, is an authority against it: the collusive act of bankruptcy was deemed equivalent to a real one; it bound the bankrupt to all civil and criminal purposes; it subjected his property to be seized for the benefit of his creditors; it subjected his person to the punishment ordained by the bankrupt laws: there is no distinction made between civil and criminal purposes.

Suppose a commission of bankruptcy issuing fairly upon a real act of bankruptcy, and a concealment by the bankrupt; and let me suppose farther, which is not an impossible thing, that the commission by collusion between the assignees and the bankrupt is superseded, as having improperly issued, by an order of my lord chancellor, and an indictment should be afterwards preferred for the concealment; would any judge suffer a man to be tried as a felon under these circumstances on a suggestion of fraud in superseding the commission? Certainly not: I am persuaded every judge, who now assists your lordships, would tell the prosecutor he had mistaken the place to examine the fraud; that he ought to have applied to the court of Chancery, which has exclusive jurisdiction in bankruptcy; and direct the prisoner to be acquitted.

Fermer's case, in lord Coke's Reports, was cited to your lordships to prove, that acts temporal and ecclesiastical may be avoided for collusion: does that learned judge say where such acts are to be avoided? No; but, my lords, to illustrate that passage he refers to a case reported in lord chief justice Dyer's Reports; and there it appears, that the act of the Ecclesiastical Court, which was granting an administration, had been repealed in the Ecclesiastical Court for collusion. If I wanted authorities to add to those I have cited, I would borrow this to put into the number; because it is a direct proof, that the Ecclesiastical Court have a power to set aside their own acts for fraud.

A case of Lloyd and Maddox was cited from Moore's Reports to prove, that the Ecclesiastical Courts had a power to examine into the collusive means of obtaining a judgment in the temporal courts; and shall not, say the gentlemen, the temporal courts take the same liberty with the sentences of the ecclesiastical? The case need only to be stated to shew the fallacy of the argument. A person claiming a legacy sues in the Ecclesiastical Court, the proper forum for the recovery of that demand: the defendant in answer says, I have nothing to pay you with. Such a one, a daughter of the testator, has sued me in a court of law for a debt; has recovered a judgment against me. I must pay that debt. I cannot pay your legacy, unless I pay it out of my own pocket, and nothing can be more unjust. The executor is to administer the effects as far as they go, but not to pay the debts out of his own pocket. The legatee in answer said, The judgment was by fraud, and the temporal court would not prohibit the ecclesiastical from examining into the matter. This is not only within the principle of the common law, the legatee having an interest at the time of the fraud committed, but falls within the statute of queen Elizabeth, which ordains, that every judgment in any temporal court by collusion is utterly null and void, as if it had never existed; it is void against every person having an interest; it is void by force of the statute against the crown demanding a forfeiture.

A learned friend of mine, who spoke in the cause, and who did me the singular honour of attending to me, not for what I said, but for what I omitted, observed to your lordships, that I had avoided entering into the effect of fraud and collusion upon the sentence, unless by citing the case of Hatfield and Hatfield. I knew it would fall to my share to trouble your lordships upon that subject; and to avoid a repetition, I contented myself in that stage of the business with relying upon the case of Hatfield and Hatfield, which appeared to me alone sufficient to answer every argument upon collusion.

It is pretty singular, that as Hatfield and Hatfield was a case in equity, and two of the most eminent equity-counsel in this kingdom appear for the prosecution, that neither of them thought fit to grapple with that case. They found in the principles of the court of equity, that it was not to be answered, and therefore prudently passed it over to those who should think fit to engage with it. A woman claimed 40*l.* a year, which was vested in a trustee for her use: but there was another devise of an annuity of 10*l.* a year out of lands, and a legacy directly given her. The former husband released to the heir at law of the second husband, who had made these provisions for his supposed wife. She files her bill. The first husband in his answer states all the circumstances of their marriage, the time, the place, the minister, and the persons present, to avoid the effect of the release. A suit of jacitation is instituted in the Ecclesiastical Court by collusion with the second husband, after proof of the marriage in the cause in the Exchequer, and she is declared a separate woman, and the widow of the deceased. The Court of Exchequer received the sentence as conclusive evidence. On an appeal to the House of Lords, the decree is affirmed.

If it had stood merely upon the printed cases in the House of Lords, I should conceive your lordships could not have entertained a doubt; but the case is mentioned in sir John Strange's Reports, when he was not a young man; and the ground of the determination is stated to be, that the sentence was conclusive. The case is mentioned also by Mr. Viner in his Abridgment; where he adds, that the House of Lords held, that a sentence in the Ecclesiastical Court could not be impeached, though the proceedings were feint and by collusion. This clear and direct authority is to be got rid of and avoided in this manner: Mr. Viner is a nonsensical writer: you are not to give credit to what he says. I should have hoped that gratitude to Mr. Viner's memory would have repressed that observation: he has shortened the hours of the labour of lawyers, and more particularly of those who are in great business. But to cases in themselves irrefragable, with decisions upon the very point, answers cannot be given by argument; unless your lordships will dignify those observations with the name of argument.

The case of lady Mayo was cited from Doctors Commons, which is very material to the cause now before your lordships. It was a case of fraud and collusion, discovered in the Prerogative Court upon the appeal, which had been practised in the Consistory Court of the bishop of London. The fraud was apparent; he that ran might read it: but what said the judge of the Prerogative Court? You must go into the Consistory Court, where the fraud was committed; I can give you no relief. There the collusion must be gone into, there redress may be had, there the honour of the court will be vindicated. This is the opinion of a living judge, of high character for his abilities and integrity: a greater man perhaps never sat at the head of that court.

Your lordships have been pressed to give a more favourable attention to the wishes of the prosecutor, as the present is a criminal proceeding. Is it the principle or genuis of this country to be more active to find out and punish crimes, than to give effect to civil rights?

My lords, there is a benignity in the laws of this country to the frailties of mankind. The judges are attentive and zealous that the civil justice of the country be strictly administered, and will not suffer any contrivance, chicane, accident, or neglect, to defeat it; but in criminal prosecutions they are humane, they make great allowances, and are not over-anxious to discover criminals. This observation is verified by daily practice. In a civil cause, if the trial comes on before the plaintiff expects it, if a witness be out of the way, if the verdict be in favour of a defendant contrary to the evidence, the verdict is set aside, and a new trial ordered and justice done: but in a criminal prosecution, if the verdict be in favour of the defendant, though it arises from the absence of a witness, or from any other accident, or it be given contrary to the clearest and most satisfactory proof of guilt, though not one of the jury can shew his face without a blush, yet the verdict stands, and a new trial is never granted. It was even denied in perjury committed in the time of king William, where the defendants had the wickedness to corrupt the witnesses for the prosecution to keep out of the way; for whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops.

I cannot, my lords, sit down without reminding your lordships, that in the course of the argument have been cited many determinations in the temporal courts by judges who had no partiality to the ecclesiastical jurisdiction, acknowledging their authority, and declaring *una voce*, that in all cases, where they have an exclusive jurisdiction, the sentence is final and conclusive; there is not an exception to be found in the books. Some of these declarations were made, when the judges of the temporal courts were exceedingly jealous of the ecclesiastical, and when they were even in a state of warfare.

Does the present case call upon your lordships to break down the boundaries which the constitution has fixed between the temporal and ecclesiastical courts, or to invade those rules of decision which have been transmitted from the earliest of times? Is there an authority to warrant your lordships in taking so extraordinary a step?

Is it expected, that your lordships are to be more jealous in finding out crimes and punishing offenders than your ancestors? and to accomplish those purposes, that you will disregard the authorities of the law, the practice of ages, and the spirit of the English constitution?

If the matter, instead of being clear in fa-

vour of the noble lady at the bar, as I conceive it to be, had been only doubtful, I am persuaded your lordships would pronounce an acquittal.

It is the duty and practice of every judge in a criminal prosecution to let the jury know, that, if there hangs a doubt in the cause, they ought to give the turn of the scale in favour of innocence, and acquit the prisoner.

Can your lordships, after an argument of three days, in which so many respectable determinations in favour of the ecclesiastical jurisdiction have been cited, lay your hands upon your breasts and say, Here is no doubt; the sentence of the Ecclesiastical Court, upon the faith of which, and by the advice of a person of the first knowledge and abilities in the ecclesiastical law the noble lady acted, is a nullity and of no avail; and that she has intentionally violated the laws of her country and become a felon?

My lords, I will not permit myself to suspect any one of your lordships can entertain such an opinion; and I sit down with the most perfect confidence, that by your lordships judgment the noble lady at the bar will be dismissed from any farther attendance upon your lordships.

Lord High Steward. A noble lord asks, whether in that case you cited, where an action was brought against Mr. Thomas Hervey, the Court upon hearing the sentence in the Ecclesiastical Court refused to proceed farther in it; or whether it was, that the cause was then depending in the Ecclesiastical Court?

Mr. *Wallace.* I will give your lordships an account from my memory, confirmed by a note taken in a subsequent cause; and if there is any doubt upon the facts, I am happy to acquaint your lordships, that you will have much better information upon the subject from the noble judge who tried the cause. Mr. Hervey and the lady had lived separate several years, during which time a creditor, who had furnished her with necessaries, brought an action against Mr. Hervey. He denied his marriage. There had not been a sentence at that time in the Ecclesiastical Court. The jury were satisfied with the evidence of the marriage, and found a verdict against Mr. Hervey.—Another creditor, who had furnished necessaries for the lady afterwards, brought his action against Mr. Hervey, and was provided with the same evidence which had satisfied the former jury: but between the time of the former trial and the trial of this cause, a suit of jactitation had been instituted in the Ecclesiastical Court by Mr. Hervey against the lady, and a sentence pronounced in his favour, which was offered in evidence. The learned judge conceived himself bound by that sentence, as the judgment of a court of competent jurisdiction: there was no imposition upon the creditor, no occasion for an alarm by the decision, the debt was not contracted during cohabitation, no act of Mr. Hervey's had induced the creditor to furnish the necessaries to her as his wife, he renounced the relation; the plaintiff gave credit upon the marriage itself, and therefore took upon him to satisfy the Court that there was a legal marriage: the sentence of the Ecclesiastical Court had determined the point: the judge apprehended that the question was closed, and that he was bound to give faith and credit to the sentence; and the plaintiff failed on account of the sentence, though it was afterwards reversed upon an appeal.*

Doctor *Calvert.* My lords, the question arising upon the sentence which has taken up so much of your lordships' time, seems now confined to a narrower compass than we at first apprehended.

My lords, when the counsel for the noble duchess at your lordships' bar offered the sentence in the Ecclesiastical Court to be read as conclusive evidence, it was desired by the counsel on the other side, that the rest of the proceedings in that cause might likewise be read. This raised a belief in us, that exception would be taken to the nature of this sentence in particular, as differing from sentences in other matrimonial causes.

My lords, we apprehended it would be said, as indeed it was by some of the counsel on the other side, that a proceeding in a cause of jactitation, when the issue of it was, pronouncing for the jactitation, and the defendant enjoined silence (let the proceeding in that cause have been what it might,) would not amount to a positive decree against a marriage, but it would be merely a dismission of the party; that it would amount to no more than this, that nothing had been proved for the present, and that the judgment never would become decretal.

My lords, I take it to be a mere mistake, to speak of proceedings in such a cause in that way; but however, we have it now, as I understand, in concession from the counsel on the other side, and we are perfectly agreed about the nature of the sentence: it has been allowed, it is as complete a sentence against a marriage, as if it had been pronounced in a cause of nullity of marriage.

My lords, a concession of this sort coming from the counsel on the other side, your lordships will see, must leave them much embarrassed: first, by their own concessions of the effects similar judgments have had in other questions; and likewise by the act of parliament, upon which alone this prosecution can be founded.

My lords, it is conceded, that some judgments of the ecclesiastical courts are final as to matrimony; but if they concede that some are, there is now remaining no objection to this in particular. Your lordships will see how much this is supported by the statute on which the prosecution is founded; because the exceptions out of that statute go directly to those sentences with which it is now allowed this is upon

* Peake's Law of Evidence, c. 2, § 2, p. 80, Note.

a footing. Can it therefore with any propriety be now urged, that it ought not to be received as conclusive, because there is a possibility of setting it aside? This seemed astonishing to the learned gentleman who spoke first on the other side; that, as it is allowed that the court who passed that sentence could at any time upon proper evidence reverse it, it should be urged in this judicature as conclusive upon your lordships. Many instances have been given, where sentences not more final or irrevocable than this have been allowed in the common law courts. If in a cause of nullity, a marriage be pronounced to be void, it would not be contended a moment, but that such a sentence is within the exception of the act; and no person marrying again after such a sentence could be an object of punishment under that act. It is surely therefore a very considerable concession, and sufficient to justify the reliance we have upon it, that it is a positive and direct sentence against the marriage.

My lords, the ground of some of the exceptions out of the act of parliament seems to be the notoriety of the state of the party, which leaves no room for imposition on the person with whom the second marriage is contracted; for the act has not in view merely the punishment of the offence as against morality, because the exceptions are such which allow in many cases a second marriage, though the first is really in force. The object therefore of the act of parliament seems to be this, that there should be no deceit put upon the person: it is expressed by the preamble in these words: "Whereas many persons going from one county to another, or into places where they are not known, marry again; therefore be it enacted:" but when there has been any proceeding of this sort, when there has been any question litigated in the Ecclesiastical Court relative to that marriage, and when the sentence of the Court is against that marriage, I believe it is no strain of the interpretation of that act, to suppose it is one of those cases, in which no prosecution of this sort ought to be carried on.

My lords, the variety of instances that have been produced to shew, that whenever any sentence of this sort has been produced, it has been constantly attended to by all civil jurisdictions, will not bear a contradiction; nothing can be more clear. To all the cases that have been quoted on our side, I do not apprehend that any answer has been given to affect their authority; what is more, there has been no case cited on the other side: therefore, if a series of authorities will establish any point, it is to be conceded, that in all civil cases a sentence thus pronounced by a court having a competent jurisdiction, where the question has come before that court, marriage or not marriage, will be received. The question then will come to this: if it can be established, that in civil suits it would be received, ought it not to have the same effect in a criminal prosecution?

My lords, for that purpose there have been cases cited to your lordships; that of the King against Vincent, where there was a prosecution for a forgery, and the probate was received as conclusive evidence against that forgery.

My lords, in answer to that it was urged only, that it was a case that was too strong, and they could not give credit to the reporter. That answer seems by no means satisfactory, especially as it does not meet with support from any subsequent authority, since none has been quoted that comes up to the point. Two or three cases have been mentioned; but when they are considered, and the circumstances they were attended with, your lordships will find, it does not appear that they come up to the case in question. In two of these instances, the supposed testators were living. My lords, it was a gross imposition, and the whole proceeding a mere mistake, and nothing more. The testator came into court to give evidence. To be sure, a probate under these circumstances could not be attended to; it could not be a probate at all; nor could it be contended, that the probate of the will of a living person could be received in evidence. I know the treatment it received in the Court of Prerogative in that case, where Stirling was executed for a forgery. I enquired, to see how that stands, and I do not find there were any proceedings to reverse or revoke the probate;* the thing was too absurd to require a judicial disquisition. I was informed, a pen was drawn through the probate, and on the margin was written the word 'void.' There were two other cases mentioned of indictments for forging wills, where it was said that there was a probate existing; but it does not appear throughout these cases, that any mention was made of the probate at the trial, or that the exception was taken for the prisoners. We pointed out to your lordships the great inconvenience that would arise from going on to enquire into questions of this sort in two different judicatures. It was asserted——

A Lord. Whether the scratch with a pen through the probate, in the case of Stirling, was done by any order of the Court?

Dr. *Calvert.* Not by any judicial order, I believe. I apprehend it never came judicially before the Court. By whom it was done I know not: I am not acquainted with that.

My lords, it was asserted by the counsel on the other side, that no decision of a civil nature could be applied to any criminal question: it was asserted, but I did not find that it was supported by any principles or authorities.

My lords, we, on the other hand, did submit to your lordships, that the inconveniences arising from such different enquiries might be extremely great; for if they produce different judgments upon the same point, the persons, who should be affected and interested under them, under such a predicament might find it difficult to know what should be their duty.

* See Mr. Leach's adoption of the observation as to this already noticed, p. 496.

We pointed out, that in case the sentence now in question remains in force, which I trust it will, notwithstanding any judgment that may be passed in this Court; yet if you should proceed to censure the person thus separated from the supposed former husband, from this contrariety of judgments the greatest confusion would arise: for you would censure the person for marrying again, as being the wife of that husband, of whom it had been directly in issue and determined that she was never the wife. This, my lords, appears to us a very considerable absurdity. The only answer I heard to that was rather avowing the inconvenience than removing it. When it was asked, in what predicament would a woman stand under these circumstances? it was said, she would be a wife to criminal purposes, but not so as to civil considerations. What the distinction meant, I confess I do not well understand; but it was said, the noble lady at the bar should be considered as a wife to all criminal purposes, because persons cannot absolve themselves from their public duties. I never understood, that with regard to matrimony any party could absolve himself from his private duties neither: I always understood it, as far as his own act could affect it, to be an indelible obligation. But what are the duties to the public, which a person in this situation should be answerable for? A woman by law separated from, and even pronounced not to be the wife of, the supposed husband, and to whom she cannot return; I do not know what duties there are, that she should be answerable to the public for. It is contended, that of not marrying again; but this is expressly contrary to the meaning of the act itself, which provides that in many cases, even where the former marriage remains in force, yet a second marriage shall not be criminal: as in the case of a separation *à mensâ et thoro* there is no doubt, that the parties remain man and wife as much as if they had never been divorced; nay, it is so merely a temporary separation, that there is no occasion for a judicial proceeding to bring them together again; for whenever the parties chuse to cohabit, they may live together, and are as completely man and wife as if no separation had happened. It has been observed, that some inconveniences, which were removed by the late marriage-act, might be introduced again under these suits of jactitation: it is certainly somewhat unintelligible how these suits could be applied to those purposes. The grievance mentioned is this, that single women contracting debts did, before that act of parliament, procure themselves to be clandestinely married to persons with whom they never intended to cohabit, but merely with a view fraudulently to protect themselves against their creditors. Now, can it be argued, that by going into the Ecclesiastical Court, and obtaining a sentence, in a cause of jactitation, that end would be answered? What! when a woman wants a husband to protect her from her debts, shall she get herself fraudulently released from her husband? It seems it would have quite a contrary effect, and cannot answer the purpose for which it would be intended. If any of the excellent regulations made by that act are in danger of being infringed upon by undue practices, it were worthy the legislature to attend to it, and provide against them; but a court of justice cannot for such reasons depart from ancient and established modes of proceedings: and in this case these considerations ought not to have the least weight, because there is not any ground for the apprehension. In the proceedings in this criminal court, therefore, your lordships ought to receive these sentences upon the very same principles, or indeed broader than a civil court: for who shall pretend to say, that in a civil question parties may avail themselves of such a suit? But where a person is brought merely to answer for a crime, and for the purpose of punishment, who shall say, that it is consonant to the principles of law that such a defence should not avail? So rigorous a determination in criminal cases has not been supported on any authority, or established on any principle. Upon the authorities therefore which have been quoted, and which remain unshaken and uncontradicted, we do submit to your lordships, that these two points are well established. But it has been said, that we are now arguing for what is not open to be considered on the general principles of law: because this question has been already decided by the very act upon which the prosecution is now depending: for when an act of parliament makes some exceptions, the true interpretation of that act is, that all cases, which are not within the exceptions, are within the prohibition.

My lords, supposing that to be a good principle of interpretation, yet it may very well and with propriety be contended, that the case that is now offered, I mean the sentence pronouncing against this marriage in a cause of jactitation, is within the exceptions of the act of parliament.

My lords, the two exceptions are, that it shall not extend to any person, who is at the time of such marriage divorced by any sentence had in the Ecclesiastical Court; or to any person, where the former marriage hath been, or hereafter shall be, by sentence in any Ecclesiastical Court, decreed to be void and of no effect.

My lords, it will be difficult to explain the latter words, connected with the provision in the former clause, without taking in the very sentence which is now under consideration. The general words in the first clause are, that it shall not extend to those cases, in which at the time of such marriage the person was divorced by any sentence of the Ecclesiastical Court.

Now, my lords, the word 'divorce' has always been applied, not only to separations *à mensâ et thoro* but to divorces *à vinculo matrimonii*. The first clause therefore, under the general word of 'divorce,' seems to take in both these

cases, whether it be a temporary separation for adultery or cruelty, or whether it be a divorce *à vinculo matrimonii.* If that clause applies to these two cases, I would ask what is the meaning of the second, that speaks of sentences, declaring a marriage null and void to all effects? A sentence pronouncing a marriage null and void, and of no effect, is the same thing as a divorce *à vinculo matrimonii;* because if the marriage has ever been a true and legal marriage, it is well known, that no judicial power in this kingdom can put an end to it. In order therefore to give every part of this act some meaning, it ought to be understood, that the legislature by those general words must mean any sentence whatever, by which the Ecclesiastical Court should have pronounced, that there is no marriage, or that a marriage is void; it being the purport and the general object of this act to save not only the jurisdiction of the Ecclesiastical Court (that is not what I am contending for,) but it is to save the innocence of the persons acting under such sentences: because where that question has been agitated in a public court (for the legislature does not suppose, as some of the counsel on the other side have unwarrantably supposed, it to be a private and clandestine transaction; but) the constitution supposes every court to be open and public, and proceedings there to be before the face of the world: every body may see and know them, if they please; and when there has been this public sentence of any constitutional court, the meaning, the equity of the act must be, that any one of these sentences shall justify the party acting under it. To make a distinction between a cause of nullity and a cause of jactitation, I apprehend can be founded upon nothing, but not considering the nature of the proceedings; because I can hardly put a case, which would be a proper subject for a suit of nullity, but it might likewise be proceeded to the same effect in a suit of jactitation: the only difference is, the proof being put upon the different party. Suppose a person means to dispute the validity of his marriage; he may, if he pleases, proceed in a cause of nullity of marriage; in which case he must state the circumstances of his marriage, and the prayer of his libel will be, that under these circumstances his marriage may be pronounced void: the sentence then would be direct to that point. Suppose on the other hand, he chuses to bring a suit of jactitation, and charges that the woman has claimed him to be her husband: if she justifies that jactitation by pleading her marriage, it is incumbent on her then to state the case, and to go into the question, whether it is a marriage or no: and if in that justificatory plea such circumstances be stated, as would have been the contents of the libel in a cause of nullity, the sentence, I contend, would have precisely the same effect.

My lords, I have known more instances than one to justify what I assert. The first suit that ever was brought upon the Marriage Act to avoid a marriage by reason of minority, where the party under age was married by licence without the consent of parents, was by a suit of jactitation: it was the case of Frost and Waldeck in 1760. I looked into the sentence that was pronounced in that cause, and it was precisely in the same words as this now in question. Will any body contend that it is not an effectual sentence, declaring the marriage between these parties void? Your lordships see it is a fallacy therefore to say, that this method of proceeding in a cause of jactitation will not as effectually bring on the question of marriage, as a cause of nullity of marriage. There were two other cases afterwards upon that act, that were brought in the same way; neither of them came to a decision, but the method of proceeding was the same. Afterwards there was a suit upon that act of parliament brought as a cause of nullity of marriage. I remember it being made a question, whether even that was a proper way of proceeding; but the judge was of opinion, that the party might have proceeded in either way, conceiving, I presume, that the sentence in one way would be as effectual as in the other. With what propriety then can it be said, as it was on the other side, that all proceedings in causes for jactitation of marriage must be with an ill intent?

My lords, it doth not apply at all to the manner of proceedings. Suppose it to be true, what was asserted by the counsel, and I believe it is in a great measure so, that these suits were chiefly used for the purpose of enquiring into contracts of marriage; for before the Marriage Act put an end to such contracts, it was difficult for parties to know, whether they had entered into such contracts as would bind them or no; with what propriety can it be said, that if a suit of jactitation be brought upon such contract, it must be with an ill intent? I have mentioned, that these suits have been brought under the Marriage Act, and therefore merely upon the question of marriage. In those cases the sentences are precisely conceived in the same words with the sentence in this cause: and if a man was to be married again after such a sentence pronounced, would it be argued one moment, that he would be guilty of polygamy under this statute? If he would not, it must be, because such a sentence is on the same footing, as if it had been given in a cause of nullity. For, if a sentence given in a cause of nullity was to be offered as conclusive, and before you entered into evidence upon the fact, your lordships would think it the proper time to offer it, there would be no occasion to go into the question; because, let the fact turn out what it might, that sentence would be satisfactory, that the marriage was void, that is, that there was no marriage then subsisting between the parties. What is the assertion often then in a suit of jactitation; and what was the assertion in the cause now before your lordships? The plaintiff to justify his claim upon the lady states, that at a par-

ticular time he was married, states the circumstances, states the persons present: he attempts to prove this fact. The judge having considered the proofs, and gone into the question, determined that there was no marriage, or, in other words, that the marriage is of none effect: that is, that the marriage that is pleaded there can have no effect; for he pronounces, that, as far as to him appears, the party is a spinster, and free from all matrimonial contracts. If we are right then in bringing this cause within the exceptions of the act, every objection I should conceive, that can be stated, is removed under the express regulation of the act of parliament; because the legislature taking this matter into their consideration, well aware, as it must be supposed, of what inconveniences might be argued to arise, have still enacted, that these sentences existing, the person marrying again shall not be within the act of parliament.

Under these considerations, the reply having been so fully and so ably gone into by the gentleman who went before me, I shall take up your lordships' time no longer, than in hoping you will be of opinion, that this sentence coming within the exceptions of the act, it would be improper to go into any proof of the fact: and therefore I hope your lordships will admit of this plea of the defendant.

Lord President of the Council. My lords, I move your lordships to adjourn to the Chamber of Parliament.—*Lords.* Ay, ay.

Lord High Steward. This House is adjourned to the Chamber of Parliament.

The Lords and others returned to the Chamber of Parliament in the same order they came down. The prisoner retired from the bar.

After some time passed in the Chamber of Parliament*, the Lords and others came back from thence in the same order; and the peers being seated, and the Lord High Steward in his chair, the duchess of Kingston was again brought to the bar.

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* Die Veneris, 19 Aprilis, 1776.

Ordered by the Lords spiritual and temporal in parliament assembled, that the following Questions be put to the Judges, viz.

1. Whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?

2. Whether admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

Whereupon, the Lord Chief Justice of the court of Common Pleas, (Sir *William De Grey*, afterwards lord Walsingham), having conferred with the rest of the Judges present, delivered their unanimous Opinion upon the said Questions, with his reasons, as follow, viz.

My lords; My lord chief baron, (sir Sidney Stafford Smythe), and the rest of my brethren, have desired me to deliver their answer to the questions your lordships have been pleased to propound to us.

That our opinion may be the better understood, it is necessary to make some observations on what has passed in argument upon the subject.

What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them.

From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court: secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence, of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment.

Upon the subject of marriage, the Spiritual Court has the sole and exclusive cognizance of questioning and deciding, directly, the legality of marriage; and of enforcing, specifically, the rights and obligations respecting persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction: they do not want or require the aid of the spiritual courts; nor has the law provided any legal means of sending to them for their opinion; except where, in the case of marriage, an issue

Lord High Steward. Mr. Attorney General, you may go on to state your charge.

Attorney General. My lords, it seems to be matter of just surprize, that, before the commencement of the last century, no secular punishment had been provided for a crime of this malignant complexion and pernicious example.

Perhaps, the innocence of simpler ages, or the more prevailing influence of religion, or the severity of ecclesiastical censures, together

is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence, "general bastardy;" or, in like manner, in some other particular instances, lying peculiarly in the knowlege of their courts, as profession, deprivation, and some others; in these cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned, received, and entered upon the record in the temporal courts, is a perpetual and conclusive evidence against all the world upon that point; which exceptionable extent, on whatever reasons founded, was the occasion of the statute of the 9th of Henry 6, requiring certain public proclamations to be made for persons interested to come in, and be parties to the proceeding. But, even in these cases, if the ordinary should return no certificate, or an insufficient one; or, if the issue is accompanied with any special circumstances, as if a second issue, triable by a jury, is formed upon the same record; or, if the effect of the same issue is put into another form, a jury is to decide, and not the ordinary to certify, the truth; and to this purpose sir William Staunford mentions a remarkable instance. Bigamy was triable by the bishop's certificate; but if the prisoner, to avoid the charge, pleads that the second espousals were null and void, because he had a former wife living, this special bigamy was not to be tried by the bishop's certificate.

So that the trial of marriage, either as to legality, or fact, was not absolutely, and from its nature, an object *alieni fori.*

There was a time, when the spiritual courts wished that their determinations might in all cases be received as authentic in the temporal courts; and in that solemn assembly of the king, the peers, the bishops, and judges, convened for the purpose of settling the demands of the church, by Edward the second, one of the claims was expressed in these words: "Si aliqua causa, vel negotium, cujus cognitio spectat ad forum ecclesiasticum, et coram ecclesiastico judice fuerit sententialiter terminatum, et transierit in rem judicatam, nec per appellationem fuerit suspensum; et postmodum, coram judice seculari, super eadem re inter easdem personas questio moveatur, et provetur per testes vel instrumenta, talis exceptio in foro seculari non admittatur." The answer to which demand was expressed in this manner: "Quando eadem causa, diversis rationibus coram judicibus ecclesiasticis, et secularibus, ventilatur, dicunt quod (non obstante ecclesiastico judicio) curia regis ipsum tractet negotium, ut sibi expedire videtur." For which lord Coke gives this reason, second Institute, c. 22. "For the spiritual judges' proceedings are for the correction of the spiritual inner man, and 'pro 'salute animæ,' to enjoin him penance; and the judges of the common law proceed to give damages and recompence for the wrong and injury done;" and then adds, "and so this article was deservedly rejected."

And the same demand was made, and received the same answer, in the third year of king James the first.

It is to be observed, that this demand related only to civil suits between the same parties; and that the sentence should be received as a plea in bar. But this attempt and miscarriage did not prevent the temporal courts from shewing the same respect to their proceedings, as they did to those in other courts. And therefore where, in civil causes, they found the question of marriage directly determined by the ecclesiastical courts, they received the sentence, though not as a plea, yet as proof of the fact; it being an authority accredited in a judicial proceeding by a court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules, by which they admit the acts of other courts.

Hence a sentence of nullity, and a sentence in affirmance of a marriage, have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a real estate.

A sentence in a cause of jactitation has been received upon a title in ejectment, as evidence against a marriage, and, in like manner in personal actions, immediately founded on a supposed marriage.

So a direct sentence, in a suit upon a promise of marriage, against the contract, has been admitted as evidence against such contract, in an action brought upon the same promise for damages, it being a direct sentence of a competent court, disproving the ground of the action.

So a sentence of nullity is equally evidence in a personal action against a defence founded upon a supposed coverture.

But in all these cases, the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it; or claimed under those who were parties, and had acquiesced.

But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration: first, because the parties are not the same; for the king, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the Ecclesiastical

with those calamities which naturally and necessarily follow the enormity might formerly have been found sufficient to restrain it.

From the moment these causes ceased to produce that effect, imagination can scarcely state a crime which calls more loudly, and in a greater variety of respects, for the interposition of civil authority; which, besides the

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Court, and cannot be admitted to defend, examine witnesses, in any manner intervene, or appeal: secondly, such doctrines would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs.'

The ground of the judicial powers given to ecclesiastical courts is, merely, of a spiritual consideration, 'pro correctione morum, et pro 'salute animæ.' They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace; and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was also so. A felony by statute becomes so at the moment of its institution. The temporal courts alone can expound the law, and judge of the crime, and its proofs; in doing so, they must see with their own eyes, and try by their own rules, that is, by the common law of the land; it is the trust and sworn duty of their office.

When the acts of Henry the eighth first declared what marriages should be lawful, and what incestuous, the temporal courts, though they had before no jurisdiction, and the acts did not by express words give them any upon the point, decided, incidentally, upon the construction, declared what marriages came within the Levitical degrees, and prohibited the spiritual courts from giving or proceeding upon any other construction.

Whilst an ancient statute subsisted (2 H. 4, 15), by which personal punishment was incurred on holding heretical doctrines, the temporal courts took notice, incidentally, whether the tenet was heretical or not; for "the king's courts will examine all things ordained by statute."

When the statute of W. 3, made certain blasphemous doctrines a temporal crime, the temporal courts alone could determine, whether the doctrine complained of was blasphemous so as to constitute the crime.

If a man should be indicted for taking a woman by force and marrying her; or for marrying a child without her father's consent; or for a rape, where the defence is, that "the woman is his wife;" in all these cases, the temporal courts are bound to try the prisoner by the rules and course of the common law, and incidentally to determine what is heretical, and what is blasphemous; and whether it was a marriage within the statute—a marriage without consent; and whether, in the last case, the woman was his wife: but if they should happen to find, that sentences, in the respective cases, had been given in the Spiritual Court upon the heresy, the blasphemous doctrines, the marriage by force, the marriage without consent, and the marriage on the rape; and the court must receive such sentences as conclusive evidence, in the first instance, without looking into the case, it would vest the substantial and effective decision, though not the cognizance of the crimes, in the Spiritual Court, and leave to the jury, and the temporal courts, nothing but a nominal form of proceeding, upon what would amount to a pre-determined conviction or acquittal; which must have the effect of a real prohibition, since it would be in vain to prefer an indictment, where an act of a foreign court shall at once seal up the lips of the witnesses, the jury, and the court, and put an entire stop to the proceeding.

And yet it is true, that the spiritual courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual; and it is equally true, that the temporal courts have the sole and entire cognizance of crimes, which are wholly and altogether temporal in their nature.

And if the rule of evidence must be, as it is often declared to be, reciprocal; and that in all cases, in which sentences favourable to the prisoner, are to be admitted as conclusive evidence for him; the sentences, if unfavourable to the prisoner, are in like manner conclusive evidence against him; in what situation must the prisoners be, whose life, or liberty, or property, or fame rests on the judgments of courts, which have no jurisdiction over them in the predicament in which they stand? and in what situation are the judges of the common law, who must condemn, on the word of an ecclesiastical judge, without exercising any judgment of their own?

The Spiritual Court alone can deprive a clergyman. Felony is a good cause of deprivation: yet in lord Hobart's Reports it is held, that they cannot proceed to deprive for felony, before the felony has been tried at law; and although, after conviction, they may act upon that, and make the conviction a ground of deprivation, neither side can prove or disprove any thing against the verdict; because, as that very learned judge declares, "it would be to determine, though not capitally, upon a capital crime, and thereby judge of the nature of the crime and the validity of the proofs; neither of which belongs to them to do."

If therefore such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for a felony committed after, the opinion of a judge, incompetent to the purpose, resulting (for aught appears) from incompetent proofs (as suppose the suppletory oath) will direct, or rule, a jury and a court of competent jurisdiction, without confronting any witnesses, or hearing any proofs: for the

gross and open scandal given to religion, implies more cruel disappointment to the just and honourable expectations of the persons betrayed by it; which tends more to corrupt the purity of domestic life, and to loosen those sacred coonections and close relations, designed by Providence to bind the moral world together; or which may create more civil disorder, espe-

question supposes, and the truth is, that the temporal court does not and cannot examine, whether the sentence is a just conclusion from the case, either in law or fact; and the difficulty will not be removed by presuming, that every court determines rightly, because it must be presumed too, that the parties did right in bringing the full and true case before the court; and if they did, still the court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

If the reason for receiving such sentence is, because it is the judgment of a court competent to the enquiry then before them; from the same reason, the determination of two justices of the peace upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest court of criminal jurisdiction.

But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence (though such sentence against the marriage has not the force of a final decision, that there was none) yet a cause of jactitation is of a different nature; it is ranked as a cause of defamation only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz. "that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears;" leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause: and if such sentence is no plea to a new suit there, and does not conclude the court which pronounces, it cannot conclude a court, which receives the sentence, from going into new proofs to make out that or any other marriage.

So that admitting the sentence in its full extent and import, it only proves, that it did not yet appear that they were married, and not that they were not married at all: and, by the rule laid down by lord chief justice Holt, such sentence can be no proof of any thing to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time or place, because the court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence, and this judgment, may stand well together, and both propositions be equally true: it may be true, that the Spiritual Court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage.

But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without: although it is not permitted to shew that the court was mistaken, it may be shewn that they were misled.

Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal.

In civil suits all strangers may falsify, for covin, either fines, or real or feigned recoveries; and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this, whether the covin is apparent upon the record, as not espoining, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas.

In criminal proceedings if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself may be traversed by a purchaser, whose conveyance would be affected as it stands; and, even after a conviction by verdict, he may traverse the time.

In the proceedings of the Ecclesiastical Court the same rule holds. In Dyer there is an instance of a second administration, fraudulently obtained, to defeat an execution at law against the first; and the fact being admitted by demurrer, the court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked; and the fact being denied, issue was joined upon it; and the collusion being found by a jury, the court gave judgment against it.

In the more modern cases, the question seems to have been, whether the parties should be permitted to prove collusion; and not seeming to doubt but that strangers might.

So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury, and determined by the courts of temporal jurisdiction.

And if fraud will vitiate the judicial acts of the temporal courts, there seems as much reason to prevent the mischiefs arising from collusion in the ecclesiastical courts, which, from the nature of their proceedings, are at least as much exposed, and which we find have been, in fact, as much exposed, to be practised upon for sinister purposes, as the courts in Westminster-hall.

We are therefore unanimously of opinion:

First, that a sentence in the Spiritual Court against a marriage in a suit of jactitation of marriage is not conclusive evidence, so as to

cially in a country where the title to great honour and high office is hereditary.

[Here followed a great uproar behind the bar, and the Serjeant at Arms made the usual proclamation.]

My lords, the misfortunes of individuals, the corruption of private life, the confusion of domestic relations, the disorder of civil succession, and the offence done to religion, are suggested, not as ingredients in the particular offence now under trial, but as miseries likely to arise from the example of the crime in general; and are laid before your lordships only to call your attention to the course and order of the trial, that nothing may fall out, which may give countenance to such a crime, and heighten such dangers to the public.

The present case, to state it justly and fairly, is stript of much of this aggravation. The advanced age of the parties, and their previous habits of life, would reduce many of these general articles of mischief and criminality to idle topics of empty declamation. No part of the present complaint turns upon any ruin brought on the blameless character of injured innocence; or upon any disappointment incurred to just and honourable pretensions; or upon any corruption supposed to be introduced into domestic life. Nor should I expect much serious attention of your lordships, if I should urge the danger of intailing an uncertain condition upon a helpless offspring, or the apprehension of a disputed succession to the house of Pierrepoint, as probable aggravations of this crime.

But your lordships will be pleased withal to remember, that every plea, which, in a case differently circumstanced, might have laid claim to your pity for an unfortunate passion in younger minds, is entirely cut off here. If it be true, that the sacred rites of matrimony have been violated, I am afraid it must also appear, that dry lucre was the whole inducement, cold fraud the only means to perpetrate that crime. In truth, the evidence, if it turns out correspondent to the expectations I have formed, will clearly and expressly represent it as a matter of perfect indifference to the prisoner which husband she adhered to, so that the profit to be drawn from this marriage, or from that, was tolerably equal. The crime, stated under these circumstances, and carrying this impression, is an offence to the law; which, if it be less aggravated in some particulars, becomes only more odious in others.

But I decline making general observations upon the evidence. I will state it to your lordships (for it lies in a very narrow compass) in the simplest and shortest manner I can invent. The facts (as the state of the evidence promises me they will be laid before your lordships) form a case, which it will be quite impossible to aggravate, and extremely difficult to extenuate.

My lords, considering the length of time which has intervened, a very few periods will comprise the facts which I am able to lay before your lordships. First, the marriage of the prisoner with Mr. Hervey; her cohabitation with him at broken and distant intervals; the birth of a child in consequence of it; the rupture, and separation which soon followed. Secondly, the attempt which the prisoner, in view to the late lord Bristol's then state of health, made to establish the proofs of her marriage with the present earl. Lastly, the plan, which makes the immediate subject of the present indictment, for bringing about the celebration of a second marriage with the late duke of Kingston.

The prisoner came to London early in life, some time, as I take it, about the year 1740. About 1743, she was introduced into the family of the late princess of Wales, as her maid of honour. In the summer of 1744, she contracted an acquaintance with Mr. Hervey; which begins the matter of the present indictment. This acquaintance was contracted by the mere accident of an interview at Winchester races. The familiarity immediately began; and very soon drew to its conclusion.

Miss Chudleigh was about eighteen years of age; and resided at the house of a Mr. Merrill, her cousin, on a visit with a Mrs. Hanmer, her aunt, who was also the sister of Mr. Merrill's mother. One Mr. Mountenay, an intimate friend of Mr. Merrill's, was there at the same time.

Mr. Hervey was a boy about seventeen years old, of small fortune, but the youngest son of a noble family. He was lieutenant of the Cornwall, which made part of sir John Davers's squadron, then lying at Portsmouth, and destined for the West-Indies. In short, he appeared to Mrs. Hanmer an advantageous match for her niece.

From Winchester races he was invited to Lainston; and carried the ladies to see his ship

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stop the counsel for the crown from proving the marriage in an indictment for polygamy.

But secondly, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.*

Die Sabbati, 20 Aprilis, 1776.

Ordered by the Lords spiritual and temporal in parliament assembled, that the Lord Chief Justice of the court of Common-Pleas be, and he is hereby desired to, favour this House with a copy of his Argument upon the Questions proposed to the Judges by this House yesterday.

These reasons, says Mr. Hargrave, were thought to be so important that the Lords requested to have a copy of his argument.

* See Peake's Law of Evidence, c. 2, s. 2. 12 East 411. East's Pleas of the Crown c. 12, s. 5, and Hawkins's Pleas of the Crown, bk. 1, c. 42, s. 11.

at Portsmouth. The August following, he made a second visit at Lainston for two or three days; during which the marriage was contracted, celebrated, and consummated.

Some circumstances, which I have already alluded to, and others, which it is immaterial to state particularly, rendered it impossible, or improvident in a degree next to impossible, that such a marriage should be celebrated solemnly, or publicly given out to the world. The fortune of both was insufficient to maintain them in that situation to which his birth and her ambition had pretensions. The income of her place would have failed. And the displeasure of the noble family to which he belonged, rendered it impossible on his part to avow the connection. The consequence was, that they agreed without hesitation to keep the marriage secret. It was necessary for that purpose to celebrate it with the utmost privacy; and accordingly no other witnesses were present, but such as had been apprised of the connection, and were thought necessary to establish the fact, in case it should ever be disputed.

Lainston is a small parish, the value of the living being about fifteen pounds a-year; Mr. Merrill's the only house in it; and the parish church at the end of his garden. On the 4th of August 1744, Mr. Amis, the then rector, was appointed to be at the church, alone, late at night. At eleven o'clock, Mr. Hervey and Miss Chudleigh went out, as if to walk in the garden; followed by Mrs. Hanmer, her servant (whose maiden name I forget; she is now called Ann Cradock, having married Mr. Hervey's servant of that name) Mr. Merrill, and Mr. Mountenay; which last carried a taper to read the service by. They found Mr. Amis in the church, according to his appointment; and there the service was celebrated, Mr. Mountenay holding the taper in his hat.* The ceremony being performed, Mrs. Hanmer's maid was dispatched to see that the coast was clear; and they returned into the house, without being observed by any of the servants. I mention

* By the Marriage Act (stat. 26 Geo. 2, c. 33, s. 8,) "if any person shall solemnize matrimony in any other place than a church, or public chapel, where banns have been usually published, unless by special licence from the archbishop of Canterbury, or shall solemnize matrimony without publication of banns, unless licence of marriage be first obtained from some person having authority to grant the same; every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be guilty of felony, and transported to some of his majesty's plantations in America for fourteen years, according to the laws in force for transportation of felons, and all such marriages shall be null and void." And by s. 11, of the same statute, "marriages by licence, where either of the parties, not being a widow, or widower, shall be under twenty-one years of age, had without the previous consent of the father, or lawful guardians, or one of them, or if no guardian, then of the mother, if living and unmarried, or if none such, those of a guardian appointed by the court of Chancery, shall be null and void."

Mr. Justice Blackstone (Comm. book 1, c. 15, s. 2, vol. 1, pp. 439, 440,) observes, that "the intervention of a priest to solemnize the contract is merely 'juris positivi,' and not 'juris naturalis aut divini;' it being said (Moor 179,) that Pope Innocent the 3d" [he was Pope from 1198 to 1216] "was the first who ordained the celebration of marriage in a church: before which it was totally a civil contract. And in the times of the grand rebellion, all marriages were performed by the justices of the peace; and these marriages were declared valid without any fresh solemnization by stat. 12 Car. 2, c. 33."

The passage in Moor to which the learned judge refers is as follows:

"Goldingham Doctor del civil ley dit que la solemnization de marriages ne fut use en l'Eglise devant que le Pope Innocent 3 ceo ordaina primes; mes devant cest ordinance le marriage fuit solemnize en tiel forme, que le home vient al meason lou la feme inhabite, et amesneroit la feme ove luy a sa meason, et ceo fuit tout le ceremony; et de ceo fuit que le home est dit *ducere uxorem*, per reason que il duce la feme ove luy a sa meason, et la feme fuit dit *nupta viro* per reason que el est quasi *cooperta mile* (cest') *viro*, a que el fait luy on subject per agreament de marriage."

As to the proceedings for regulating the celebration of marriages "in the times of the grand rebellion;" on January 3, 1644-5, the parliament passed an ordinance bearing this title, "The Book of Common Prayer shall not be henceforth used; but the Directory for Publique Worship" (in the table it is intitled,* "For taking away the Book of Common Prayer, and for establishing and putting in execution of the Directory for the Publique Worship of God.")

In the Directory therein set forth is the following provision respecting marriages:

"The Solemnisation of Marriage.

"Although Marriage be no Sacrament, nor peculiar to the Church of God, but common to mankinde, and of publique interest in every Commonwealth, yet because such as marry are to marry in the Lord, and have special need of Instruction, Direction, and Exhortation from the Word of God, at their entring into such a new condition; and of the blessing of God upon them therein, we judge it expedient, that Marriage be solemnized by a lawfull Minister of the Word, that he may accordingly counsel them, and pray for a blessing upon them.

* Of the titles inserted in Scobell's table of the 'Acts of Ordinances' but very few are the same with those respectively, which are prefixed to the Acts and Ordinances themselves.

these small circumstances, because they happen to be recollected by the witness.

The marriage was consummated the same night; and he lay with her two or three nights following; after which he was obliged to return to his ship, which had received sailing orders.

Miss Chudleigh went back, as had been agreed, to her station of maid of honour in the family of the princess dowager. Mr. Hervey

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"Marriage is to be betwixt one man and one woman only, and they,* such as are not within the degrees of Consanguinity or Affinity prohibited by the Word of God. And the parties are to be of years of discretion, fit to make their own choice, or upon good grounds to give their mutual consent.

"Before the solemnizing of Marriage between any Persons, their purpose of Marriage shall be published by the Minister three several Sabbath dayes in the Congregation, at the place or places of their most usual and constant abode respectively. And of this Publication, the Minister who is to joyn them in Marriage, shall have sufficient Testimony, before he proceed to solemnize the Marriage.

"Before that Publication of such their purpose (if the parties be under age) the consent of the Parents, or others, under whose power they are (in case the Parents be dead) is to be made known to the Church-officers of that Congregation, to be Recorded.

"The like is to be observed in the proceedings of all others, although of age, whose Parents are living, for their first marriage. And in after marriages of either of those parties, they shall be exhorted not to contract marriage, without first acquainting their parents with it, (if with conveniency it may be done) endeavouring to obtain their consent.

"Parents ought not to force their children to marry without their free consent, nor deny their own consent without just cause.

"After the purpose or contract of marriage hath been thus published, the marriage is not to be long deferred. Therefore the Minister, having had convenient warning, and nothing being objected to hinder it, is publikely to solemnize it in the place appointed by Authority for publique Worship, before a competent number of credible witnesses, at some convenient hour of the day, at any time of the year, except on a day of publique Humiliation. And we advise that it be not on the Lord's day.

"And because all relations are sanctified by the Word and Prayer, the Minister is to pray for a blessing upon them to this effect:

"'Acknowledging our sins, whereby we 'have made ourselves less than the least of all 'the mercies of God, and provok'd him to imbitter all our comforts earnestly in the name 'of Christ to intreat the Lord (whose presence 'and favour is the happiness of every condition, 'and sweetens every relation) to be their portion, and to own and accept them in Christ, 'who are now to be joyned in the Honourable 'estate of Marriage, the Covenant of their God. 'And that as he hath brought them together 'by his Providence, he would sanctifie them 'by his Spirit, giving them a new frame of 'heart fit for their new estate; enriching them 'with all Graces, whereby they may perform 'the duties, enjoy the comforts, undergo the 'cares, and resist the temptations which accompany that condition, as becometh Christians.'

"The prayer being ended, it is convenient that the Minister do briefly declare unto them out of the Scripture,

"'The Institution, Use, and ends of Marriage, with the Conjugal duties which in all 'faithfulness they are to perform each to other, 'exhorting them to study the holy Word of 'God that they may learn to live by Faith, and 'to be content in the midst of all Marriage 'cares and troubles, sanctifying God's name in 'a thankfull, sober, and holy use of all Conjugal comforts, praying much with and for 'one another, watching over and provoking 'each other to love and good works, and to 'live together as the heirs of the Grace of life.'

"After solemn charging of the persons to be married, before the great God, who searcheth all hearts, and to whom they must give a strict account at the last day, that if either of them know any cause, by precontract or otherwise, why they may not lawfully proceed to marriage, that they now discover it: the minister, (if no impediment be acknowledged) shall cause, first, the man to take the woman by the right hand, saying these words:

"'I N. do take thee N. to be my married 'wife, and do, in the presence of God, and 'before this congregation, promise and covenant to be a loving and faithfull husband unto 'thee, untill God shall separate us by death.'

"Then the woman shall take the man by his right hand, and say these words;

"'I N. do take thee N. to be my married 'husband, and I do, in the presence of God, 'and before this congregation, promise and 'covenant to be a loving, faithfull, and obedient wife unto thee, untill God shall separate 'us by death.'

"Then without any farther Ceremony, the Minister shall in the face of the Congregation, pronounce them to be Husband and Wife, according to God's Ordinance; and so conclude the action with Prayer to this effect;

"'That the Lord would be pleased to accompany his own Ordinance with his blessing, beseeching him to enrich the persons 'now married, as with other pledges of his 'love, so particularly with the comforts and 'fruits of marriage, to the praise of his abundant mercy, in and through Christ Jesus.'

"A Register is to be carefully kept, wherein the names of the parties so married, with the time of their marriage, are forthwith to be fairly Recorded in a Book prepared for that pur-

* So in Scobell.

sailed in November following for the West Indies; and remained there till August 1746, when he set sail for England. In the month of October following he landed at Dover, and resorted to his wife, who then lived, by the name of Miss Chudleigh, in Conduit-street. She received him as her husband, and entertained him accordingly, as far as consisted with

pose, for the perusal of all whom it may concern."

Afterwards, by the Act of 1653 (passed August 24,) cap. 6, 'How Marriages shall be Solemnized and Registered; As also a Register for Births and Burials,' (but tabulated under the title of 'Touching Marriages, and the registering thereof; and also touching Births and Burials,') it was enacted, that "whosoever shall agree to be married within the Commonwealth of England, after the 29th day of September, in the year 1653, shall (one and twenty days at least, before such intended Marriage) deliver in writing, or cause to be so delivered unto the Register (hereafter appointed by this Act) for the respective Parish where each party to be married liveth, the names, surnames, additions, and places of abode of the parties so to be married, and of their Parents, Guardians, or Overseers; All which the said Register shall publish or cause to be published, three several Lords days then next following, at the close of the morning Exercise, in the publique meeting place, commonly called the Church or Chappel; or (if the parties so to be married shall desire it) in the Market-place next to the said Church or Chappel, on three Market-days, in three several weeks next following, betwen the hours of eleven and two; which being so performed, the Register shall (upon request of the parties concerned) make a true Certificate of the due performance thereof, without which Certificate, the persons herein after authorized shall not proceed in such marriage: And if any Exception shall be made against the said intended marriage, the Register shall also insert the same, with the name of the person making such exception, and their place of abode, in the said Certificate of Publication."

And that "all such Persons so intending to be married, shall come before some Justice of peace within and of the same County, City or Town Corporate where publication shall be made as aforesaid; and shall bring a Certificate of the said publication, and shall make sufficient proof of the consent of their Parents or Guardians, if either of the said parties shall be under the age of one and twenty years: And the said Justice shall examine by witnesses upon Oath, or otherways (as he shall see cause) concerning the truth of the Certificate, and due performance of all the premises; and also of any exception made or arising: And (if there appear no reasonable cause to the contrary) the Marriage shall proceed in this manner:

"The Man to be married, taking the Woman to be married by the hand, shall plainly and distinctly pronounce these words:

"'I A. B. do here in the presence of God 'the searcher of all hearts, take thee C. D. for 'my wedded Wife; and do also in the presence 'of God, and before these witnesses, promise 'to be unto thee a loving and faithful Husband.'

"And then the Woman, taking the Man by the hand, shall plainly and distinctly pronounce these words:

"'I C. D. do here in the presence of God 'the searcher of all hearts, take thee A. B. for 'my wedded Husband, and do also in the pre-'sence of God, and before these witnesses, 'promise to be unto thee a loving faithful and 'obedient Wife.'

"And it is further Enacted, That the Man and Woman having made sufficient proof of the consent of their Parents or Guardians as aforesaid, and expressed their consent unto marriage, in the manner and by the words aforesaid, before such Justice of Peace in the presence of two or more credible witnesses; the said Justice of Peace may and shall declare the said Man and Woman to be from thenceforth Husband and Wife; and from and after such consent so expressed, and such declaration made, the same (as to the form of marriage) shall be good and effectual in Law. And no other marriage whatsoever within the Commonwealth of England, after the 29th of September, in the year one thousand six hundred fifty three, shall be held or accompted a Marriage according to the Laws of England: But the Justice of Peace (before whom a Marriage is solemnized) in case of dumb persons, may dispense with pronouncing the words aforesaid; and with joyning hands in case of persons that have not hands."

Then follow directions respecting the registration of marriages, &c.

The act of 1656, cap. 10, continues and confirms, for six months after the end of the first session of that present parliament, the abovementioned act of 1653, excepting the clause that "no other marriage whatsoever within the commonwealth of England after September 29th 1653, shall be held or accounted a marriage according to the laws of England," which clause is thereby declared null and void.

By stat. 12 Car. 2, c. 33, (confirmed by 13 Car. 2. c. 11,) after recital that, by virtue or colour of certain ordinances, or pretended acts or ordinances, divers marriages since the beginning of the late troubles had been had and solemnized in some other manner than had been formerly used, it was enacted that all marriages had or solemnized in any of his majesty's dominions since May 1st, 1642, before any justice of peace or reputed justice of peace, and all marriages within, &c. since the same day had, &c. according to the direction of any act or ordinance of one or both Houses of Parliament, or of any convention at Westminster under the stile or title of a parliament, should be as valid as if they had been solemnized ac-

their plan of keeping the marriage secret. In the latter end of November in the same year, Mr. Hervey sailed for the Mediterranean, and returned in the month of January 1747, and stayed here till May in the same year. Mean while she continued to reside in Conduit-street, and he to visit her as usual, till some differences arose between them, which terminated in a downright quarrel; after which they never saw each other more. He continued abroad till December 1747, when he returned; but no intercourse, which can be traced, passed between them afterwards.

This general account is all I am able to give your lordships of the intercourse between Mr. Hervey and his wife. The cause of the displeasure which separated them, is immaterial to be enlarged upon. The fruit of their intercourse was a son, born at Chelsea, some time in the year 1747. The circumstances of that birth, the notice which people took of it, and the conversations which she held about that, and the death of the child, furnish part of the evidence that a matrimonial connection actually subsisted between them.

After having mentioned so often the secrecy with which the marriage and cohabitation were conducted, it seems needless to observe to your lordships, that the birth of a child was suppressed with equal care. That also made but an awkward part of the family and establishment of a maid of honor.

My lords, that which I call the second period, was in the year 1759. She had then lived at a distance from her husband near twelve years. But the infirm state of the late lord Bristol's health seemed to open the prospect of a rich succession, and an earldom. It was thought worth while, as nothing better had then offered, to be countess of Bristol; and for that purpose to adjust the proofs of her marriage.

Mr. Amis, the minister who had married them, was at Winchester, in a declining state of health. She appointed her cousin, Mr. Merrill, to meet her there on the 12th of February 1759; and by six in the morning she arrived at the Blue Boar inn, opposite Mr. Amis's house. She sent for his wife, and communicated her business, which was to get a certificate from Mr. Amis of her marriage with Mr. Hervey. Mrs. Amis invited her to their house, and acquainted her husband with the occasion of her coming. He was ill a-bed; and desired her to come up. But nothing was done in the business of the certificate, till the arrival of Mr. Merrill, who brought a sheet of stamped paper to write it upon. They were still at a loss about the form, and sent for one Spearing, an attorney. Spearing thought that the merely making a certificate, and delivering it out in the manner which had been proposed, was not the best way of establishing the evidence which might be wanted. He therefore proposed, that a check-book (as he called it) should be bought; and the marriage be registered in the usual form, and in the presence of the prisoner. Somebody suggesting that it had been thought improper* she should be present at the making of the register, he desired she might be called; the purpose being perfectly fair, merely to state that in the form of a register, which many people knew to be true; and which those persons of honour, then present, give no room to doubt. Accordingly his advice was taken, the book was bought, and the marriage was registered. The book was entitled, Marriages, Births, and Burials in the parish of Lainston. The first entry ran, The 22d of August, 1742, buried Mrs. Susannah Merrill, relict of John Merrill, esq. The next was, The 4th of August 1744, married the honourable Augustus Hervey, esq. to Miss Elizabeth Chudleigh, daughter of colonel

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cording to the rites and ceremonies of the church of England.

"Le mariage dans l'ordre civil est une union légitime de l'homme et de la femme, pour avoir des enfans, pour les élever, et pour leur assurer les droits des propriétés, sous l'autorité de la loi. Afin de constater cette union, elle est accompagnée d'une cérémonie religieuse regardér par les uns comme un sacrement, par les autres comme une pratique du culte public; vraie logomachie, qui ne change rien à la chose. Il faut donc distinguer deux choses dans le mariage, le contrat civil ou l'engagement naturel, et le sacrement ou la cérémonie sacrée. Le mariage pourrait donc subsister avec tous les effets naturels et civils, independamment de la cérémonie religieuse. Les cérémonies même de l'Eglise ne sont devenues nécessaires dans l'ordre civil que par ce que le magistrat les a adoptées. Il s'est même écoulé un long temps, sans que les ministres de la religion aient eu aucune part à la célébration des mariages. Du temps de Justinien le consentement des parties en présence de témoins, sans aucune cérémonie de l'Eglise, légitimoit encore le mariage parmi les chrétiens. C'est cet empereur qui fit, vers le milieu du sixième siècle, les premières lois pour que les prêtres intervinssent comme simples témoins, sans ordonner encore de bénédiction nuptiale. L'émpereur Léon, qui mourut" [qu. monta] "sur le trône en 886, semble être le premier, qui ait mis la cérémonie religieuse au rang des conditions nécessaires. La loi même qu'il fit atteste que c'était un nouvel établissement.

"De l'idée juste que nous nous formons ainsi du mariage, il résulte d'abord que le bon ordre et la piété même rendent aujourd'hui nécessaires les formalités religieuses, adoptées dans toutes les communions chrétiennes. Mais l'essence du mariage ne peut en être dénaturée; et cet engagement, qui est le principal dans la société, est et doit demeurer toujours soumis, dans l'ordre politique, à l'autorité du magistrat." Voltaire Dict. Philosoph. art. Droit Canonique, sect. 6.

* So in former edition.

Thomas Chudleigh, late of Chelsea College, deceased, in the parish church of Lainston, by me Thomas Amis. The prisoner was in great spirits. She thanked Mr. Amis, and told him, it might be a hundred thousand pounds in her way. She told Mrs. Amis all her secrets; of the child she had by Mr. Hervey; a fine boy, but it was dead; and how she borrowed 100*l.* of her aunt Hanmer to make baby clothes. It served the purpose of the hour to disclose these things. She sealed up the register, and left it with Mrs. Amis, in charge, upon her husband's death, to deliver it to Mr. Merrill. This happened in a few weeks after.

Mr. Kinchin, the present rector, succeeded to the living of Lainston; but the book remained in the possession of Mr. Merrill.

In the year 1764 Mrs. Hanmer died, and was buried at Lainston. A few days after, Mr. Merrill desired her burial might be registered. Mr. Kinchin did not know of any register which belonged to the parish; but Mr. Merrill produced the book which Mr. Amis had made; and taking it out of the sealed cover, in which it had remained till that time, shewed Kinchin the entry of the marriage, and bade him not mention it. Kinchin subjoined the third entry, Buried, December the 10th, 1764, Mrs. Ann Hanmer, relict of the late colonel William Hanmer: and delivered the book again to Mr. Merrill.

In the year 1767 Mr. Merrill died. Mr. Bathurst, who married his daughter, found this book among his papers; and taking it to be, what it purported, a parish register, delivered it to Mr. Kinchin accordingly. He has kept it as such ever since; and upon that occasion made the fourth entry, Buried, the 7th of February, 1767, John Merrill, esq.

The earl of Bristol recovered his health; and this register was forgotten, till a very different occasion arose for enquiry after it.

The third period to which I begged the attention of your lordships in the outset, was in the year 1768. Nine years had passed, since her former hopes of a great title and fortune had fallen to the ground. She had at length formed a plan to attain the same object another way. Mr. Hervey also had turned his thoughts to a more agreeable connection; and actually entered into a correspondence with the prisoner, for the purpose of setting aside a marriage so burdensome and hateful to both. The scheme he proposed was rather indelicate; not that afterwards executed, which could not sustain the eye of justice a moment; but a simpler method, founded in the truth of the case; that of obtaining a separation by sentence 'a mensa et thoro propter adulterium;' which might serve as the foundation of an act of parliament for an absolute divorce. He sent her a message to this effect, in terms sufficiently peremptory and rough, as your lordships will hear from the witness. Mrs. Cradock, the woman I have mentioned before as being Mrs. Hanmer's servant, and present at the marriage, was then married to a servant of Mr. Hervey, and lived in the prisoner's family with her husband. He bade her tell her mistress, 'that he wanted a divorce; that he should call upon her (Cradock) to prove the marriage; and that the prisoner must supply such other evidence as might be necessary.'

This might have answered his purpose well enough; but her's required more reserve and management; and such a proceeding might have disappointed it. She therefore spurned at that part of the proposal; and refused in terms of high resentment, 'to prove herself a whore.' On the 18th of August following she entered a caveat at Doctors Commons, to hinder any process passing under seal of the court, at the suit of Mr. Hervey, against her, in any matrimonial cause, without notice to her proctor.

What difficulties impeded the direct and obvious plan, or what inducement prevailed in favour of so different a measure, I cannot state to your lordships. But it has been already seen in a debate of many days, what kind of plan they substituted in place of the former.

In the Michaelmas session of the year 1768, she instituted a suit of jactitation of marriage in the common form. The answer was a cross libel, claiming the rights of marriage. But the claim was so shaped, and the evidence so applied, that success became utterly impracticable.

A grosser artifice, I believe, was never fabricated. His libel stated the marriage, with many of its particulars; but not too many. It was large in alleging all the indifferent circumstances which attended the courtship, contract, marriage ceremony, consummation, and cohabitation; but when it came to the facts themselves, it stated a secret courtship, and a contract, with the privity of Mrs. Hanmer alone, who was then dead. The marriage ceremony, which, in truth, was celebrated in the church at Lainston, was said to have been performed at Mr. Merrill's house, in the parish of Sparshot, by Mr. Amis, in the presence of Mrs. Hanmer and Mr. Mountenay, who were all three dead. Mrs. Cradock, whom but three months before he held out as a witness of the marriage, was dropped; and, to shut her out more perfectly, the consummation is said to have passed without the privity or knowledge of any part of the family and servants of Mr. Merrill; meaning perhaps that Cradock was servant to Mrs. Hanmer. It was further insinuated, that the marriage was kept a secret, except from the persons before-mentioned.

To these articles the form of proceeding obliged her to put in a personal answer upon oath. She denies the previous contract; she evades the proposal of marriage, by stating that it was made to Mrs. Hanmer without her privity; not denying that it was afterwards communicated to her. The rest of the article, which contains a circumstantial allegation of the marriage, together with the time, place, witnesses, and so forth, she buries in the formulary conclusion of every answer, by denying the rest of the said pretended position or

article to be true in any part thereof. Finally, she demurs to the article which alleges consummation.

Denying the rest of the article to be true in 'any part' of it reserved this salvo. The whole averment of marriage was but 'one part' of the article; that averment (the language is so constructed) makes but one member of a sentence; and yet it combines false circumstances with true. 'They were, in Mr. Merrill's house at Sparshot, joined together in holy matrimony.' This part of the article, as her answer calls it, is not true. It is true they were married; but not true, that they were married at Sparshot, or at Mr. Merrill's house.

How was this gross and palpable evasion treated? It is the course of the Ecclesiastical Court to file exceptions to indistinct or insufficient answers. Otherwise, to be sure, they could not compel a defendant to put in any material answer. But it was not the purpose of this suit to exact a sufficient answer; consequently no exceptions were filed; but the parties went to issue.

The plan of the evidence also was framed upon the same measured line. The articles had excluded every part of the family: even the woman whom Mr. Hervey had sent to demand the divorce, was omitted. But her husband *is* produced, to swear, that in the year 1744 Mr. Hervey danced with Miss Chudleigh at Winchester races, and visited her at Lainston; and in 1746 he heard a rumour of their marriage. Mary Edwards and Ann Hillam, servants in Mr. Merrill's family, did not contradict the article they were examined to, which alleges, that none of his servants knew any thing of the matter. But they had heard the report. So had Messrs. Robinson, Hossack, and Edwards. Such was the amount of Mr. Hervey's evidence; in which the witnesses make a great shew of zeal to disclose all they know, with a proper degree of caution to explain that they know nothing.

The form of examining witnesses was also observed on her part; and she proved, most irrefragably, that she passed as a single woman; went by her maiden name; was maid of honour to the princess dowager; bought and sold; borrowed money of Mr. Drummond; and kept cash with him, and other bankers, by the name of Elizabeth Chudleigh; nay, that Mr. Merrill and Mrs. Hanmer, who had agreed to keep the marriage secret, conversed and corresponded with her by that name.

For this purpose a great variety of witnesses was called; whom it would have been very rash to produce, without some foregone agreement, or perfect understanding, that they should not be cross-examined. Many of them could not have kept their secret under that discussion; even in the imperfect and wretched manner, in which cross-examination is managed upon paper, and in those courts. Therefore not a single interrogatory was filed, nor a single witness cross-examined, though produced to articles exceedingly confidential, such as might naturally have excited the curiosity of an adverse party to have made further enquiries.

In the event of this cause, thus treated, thus pleaded, and thus proved, the parties had the singular fortune to catch a judgment against the marriage by mere surprise upon the justice of the court.

While I am obliged to complain of this gross surprise, and to state the very proceedings in the cause as pregnant evidence of their own collusion, I would not be understood to intend any reflection on the integrity or ability of the learned and respectable judges.

For oft, though wisdom wake, suspicion sleeps
At wisdom's gate, and to simplicity
Resigns her charge; while goodness thinks no ill;
Where no ill seems.——

Nor should any imputation of blame be extended to these names, which your lordships find subscribed to the pleadings. The forms of pleading are matters of course. And if they were laid before counsel, only to be signed, without calling their attention to the matter of them, the collusion would not appear. A counsel may easily be led to overlook what nobody has any interest or wish that he should consider.

Thus was the way paved to an adulterous marriage; thus was the duke of Kingston drawn in to believe, that Mr. Hervey's claim to the prisoner was a false and injurious pretension; and he gave his unsuspecting hand to a woman, who was then, and had for 25 years, been the wife of another.

In the vain and idle conversations which she held, at least with those who knew her situation, she could not refrain from boasting how she had surprised the duke into that marriage. "Do not you think," says she with a smile to Mrs. Amis, "do not you think, that it was very kind in his grace to marry an old maid?" Mrs. Amis was widow of the clergyman who had married her to Mr. Hervey, who had assisted her in procuring a register of that marriage, and to whom she had told of the birth of the child. The duke's kindness, as she insultingly called it, was scarcely more strange, than her manner of representing it to one who knew her real situation so well.

My lords, this is the state of the evidence; which must be given, were it only to satisfy the form of the trial; but is in fact produced, to prove that, which all the world knows perfectly well, as a matter of public notoriety. The subject has been much talked of; but never, I believe, with any manner of doubt, in any company at all conversant with the passages of that time in this town. The witnesses, however, will lay these facts before your lordships; after which, I suppose, there can be no question what judgment must be pronounced upon them: for your lordships will hardly view this act of parliament just in the light in which the prisoner's counsel have thought fit to represent it, as a law made for beggars, not for

people of fashion. To be sure, the preamble does not expressly prove the legislature to have foreseen or expected, that these would be the crimes of higher life, or nobler condition. But the act is framed to punish the crime, wherever it might occur; and the impartial temper of your justice, my lords, will not turn aside its course in respect to a noble criminal.

Nor does the guilt of so heinous a fraud seem to be extenuated, by referring to the advice of those by whose aid it was conducted, or to the confident opinion they entertained of the success of their project. I know this project was not (nor did I ever mean to contend it was) all her own. Particularly, in that fraudulent attempt upon public justice, it could not be so. But, my lords, that imparting a criminal purpose to the necessary instruments for carrying it into execution, extenuates the guilt of the author, is a conceit perfectly new in morality, and more than I can yield to. It rather implies aggravation, and the additional offence of corrupting these instruments. Not that I mean by this observation to palliate the guilt of such corrupt instruments. I think it may be fit, and exceedingly wholesome, to convey to Doctors Commons, that those among them, if any such there are, who, being acquainted with the whole extent of the prisoner's purpose, to furnish herself with the false appearance of a single woman in order to draw the duke into such a marriage, assisted her in executing any part of it, are far enough from being clear of the charge contained in this indictment. They are accessaries to her felony; and ought to answer for it accordingly. This is stating her case fairly. The crime was committed by her, and her accomplices. All had their share in the perpetration of the crime: each is stained with the whole of the guilt.

My lords, I proceed to examine the witnesses. The nature of the case shuts out all contradiction or impeachment of testimony. It will be necessary for your lordships to pronounce that opinion and judgment, which so plain a case will demand.

Sol. Gen. My lords, we will now proceed to call our witnesses.—Call Ann Cradock.

(Who came to the bar, and one of the clerks held the book to her, upon which she laid her hand.)

Cl. of the Cr. Hearken to your oath.—'The evidence that you shall give on behalf 'of our sovereign lord the king's majesty, 'against Elizabeth duchess-dowager of King-'ston, the prisoner at the bar, shall be the 'truth, the whole truth, and nothing but the 'truth, So help you God.' [Then she kissed the book.]

Mr. *Wallace.* My lords, I am desired by the noble lady at the bar to apply to your lordships for an indulgence, that a question may be put to the witness by her counsel.

Lords. Aye, aye.

Mr. *Wallace.* I shall beg the witness may inform your lordships whether she has not had a security for some provision, or benefit, or a promise, in consequence of the evidence she is to give on this indictment?—*Cradock.* No.

Examined by Mr. *Solicitor General.*

How long have you been acquainted with the lady at the bar?—Above 32 years.

Where did you first become acquainted with her?—I saw the lady first in London, afterwards at Lainston.

What occasion carried you to the lady at Lainston?—Along with a lady that I served.

Name the lady.—Mrs. Hanmer.

Was Mrs. Hanmer any relation to the lady at the bar?—Her own aunt.

Was the lady at the bar at Lainston along with Mrs. Hanmer?—Not when I first went down to Lainston.

Did she come down there afterwards?—Yes.

Do you remember seeing Mr. Augustus Hervey there at that time?—I remember seeing Mr. Augustus Hervey there, but not at the time I first saw the lady there.

When did Mr. Hervey come there?—It was in June, at the Winchester races.

How long did he stay there at that time?—I cannot particularly say how long he might stay: he was coming and going.

Were you in Lainston church with Mr. Hervey and that lady, at any time in that summer?—I was.

At what time of the day?—It was towards night: it was at night, not in the day.

Upon what occasion?—To see the marriage.

Name the persons who were present.—Mr. Merrill, Mrs. Hanmer, Mr. Mountenay, Mr. Hervey, Miss Chudleigh, and myself.

Who was the clergyman?—Mr. Amis, who belonged to the church.

Were they married there?—Yes; I saw them married.

Was the marriage kept secret?—Yes.

By what ceremony was the marriage?—By the matrimonial ceremony; by the Common Prayer Book.

Were you employed to take care, that the other servants should be out of the way?—Yes.

Did they return to Mr. Merrill's house after the marriage?—Yes, they did.

How far is the church from the house?—Not a great distance, but I cannot say how far: it is in the garden.

Did Mr. Amis return with the party into the house?—Not that I saw.

Did you attend on the lady as her maid?—I did at that time, her own not being able.

After the ceremony, did you see the parties in bed together?—I did.

A Lord. Repeat what you said.—*Cradock.* I saw them put to bed: I also saw Mrs. Hanmer insist upon their getting up again.

Did you see them the next morning?—I saw them that night afterwards in bed, the same night after Mrs. Hanmer went to bed.

Did you see them afterwards in bed for some nights after that?—I saw them particularly in bed the last night Mr. Hervey was there, for he was to set out in the morning at five o'clock; I was to call him at that hour, which I did; and entering the chamber, I found them both fast asleep: they were very sorry to take leave.

Can you fix what year this was?—I believe it to be in the year 1744, but I am certain it was the same year in which the Victory was at Portsmouth.

Do you recollect what time of the year it was?—In the month of August, I think.

What is your reason for thinking it was in the month of August?—My reason is, that it was in the time of Maunhill fair; and also that there were green-gages ripe, which the lady and gentleman were both very fond of.

Do you recollect how long it was after the death of Mr. Merrill's mother?—No, I cannot justly say.

Where did Mr. Hervey go, as you understood, the morning he went away?—To Portsmouth.

Did you understand that he was then in the sea service?—I did, and that he was going with admiral Davers.

Have you any particular reason for knowing that he did go with admiral Davers?—The reason I have to believe he did go with him is, the person whom I married afterwards was Mr. Hervey's servant.

Was he servant to him at that time?—He was.

Did you receive a letter from the person you afterwards married, who was Mr. Hervey's servant, and attended him?—I did, from Port-Mahon.

Do you know what relation Mr. Merrill was to the lady at the bar?—First-cousin.

Who was Mr. Mountenay, whom you mentioned as present at the marriage?—A friend of Mr. Merrill's, as he pretended.

Did he live in the family at that time?—He was in the family at that time, and had been from the time of the death of his mother.

Do you know whether any other part of the family, of both parties, were acquainted with the marriage, except those persons you have mentioned?—No, I did not at that time.

Did the lady change her name on the marriage?—Never in public, to my knowledge.

Had you occasion after this to see the lady in London?—I saw the lady in London many times.

Do you know whether there were any children of the marriage?—I believe one.

What reason have you for believing so?—The lady herself told me so, and her aunt also, whom I ought to have mentioned first. The lady told me, that she would take me to see the child.

Did she offer to carry her aunt as well as you to see the child?—I do not know that.

How long after the marriage was it, that she told you she would take you to see the child?—That I cannot say, but it was after Mr. Hervey returned a second time.

Returned, from whence?—I heard he had been at Port-Mahon.

Do you recollect how long Mr. Hervey had been absent the first time?—No, I do not.

How long had he been absent the second time?—After his return the second time, I believe the child to have been begotten.

How long after Mr. Hervey's second return was it, that she told you she would carry you to see the child?—It was after his first return.

A Lord. I believe there is some mistake. Let the witness explain that.

Sol. Gen. Was it after Mr. Hervey's first or second return, that the lady told you she would carry you to see the child?—I believe the first time.

Do you recollect how long that was after the marriage?—I do not recollect.

When did you marry Mr. Hervey's servant?—The 11th of February 1752.

Did the prisoner at the bar say any thing particular to you about the child?—She told me the child was a boy, and like Mr. Hervey.

How long did you continue in the service of Mrs. Hanmer?—Till she died.

When did Mrs. Hanmer die?—She has been dead eleven years the second of last December.

Had you any occasion to know what became of the child, whether it lived or died?—I know nothing further than what the lady said. When I expected to go to see it, the lady came in great grief, and told me it was dead.

Have you any reason to know at what place the child was born?—At Chelsea, by reason her mother could not go there.

Who informed you that the child was born at Chelsea?—Mrs. Hanmer told me this.

Have you ever heard it from the prisoner?—Yes, I certainly have.

She said, her mother could not go there. What do you understand to be the reason, why Mrs. Chudleigh could not go to Chelsea?—By reason her husband and son were buried there, as I have been told.

Had you any conversation with the prisoner, about the year 1768, about any message to be delivered to the prisoner, that Mr. Hervey had given to you?—I had a message from Mr. Hervey, signifying to the lady he was determined to be parted from her.

Did you deliver that message?—Not for some time after I received it, not being able.

When did you deliver it?—On Saturday morning, when the lady came up to me, and told me, that she knew what had been the matter with me. I told her Mr. Hervey desired me to let her know, that he was determined, to be, I should have said divorced, but I said parted; and also, that he desired me to tell the lady, she had it in her own power to assist him. I delivered the message, and the lady replied, was she to make herself a whore to oblige him?

Did she appear to be with child before this conversation with you?—She did appear so to be.

What parish is Mr. Merrill's house in?—I believe in St. George's: his house at Lainston is a parish of itself.

Are there any other houses in the parish besides Mr. Merrill's?—Not at Lainston, there is not.

Was there service regularly in Lainston church, or did the family go to any other church?—They went to service at Sparshot church.

Solicitor General. My lords, we have no more questions to ask this witness at present.

Lord High Steward. The counsel for the prisoner are at liberty to ask the witness any questions they think proper.

Examined by Mr. *Wallace.*

Have you not declared to some persons, that you had an expectation of some provision or benefit on the event of this prosecution?—I never could declare I had any thing promised me by any body.

Expectation of provision from the persons that prosecute?—I never had; I know none of the family.

Where have you lived for this month, or two, or three?—I have lived at Mr. Beauwater's.

What is the reason of your having your residence there?—In regard to his lady being a relation to Mr. and Mrs. Bathurst.

Had your residence there any relation to this prosecution?—It is unknown to me, if it has.

What have you to do with Mr. Bathurst?—Mrs. Bathurst is so kind as to have me there, as being a servant to her aunt from my childhood.

How long have you been at Mr. Beauwater's?—I am sure I cannot justly say the day when I came there.

How long before this prosecution was commenced?—I can't tell when I came there; I can't tell how long I have been there.

I do not mean that you should answer to a day, but according to the best of your memory.—About four months, I fancy.

Was it before or since you appeared before the grand jury?—Since I appeared before the grand jury.

Do you know who is the prosecutor of this indictment?—Mr. Meadows, I imagine.

Do you know Mr. Meadows?—I have seen him twice or three times in my life, and that is all.

Where?—The first time I ever saw him, was at Mr. Beauwater's house, since I came to town.

Are you to stay at Mr. Beauwater's or to return, when this prosecution is over?—The last home I had is at Lainston, where I hope I may return again. I went down there in August was a twelvemonth.

Have you never declared to any body, that you had an expectation of some provision from the cause now in hand?—I could not declare it, as I had no offers made me from the prosecutor.

Have you declared it?—I have just now said, I could not.

Would you be understood, that you have not?—What was I to declare?

Whether you have not declared, whether true or false I do not care, that you had an expectation of some provision from this prosecution?—I could not declare it, before it was made to me.

You must say whether you did say so or not.—I never had any offer from the prosecution.

Had not you an expectation from the prosecution?—No, I could not say that, when they never offered it me.

Do you understand the question generally, or confined to the prosecutor?—I think it can be confined to none but himself.

Have you any expectation from any body else?—No, none.

Nor ever declared so?—No. I never declared that I had any such expectations.

At what time of the night was this marriage?—I cannot possibly tell the hour; it was at night.

Have not you mentioned to any body some hour of the night?—I do not know that I have mentioned it, any farther than that it was at night.

You have said, that you were employed to keep the servants out of the way at the time; how came you then to go to the church?—I was employed to come out of the church after the marriage, and see that the house was clear: after the marriage, and not before.

Was there any care taken before they went to church?—No, I do not know that there was. Mr. and Mrs. Merrill dined out that day, and I do not know that any of the house knew that there was to be a marriage.

Are you sure that Mr. and Mrs. Merrill dined out that day?—Yes.

When did Mrs. Merrill die?—I do not know, Mrs. Hanmer it was; there was no Mrs. Merrill at that time.

Then by Mrs. Merrill you meant Mrs. Hanmer, did you?—Certainly I did mean Mrs. Hanmer, for there was no Mrs. Merrill.

Were you desired to go to the church?—I don't know whether I was desired to go, but there I was; that I recollect.

Did you go as a witness, or out of curiosity?—I was there to see the marriage. As to witness, I was not called to be a witness.

Did any of the parties know you were in the church?—Those that were in the church knew it.

Did you hear the ceremony performed?—I did.

Did you hear the whole ceremony?—I believe so: certainly.

Have you not said; you did not hear the ceremony?—Not that I know of, and I never was asked, to my knowledge.

Do you speak positively that you have not

so declared?—Certainly I do, for I know whether I was asked or not.

How long did Mr. Hervey stay there after this marriage?—I really cannot say how many days; he was not long there.

You said that Mrs. Hanmer made them get up soon after they went to bed; how long did Mrs. Hanmer sit up after that?—I cannot justly say how many hours; I can't say whether it might have been one, or two, or three hours.

Was it Mrs. Hanmer's custom to lock the door where Miss Chudleigh lay?—I never knew that she did lock the door at all.

Nor any body by her order?—Not to my knowledge: I never knew the door ordered to be locked by any body, nor by myself neither: I am sure I never locked it.

You are sure the door was never locked then, when Mr. Hervey went out, when he was made to get up and leave the room as you have said?—Went out where? I don't understand.

You have said, he was made to get up again.—To the best of my knowledge, the lady got up too, as well as Mr. Hervey.

And both left the room?—I believe they both left the room, I know nothing to the contrary; but I know they afterwards went to bed together.

Have you not declared, you knew nothing of this marriage?—No, never in my life, to my knowledge.

That you did not remember any thing about it?—It is very odd that I can remember it now, and should not have remembered it before: I ever had it in my memory.

Have not you declared that you did not remember it?—No, not that I know of.

I desire you will give a positive answer, yes or no, whether you have or not have declared it?—I never could have declared that which I did not know.

That you did not remember any thing about it?—No, I never could say that.

Did you or did you not say so?—No, I did not say so.

By the Earl of *Buckinghamshire*.

I beg to put one question to the witness. You know that you speak not only in the presence of this respectable court, but in the presence of Almighty God?—Yes.

Have you, or have you not, ever declared that you did expect an advantage from the prosecution? say aye, or no.—I must say no: I could not say aye.

You have told us, that Mr. Merrill and Mrs. Hanmer went out to dinner the day on which the marriage was performed; I should be glad to know at what time Mr. Merrill and Mrs. Hanmer returned home?—I believe it might be between seven and eight o'clock, as I had given tea out of the housekeeper's room to the gentleman and lady by candle-light.

What day of the month was it?—That I cannot tell.

By the Duke of *Grafton*.

Did you ever see the child, that the lady at the bar offered to carry you to see?—No, I never did.

What was the interval of time between the offer to carry you to see the child, and the death of that child?—That I cannot justly say neither; but as far as I can remember, the day that I was to go to see the child, the lady came and said it was dead.

Though you cannot exactly recollect the interval between the one transaction and the other, yet still you may speak at large. Was it a week? Was it a month? Was it half a year?—It was not a month, nor yet half a year.

Were there a few days interval between the one and the other?—There was, but I cannot say how many days.

Did you, in the space of these few days, ever express to the lady at the bar your earnestness and desire to see the child, which, you say the lady at the bar told you was so like Mr. Hervey?—I expressed my desire at the time, when the lady spoke of the child to her aunt.

What was the answer that you had for not carrying you immediately to the child?—The lady told me, she would come on such a day with the princess's coach, and that I should go and see the child.

Were you examined by the Ecclesiastical Court?—I was not.

Did you know at the time, that there was such a process going on there?—I was told by Mr. Hervey there was.

Did you offer to Mr. Hervey, or to any other of the parties, to give that evidence which you now have proved it was material to give?—He told me, he must call upon me to assist him in his marriage.

Did any thing else pass relative to the process in Doctors Commons, after Mr. Hervey's conversation with you?—Yes, there certainly was, though I never was called.

Did any thing pass between Mr. Hervey and you, or between any of the parties and you, after that declaration of Mr. Hervey's to you?—I was to acquaint the lady with his intentions.

You said you were to remove the servants out of the way at Mr. Merrill's house at the time of the marriage: how many servants might there be about Mr. Merrill's house at the time of the marriage?—The butler; a maid, who waited on Miss Merrill; two house-maids: a laundry-maid: one of the house-maids belonged to Mrs. Hanmer, who always went down along with her, and there was a kitchen-maid.

Were there any lights in the church at the time of the ceremony being performed?—There was a wax light in the crown of Mr. Mountenay's hat.

Lord *Townshend*. Whether she has ever received or been offered any thing to with-hold her evidence relative to the supposed marriage?—*Ann Cradock*. I never have.

By Lord *Hillsborough*.

Did you ever receive any letter, offering you any advantage in case you would appear against the prisoner, before you were subpœnaed at Hicks's-hall?—I received a letter from a friend, wherein I was told, that a gentleman of their acquaintance would get me a sinecure, but on what account I knew not.

A gentleman of whose acquaintance?—I do not know who the gentleman was; it never was explained to me who the gentleman was; nor I never asked.

Who was the friend who wrote that letter to you?—Mr. Fozard of Piccadilly.

What answer did you make to that letter?—I made no answer any further, but that it was very kind in any body that would assist me in getting me any thing.

Who is Mr. Fozard?—A person that lives near Hyde-park-corner, and keeps livery-stables.

You say he wrote you word, that some of their friends would get you a sinecure?—I said, a gentleman of their acquaintance.

Of whose acquaintance?—Mr. Fozard's.

Upon what account did you conceive or understand that he was to get you a sinecure?—That I cannot tell.

What have you done with the letter?—I do not know where the letter is; I know I have it not.

Will you take upon you to say, that there was not in that letter an expression intimating, that if you would appear against the prisoner at the bar, a sinecure would be gotten for you?—I certainly do say, there was no such expression in the letter; only a friend of theirs, or a gentleman of their acquaintance, I do not know which, would get me a sine cure.

Did you, or did you not, by virtue of your oath, understand that that was to be the consequence of your appearing against the prisoner at the bar?—I did not know that that was to be the consequence of my appearing. I had no room to imagine so, because I know not the person of the prosecutor, nor none of his family.

Did you advise with any body concerning what you should do with regard to that letter?—I certainly did apply to a friend, and acquainted him I had received such a letter.

What did you write to your friend?—I never writ to any friend; I applied to a friend, and shewed the letter.

Whether you did not ask advice from some body, what you should do with regard to that letter?—I did not ask any body what I was to do with it; I received it.

What did you consult that friend about?—To let him know I had received such a letter; but I did not know what it might be upon, or what it might not.

Did he read the letter?—Yes.

What conversation passed between you and him on the subject of the letter?—I told him, I did not know what it might be from, but that I apprehended it might be something concerning my being called upon in point of the lady. I think I told him, that I had once been told, that I might have the same settled upon me as the lady promised me when I went into the country.

What reason had you for thinking so?—The reason I had for thinking so, was, because I had been told once, that I might have the same given me that the lady at the bar offered me, when I was to go into the country, if I would speak the truth; but by whom I know not: I never asked the question.

I desire to know, what you did with that letter, whether you put it into the hands of the person whom you consulted?—I put it into no one's hands; the person had the letter I consulted.

You put it into that person's hand to read it?—I gave the letter into that person's hand to read it, and told him, he might shew it to Mr. Hervey, if he would.

For what purpose did you desire it might be shewn to Mr. Hervey?—For this purpose, believing it might be against him and the lady; but by whom I know not, for I never asked the question, who it was that was to give it.

Did you desire your friend to shew it to the prisoner at the bar?—That was impossible, for the lady was not in England.

Did you then desire him to shew it to any body on her part?—I should look upon it, if it was shewn to Mr. Hervey, it would be on her part, as being man and wife.

Whether you desired it to be shewn to any body else?—No, not besides Mr. Hervey.

[*Adjourned.*

FOURTH DAY.

Saturday, April 20.

Ann Cradock's examination continued.

Lord *Hillsborough*. I was exceedingly glad the House was adjourned, but I would much rather it had been adjourned sooner, because I now lie under a good deal of difficulty to resume the thread of those questions, that for my own information, and for that of the House, I thought highly proper and necessary to be explicitly and exactly answered. My lords, I think the last question that I put to the witness at the bar, was, whether she had put that letter, which she said was signed by Fozard, into the hand of any other person? If I do not mistake, my lords, she said, she had put it into the hand of a friend of hers to read. Upon asking her, whether she had any other intention than that of putting the letter into his hand? I think she said, she told the person he might shew the letter to Mr. Hervey, as she apprehended it related to him. Now I desire to ask the evidence at the bar, whether she knows, that her friend did shew that letter to Mr. Hervey or not?—*Ann Cradock*. My friend did shew it to Mr. Hervey.

Did your friend tell you what Mr. Hervey

said concerning the letter?—My friend told me, that he desired I should keep the letter.

Do you mean Mr. Hervey or the friend desired you to keep the letter?—I mean, the answer, that was given upon the letter being shewn, was brought by my friend, and Mr. Hervey desired me to keep the letter.

Did your friend, who carried the letter from you to Mr. Hervey, say any thing more to you, than that Mr. Hervey desired you should keep the letter?—He told me that I should acquaint the lady that was abroad with it.

Did you acquaint the lady that was abroad with it?—I had it not in my power so to do.

Did you acquaint any body else with it?—I did several of my acquaintance.

In particular, did you acquaint any body that was concerned in business for the lady?—No.

I desire to know, whether you did by yourself, or by any body else for you, make any answer whatever to the letter to Mr. Fozard?—I went to Mr. Fozard when I received the letter, as in the letter it was required to know my age, and where I was born.

I desire you will inform their lordships of the whole of what passed between Mr. Fozard and you at that interview?—Nothing in particular, further than relating to where I was born, and my age; my age I did not know. I did not ask who was to give me the sinecure.

Did you not think it extraordinary, that Mr. Fozard should enquire of you your age, and where you were born?—I certainly did think it extraordinary.

Whether you did not ask the meaning of it?—I did not ask any meaning for it.

By Lord *Derby*.

You said yesterday, that you did expect to receive something adequate to what you had received from the prisoner at the bar: what did you formerly receive from the prisoner at the bar?—Many favours in friendship, but not any thing in particular.

What were you offered by the lady?—Twenty guineas a-year, to go and settle in the country, and the choice of three different counties.

At what time was that offer made to you?—The time I cannot justly remember.

Recollect; how many years was it ago?—I believe it may be three years ago, or four, I am not certain.

What was your answer to that proposal?—It made me very unhappy to think that I was to be banished, but I consented to go into Yorkshire.

What were the counties that were proposed to you?—Yorkshire, Derbyshire, I think, and Northumberland.

In consequence of that consent to go into Yorkshire, did you go into Yorkshire?—No, I did not; I went to Thoresby: I tried, but I could go no further.

What was the reason that you could go no further?—From being unhappy, and going from all my friends.

Did you receive any sum of money in consequence of going as far as Thoresby?—None, no further than was to carry me to the place where I said I was to go.

You mentioned an annuity of twenty guineas a-year; has that annuity been paid, or have you received any part of it since that agreement?—No.

Lord *Coventry*. You said you were present at the marriage in 1744; I desire to know whether you have ever communicated that information to any person till this year, and to whom?—*Ann Cradock*. I have several times to many, but to particular persons I cannot speak.

Lord *Derby*. I should be glad to know whether you do understand, or do not understand, that any sum or sums were ever paid to any person for your subsistence and board, on the part of the prisoner at the bar?—*Ann Cradock*. No, I do not know that ever any sum was paid upon my account.

Lord *Buckinghamshire*. I desire to ask the witness, whether she at any time did receive any present whatever from the prisoner at the bar?—*Ann Cradock*. Several in point of friendship.

Lord *Townshend*. Were you ever offered any sum of money at any time, to conceal any evidence?—*Ann Cradock*. No.

Lord *Townshend*. By either side?—*Ann Cradock*. No.

By Lord *Camden*.

I desire to know whether you saw the lady at Thoresby, in the way to Yorkshire?—I was in the lady's house, and saw her several times.

In any of those interviews, did any thing pass respecting the annuity of twenty guineas a-year, and the journey you were then making to Yorkshire?—No, not any thing in particular as to that.

What was the reason of your return from Thoresby, and not going to your journey's end?—My reason was, from my ill state of health, and unhappiness of mind.

Lord *Lyttelton*. Did the lady explain to you what were her motives for sending you, or, as you called it, banishing you, into those distant counties?—*Ann Cradock*. No, my lords.

Lord *Derby*. What did you apprehend to be the lady's motives for such a proposal?—*Ann Cradock*. That I was ever at a loss to know, because I never asked.

By the *Duke of Ancaster*.

Did you consult a friend on account of the substance of Mr. Fozard's letter?—I did.

I desire you to tell the House, who that friend was?—My friend was Dr. Hossack, who is physician of Greenwich hospital.

What is become of that letter, or have you it?—I have it not; but it is in my box, I believe at Lainston, as I carried it with me when I went there with my other things.

By the Duke of *Richmond.*

Was not the marriage to be kept a secret?—Yes.

If during the time the marriage was to be kept a secret, any person had asked you about the marriage, would you have owned it, or denied it?—I never from the time divulged the secret, until it had been told before.

Did no person, during the time it was a secret, ever ask you if you knew it?—Several have asked me, but I have always replied, No.

By the *Lord President.*

Do you not know, that your husband was examined in the Spiritual Court, in the cause of jactitation?—I know he was called upon in the Court, but what passed I am an utter stranger to, as I never asked.

Had not Mr. Hervey intimated to you, that you were to be called upon on that occasion?—He did.

After that did you hear any thing from Mr. Hervey, respecting your attendance in that cause?—Mr. Hervey told me, he must call upon me to assist him in the marriage, and to swear to Mrs. Hanmer's hand-writing.

Were you ever called upon that occasion?—I was not.

By Lord *Derby.*

Did you live with Mrs. Hanmer until the time of her death?—I did.

Which happened eleven years ago the 2d of last December?—Yes.

Upon what have you subsisted since that time?—Mrs. Hanmer left me 200*l.*; one was taken up, the other was left: I quitted the lady's house, and went to Newington. I should have told you that the 200*l.* were in this lady's hands [pointing to the Duchess]; one was taken up, and the other, with my husband's income, supported me whilst he lived.

How do you know that that 200*l.* was left you by Mrs. Hanmer?—It was left me in her will.

By the Duke of *Ancaster.*

Do you of your own knowledge assert that there was a child?—I do assert I was told so. I never saw the child.

Who told you so?—Mrs. Hanmer told me so, and the lady told me at our return out of the country.

Who told you there was a child?—This lady at the bar told me so herself. Both told me so.

Do you from your own knowledge, affirm, that that child is dead?—The lady at the bar told me it was dead, as she told me before she would take me to see it.

Did the lady at the bar bring the princess of Wales's coach, and carry you to see the child at Chelsea?—The lady told me she would come in the princess's coach, and carry me to see the child.

By Lord *Radnor.*

How old do you apprehend the child was at the time of its death?—That I can give no account of: it was very young; but the age I know not.

Weeks, months, or years?—Months, but not years.

Did you ever hear that the child was baptized?—I did hear that the child was baptized; but Mrs. Hanmer and I were in the country at that time.

Did you ever hear what the child's name was?—No, I cannot recollect that I did.

Did you ever hear where the child was buried?—I did hear that it was buried at Chelsea.

Who told you so?—The lady at the bar told me so herself one day, when I was airing in the coach with her that way.

By Lord *Fortescue.*

How have you subsisted since your husband's death?—With what I made of my furniture which was in my house, which was all new.

How long is it since your husband died?—Five years last March. [Ordered to withdraw.

L. H. S. Who do you call next, Mr. Solicitor General?

Sol. Gen. We desire to call Mr. Cæsar Hawkins.

Mr. *Cæsar Hawkins* sworn.

Examined by Mr. *Dunning.*

Mr. Hawkins, are you acquainted with the lady at the bar? and how long have you been so?—A great many years: I believe above thirty.

Are you acquainted with the present lord Bristol? and how long have you been so?—I have had the honour of knowing the earl of Bristol nearly as many years.

Do you know of any intercourse between my lord Bristol and the lady at the bar?—Of an intercourse certainly; of acquaintance undoubtedly.

Do you know from the parties of any marriage between them?—Mr. *Hawkins.* I do not know how far any thing that has come before me in a confidential trust in my profession should be disclosed, consistent with my professional honour.* [Question and answer repeated.]

Mr. *Dunning.* I trust your lordships will see nothing in my question, that can betray confidential trust, or dishonor Mr. Hawkins in giving it. My question is simply, whether Mr. Hawkins knows, from the parties, of any marriage between them?

Lord High Steward. The question that was asked by the counsel at the bar, is, "Whether the witness knew, from any information of either of the two parties, that they were married?" The witness objects to it, whether he is to answer any questions that are incon-

* See Leach's Hawkins's Pleas of the Crown, book 2, c. 46, s. 92.

sistent with his professional honor. Your lordships are to determine, whether the question put by the counsel at the bar shall be asked?

Lord *Mansfield.* I suppose Mr. Hawkins means to demur to the question upon the ground, that it came to his knowledge some way from his being employed as a surgeon for one or both of the parties; and I take for granted, if Mr. Hawkins understands that it is your lordships' opinion, that he has no privilege on that account to excuse himself from giving the answer, that then, under the authority of your lordships' judgment, he will submit to answer it: therefore, to save your lordships the trouble of an adjournment, if no lord differs in opinion, but thinks that a surgeon has no privilege to avoid giving evidence in a court of justice, but is bound by the law of the land to do it; [if any of your lordships think he has such a privilege, it will be a matter to be debated elsewhere, but] if all your lordships acquiesce, Mr. Hawkins will understand, that it is your judgment and opinion, that a surgeon has no privilege, where it is a material question, in a civil or criminal cause, to know whether parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession, and in that way he came to the knowledge of it. I take it for granted, that if Mr. Hawkins understands that, it is a satisfaction to him, and a clear justification to all the world. If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, and of great indiscretion; but, to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever.*

Mr. *Dunning.* My question is, Whether you knew from either of the parties, that there

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* See in the Case of Annesley *v.* the earl of Anglesey, vol. 17, p. 1139, the objection taken and over-ruled to the examination of Giffard. See, also, the examination of Kirkland in earl Ferrers's Case, vol. 19, p. 886. See, too, what passed upon lord Barrington's objecting to reveal confidential communications, *infra*, p. 586, and upon the examination of Mr. Berkley, *infra*, p. 613. See, also, Blackst. Comm. b. 3, c. 23, p. 370, and Peake's Law of Evidence, part 1, c. 3, s 4, "Of persons incompetent by reason of their relation to the parties:" where many cases on the subject are referred to, and the result from them is very clearly stated.

In a case where Dixon an attorney had been subpœnaed to give evidence, and to produce certain papers before a grand jury; upon an indictment for forgery to be preferred against one of his clients, by whom the papers had been confidentially communicated to him, the Court held that he was not compellable to produce those papers against his client: and lord Mansfield said, that instead of producing them against his client, he ought, immediately upon receiving the subpœnâ, to have delivered them up to his client. 3 Burr. 1687.

In the Case of Lea *v.* Wheatley, in C. B. Pasch. 30 Car. 2, where the defendant pleaded that he was servant to a peer, North, Ch. Just. held that the defendant ought to sue his writ of privilege; observing that it was the privilege of the master, not of the servant, and perhaps his master would not protect him, and then he must answer. And he illustrated this doctrine by the case of a counsellor, "where" said he, "it is the privilege of the client, that he shall not be compelled to discover the secrets of his client; but if the client be willing, the Court will compel the counsel to discover what he knows." See Jacob's Law Dictionary, (10th edition, 1782) art. Privilege, s. 2. 'Of the privilege of peers and members of parliament.'

The doctrine respecting the extent of the privilege that persons standing in particular relations to a party, shall not be examined against such party, was very ably investigated by Mr. Justice Buller, in his judgment (*a*)

(*a*) "This action was brought to recover penalties upon the Bribery Act, for bribing voters at the election in 1790, for the borough of Newark-upon-Trent, to vote for one of the candidates. The bribery was charged to have been committed by the defendant and his agents, among whom was one W. Handley. At the trial before Thomson, baron, at the Nottingham assizes, W. Handley was called as a witness, who deposed, that previous to the dissolution of parliament, he had received letters at Newark from the defendant in London, which he had notice to produce. He had them not, but said he had restored some of them to the defendant, and given the others to Mrs. Elizabeth Handley, with a direction to destroy them: he had since endeavoured to procure them again from her for that purpose, but she had refused to give them up. W. B. Handley, an attorney, was called, who said that he had the letters in question, and that he had received them from Mrs. E. H. He further stated that he was not then concerned in carrying on any action for W. H.; that he had been applied to by W. H. to be concerned, but had declined it as he was under-sheriff, and a material witness; that he had not employed W. H.'s attorney for him; but that W. H. had consulted him in his profession as a confidential person; and had applied to him both before and after he had received the letters. The witness objected to produce the letters (*), and the judge thought he was not bound so to do.—The Jury found a verdict for the defendant."

(*) "It was understood and argued upon at the bar, and so assumed by the Court, that the objection made by the witness to the production of the letters, was on the foundation of his character of attorney, by which he conceived himself bound to withhold them."

was a marriage between them?—Mr. *Hawkins.*—From the conversation with both parties I apprehended there was a marriage, but nothing in proof appeared before me: I mean nothing as legal proof, but conversation.

But did they in conversation admit, that they

upon the case of Wilson against Rastal, 4 Term Rep. 753, as follows:

"This doctrine of privilege was fully discussed in a case before lord Hardwicke. The privilege is confined to the cases of counsel, solicitor, and attorney; but in order to raise the privilege, it must be proved that the information, which the adverse party wishes to learn, was communicated to the witness in one of those characters; for if he be employed merely as a steward, he may be examined. It is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded. It is a subject of just indignation where persons are anxious to reveal what has been communicated to them in a confidential manner; and in the case(*b*) mentioned, where Reynolds, who had formerly been the attorney of Mr. Petrie, but who was dismissed before the trial of the cause, wished to give evidence of what he knew relative to the subject while he was concerned as the attorney, I strongly animadverted on his conduct, and would not suffer him to be examined: he had acquired his information during the time that he acted as attorney; and I thought that the privilege of not being examined to such points was the privilege of the party,(*c*) and not of the attorney; and that that privilege never ceased at any period of time. In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is shut for ever. I take the distinction to be now well settled; that the privilege extends to those three enumerated cases at all times, but that it is confined to these cases only. There are cases, to which it is much to be lamented, that the law of privilege is not extended; those in which medical persons are obliged to disclose the information, which they acquire by attending in their professional characters. This point was very much considered in the duchess of Kingston's Case, where sir C. Hawkins, who had attended the duchess as a medical person, made the objection himself, but was over-ruled, and compelled to give evidence against the prisoner. The question therefore here is whether B. Handley were privileged with respect to any person. As to W. Handley, he certainly was not; for he said that the witness neither was, or could be his attorney; because he was at that time acting as under-sheriff. Neither was he privileged as to this defendant for the same reason; and though it was said that the defendant (by W. Handley) consulted him in his profession, as a confidential person, the meaning of that was, that as B. Handley was more conversant with business of this kind than those who were not of his profession, W. Handley consulted him, but did not employ him as an attorney. But it was contended on the part of the plaintiff, that supposing the witness were privileged in any action, in which W. Handley was a party, the privilege did not extend to this action against Rastall. But to that I cannot accede; for if he were privileged, so as not to be examined to particular points in any action against W. Handley, he could not prove the same facts in an action against any other person. For the nature of this kind of privilege is, that the attorney shall not be permitted to disclose in any action, that which has been confidentially communicated to him as an attorney. However as B. Handley was neither the attorney of W. Handley, or of the defendant, I am of opinion, that he was improperly prevented from producing the letters in question."

Lord Kenyon said in giving his judgment upon this rule for a new trial: "But in order to shew that the privilege extends beyond the case of an attorney and client, a hard case has been pressed upon our feelings, of confidence reposed in a friend. But if a friend could not reveal what was imparted to him in confidence, what is to become of many cases, even affecting life; *e. g.* Ratcliff's case (18 St. Tr. 430). And if the privilege now claimed extended to all cases and persons, W. lord Russell died by the hands of an assassin, and not by the hands of the law; for his friend lord Howard (9 St. Tr. 608) was permitted to give evidence of confidential conversations between them: all good men, indeed, thought that he should have gone almost all lengths rather than have betrayed that confidence; but still if the privilege had extended to such a case, it was the business of the Court to interfere and prevent the evidence being given. I therefore think that this privilege is only allowed in the case of attorney and client."

(*b*) It was said in argument by the defendant's counsel, "In one of Petrie's causes for bribery, tried a few years ago at Salisbury, Reynolds, who had been Petrie's attorney, though not so at the time of the trial, was called to prove something that he had learned in a confidential conversation with Petrie, but Mr. Justice Buller would not suffer him to give the evidence, and strongly reproached him for his anxiety to reveal the secrets of his former client."

"In Madame Du Barré's Case, where trover was brought to recover her jewels from persons who had stolen them in France, and brought them over here, lord Kenyon would not permit the person who acted as interpreter between the defendants and their attorney, to be examined as to the conversation which was held between them, considering the interpreter as standing in the same situation as the attorney himself, and said at the trial, 'that he was the organ of the attorney.'"

(*c*) Vid. Lindsey *v.* Talbot, Bull. N. P. 284.

were man and wife? and is that the ground upon which you form that apprehension?—Yes, it is; they did admit it in conversation.

Do you, or do you not, know that a child was the fruit of that marriage?—Yes, I do.

Can you tell their lordships, about what time that child was born? and where?—About the time I cannot tell. If I ever put down any thing in writing at the time, I might have destroyed it afterwards, according to my custom, which is to destroy papers that are of no use, and which might be improper to be found after my decease.

Inform their lordships about what time this might be, as near as your memory will enable you to do.—I should suppose it was about thirty years ago; but I do protest I do not know.

Where was this child born?—At Chelsea, near to Chelsea-College; but I forget the name of the street.

Was this marriage, and the birth of that child, at that time kept a secret?—I was told it was to be a secret.

Do you know what is since become of that child?—I believe it died in a little time afterwards.

By your answer, that you understood it was to be kept a secret, did you mean the marriage, or the birth of the child, or both?—Both.

Which of the parties can you recollect it was, Mr. Hervey or Miss Chudleigh, that desired this might be kept a secret? or both?—I should take for granted both equally.

Do you know enough of the then Mr. Hervey's motions to be able to inform their lordships, whether this child was born after his first or second return from sea, subsequent to the marriage?—No, I do not know enough of his motions to answer this question.

Do you know what age this child had attained before its death?—I protest I do not remember now.

Can you recollect about what time of the year it was you first heard this child was born, and about what time of the year you heard it died?—I do not know; I might hear of the death immediately.

Did you ever attend the child in the course of your profession?—I did once: I am not sure whether I did not attend more, but I remember I attended it once.

Do you remember whether your recollection of this transaction was, or was not, helped about the time of the commencement of the suit in the Spiritual Court?—Really I do not know any thing that passed to bring it to my mind then.

Were you, or were you not, applied to by either of the parties, or both, at the time of the commencing this suit in the Spiritual Court?—I was applied to by the earl of Bristol.

Will you be so good as to tell what was the purport of lord Bristol's then application to you?

Mr. *Wallace.* On the part of the noble lady I must submit to your lordships, that nothing said in the absence of the lady is evidence against the prisoner at the bar.

Mr. *Dunning.* I will put the question in a way that it shall be liable to no objection. Did you, or did you not, in consequence of lord Bristol's application, apply to the lady at the bar?—Mr. *Hawkins.* I did.

Mr. *Dunning.* Then tell us, what was the purport of lord Bristol's application to you, and what message you carried from lord Bristol to the lady at the bar?—Mr. *Hawkins.* To the best of my remembrance, the earl of Bristol met me in the street, and stopped me, telling me that he should be glad I would call on him at his house the first morning I had half an hour to spare; and that if I could then fix the time, he would take care to be in the way, and that no other company should interrupt the conversation. He intimated that it was not on account of his own health, but on account of an old friend of mine. I named the time, and went to him. I found his lordship expecting me. Upon a table, at a little distance from his right hand, there lay two or three bundles of papers, folded up as these papers are [taking up some papers at the bar:] to these papers he often pointed in course of what he said afterwards. After making some polite apologies to me for the particular trouble he was then giving me, he told me it was on the present duchess of Kingston's account: that he wished me to carry her a message upon a subject that was very disagreeable, but that he thought it would be less shocking to be carried by, and received from, a person she knew, than from any stranger: that he had been for some time past very unhappy on account of his matrimonial connections with the duchess, Miss Chudleigh that was then: that he wished to have his freedom; which the criminality of her conduct, and the proofs which he had of it (which, in pointing to the papers I before mentioned, he said he had for some time past, with intent and purpose to procure a divorce, been collecting and getting together:) that he believed they contained the most ample and abundant proofs, circumstances, and every thing relative to such proof: that he intended to pursue his prosecution with the strictest firmness and resolution; but that he retained such a regard and respect for her, and as a gentleman to his own character, that he wished not to mix malice or ill temper in the course of it; but that in every respect he would wish to appear and act on the line of a man of honour and of a gentleman: that he wished (he said) she would understand that his soliciting me to carry the message, should be received by her as a mark of that disposition: that as most probably in the number of so many testimonial depositions as were there collected, there might be many offensive circumstances named, superfluous to the necessary legal proofs, that if she pleased I might inform her, that her lawyers, either with or without herself, might, in conjunction with his lawyers, look over all the depositions, and that if any parts were found tending to indecent or scandalous reflections, which his gentlemen of the law should think might be omitted without

weakening his cause, he himself should have no objection to it: that as he intended only to act upon the principles of a gentleman and a man of honour, he should hope she would not produce any unnecessary or vexatious delays to the suit, or enhance the expences of it, as he did not intend to prosecute to gain by any demands of damages, I think, or to that purpose. I delivered this message to the duchess as well as I could. I do not presume now, that either the precise words, or the identity of the words and expressions can be recollected by me, but it was to the purport, as near as possibly I can remember, of what I have said.

Will you recollect, whether upon this conversation any distinct proposition was stated to the duchess which required an answer? or, what answer you carried back from the duchess for that purpose? You will of course be referring yourself to what passed between you and the duchess.—I delivered my message to the duchess. After a little time taken for consideration, I do not recollect exactly what her grace desired me to report to the earl of Bristol; but it was to this effect: that she was obliged to him for the polite parts of his message, but, as to the subject of the divorce, she should cut that short by wishing him to understand, that she did not acknowledge him for her legal husband, and should put him to the defiance of such proof: that she had then already, or should immediately, institute a suit in the Ecclesiastical Court, which she called, I think, a jactitation of marriage; but, as he had promised before, that he would act upon the line of a man of honour and a gentleman in his own intended suit, she hoped that he would pursue the same line now, and that he would confine himself to the proofs of legal marriage only, and not to other proofs of connections or cohabitations: if he did, that he would make it a process of no long delay, and that either he would gain an equal freedom to himself by a sentence of that court, declaring them to be free, or he would the sooner be able to institute his own intended suit. The earl of Bristol received my message as one affected and struck by it, making no reply or answer for two or three minutes; then, not speaking to me, but rather seeming to express his own thoughts aloud in short sentences, that he did not conceive he should have his equal freedom by that method. I believe I should have mentioned, that her grace desired, in part of her message, that nothing might be brought forward, which might be the subject of useless conversation and scandal. He said, in reply, that he was no more inclined to bring forward any thing for the lovers of scandalous conversation only, than she could be; and that, if he could not establish the proof of legal matrimony (I do not remember the words, but to the sense of this) that he was too much a gentleman to bring any thing before the public relative to other connections with the lady. I do not remember that any thing material passed, or more than this.

Do you recollect that in any subsequent conversation with the lady, you were desired to apply to the gentleman for any other civility in the course of this cause?—Before the first attendance that I have lately alluded to in illness, Mrs. Chudleigh, her mother, did us the honour of a private family friendship. After these messages, her grace now and then called on my wife in an evening, frequently saying, she was passing to or from her law gentlemen. When I happened to see her grace, I every now and then asked how her suit went on? to which, I think, she always seemed to answer cheerfully, 'Very right,' and 'Well.'

Did you ever carry any other messages?—Two or three times, I cannot recollect which, she asked me to deliver some message to the earl of Bristol; I am not sure whether one was not a letter, or whether upon the occasion of her asking me to deliver something, for my own memory I might not ask her to write it down, but I really do not remember at present, though I have endeavoured to recollect what the subject of these messages were: but I know they were of very trifling import, nothing that could have struck me strongly, or I should have remembered them; and I understood they were rather given to me, as if the earl of Bristol was delicate in receiving any message from her grace, and that I was only to expect a verbal answer on that account.

Do you recollect, whether any of these messages related to any witness or witnesses to be produced or kept back?—Certainly not; I never had a supposition, that the duchess would have given me such a message. Nothing appeared to me, but what contained matter of little import, and of the most honourable kind.

Did you ever observe, or do you now recollect, any ground to form a belief, whether the parties had forgotten or remembered, that there was then living one of the witnesses to the fact of the marriage?—I profess I do not recollect that: I have heard it in common conversation in the town, but not that ever I remember from either him or her at that time.

At what time did you receive that report from him or her?—I think I have seen the earl of Bristol but once since the commencement of this prosecution, and then his lordship seemed rather to speak peevishly.

Lord *Mansfield*. They will not examine to what lord Bristol has said since the commencement of the prosecution?

Mr. *Dunning*. Was any thing, that my lord Bristol said on that subject, communicated to the lady?—*Hawkins*. I certainly might, and did, I believe, tell her grace what was said.

Lord *Mansfield*. Then you may go on.

Mr. *Dunning*. Then tell the house what lord Bristol said, and you repeated to the lady.—*Hawkins*. His lordship seemed to be peevish, that such a person was now brought forward, and as he had heard it supposed, I believe, for want of her having such allowance or such care taken of her by the duchess, as he supposed she used to have. If I understood him

right, the earl of Bristol said, this person had been with him to express things to that purpose; and said, that if she had been as easy to come at, or had had as good a memory when that cause was carried on in the Ecclesiastical Court, that he believed the issue of it would have been different.

Will you be so good as to recollect, whether you communicated this to the lady, and what passed upon that occasion?—I did communicate it to the duchess; and I thought she was rather out of temper with the message, or with me, she calling at my house at a time I was very much in haste to go out upon business, and could not give her grace that time to hear, what she seemed to wish to have to talk more upon it. She offered to come again, but I was then not well in my health at all, and perhaps, as she might think, not quite so civil, would not name another time with her grace for her to call upon me, but said, that I would take an opportunity, as soon as I was able, of waiting upon her grace at her own house. I did do this some time after, and was told at the door, that her grace was not at home. I left my name, and said I should call again. After some days interval I did so, and then was told, that her grace was at home, but was laid down to sleep; from whence I concluded, that I was not to call again.

Am I to understand from you, that this last message from my lord Bristol was never the conversation between you and the duchess?—I did relate it to her during the time that she was at my house.

Have you at any time since heard any thing from the duchess on that subject?—I did hear, but not from any good authority, that her grace was rather angry.

Has the lady never conversed with you on the subject of this living witness to the marriage, from that time to this?—I have never seen her grace but once since, and that was yesterday morning for a few minutes at the duke of Newcastle's.

Generally, at any time whatever, have you heard any thing from the duchess on the subject of this living witness to the marriage, where she was, or any thing concerning her?—I protest, nothing conclusive. I might hear there was such a person, but it was never related to me, whether she was a better or worse evidence; nothing relative to that, whether she was a better or worse evidence, or that she was afraid of her, or any thing to that purpose?

Am I to understand you to have heard her say, that there was such a witness?—In what lesser conversation I cannot tell, but nothing that ever made me know, that there was such a person, who had such material knowledge.

I understand you, that from lord Bristol you understood there was a surviving witness to the marriage. My question is, whether you ever learnt the same thing from the lady, or not?—If it was, it was some accidental lesser conversation, not as trusting me with such a knowledge.

Was it then mentioned in any lesser or accidental conversation, or any conversation?—I protest, it is impossible to remember that with any degree of precision or of use.

I did not mean to ask you to recollect any particulars of the conversation, but simply to the point, whether the duchess ever stated to you, or acknowledged, there was a living witness to the marriage?—No, I do not remember that she ever stated to me, or said, that there was a living witness to the marriage.

Is it a fact that ever you learned from the lady?

Lord *Derby* moved the Clerk might read this part of the Evidence.

Hawkins. I rather (if I may say any thing) understood from her grace, that there was some lesser marriage, not quite in the common manner. I think I could remember an expression of her grace's once, upon her grace's speaking on the occasion. If I remember, I asked her grace how her suit went on? This was towards the latter part of it. She looked grave, and desired to speak to me in another room. She said, that she had had a great deal of concern and agitation of mind since she last saw me, which I remarked to her had been for a longer interval of time on her not calling at the house upon my wife in the usual manner. Her grace said, that she had had so much concern upon what she had not expected at the commencement of her suit, from finding that a positive oath was expected from her grace that she was not married, and which she had for some time together apprehended would be put to her in that form, that she thought she should have dropped her suit entirely, for that she would not for the whole world have taken that direct kind of positive oath; but that what had been offered to her, had been so complicated (I think, I understood) with other things that were certainly not true, that she could and had taken the oath with a very safe conscience. To some questions, I do not remember the words to her grace from me, how then she came to institute a suit at all? She answered me, "O, for that matter (I think it was) the ceremony as done, was such a scrambling shabby business (I do not say these were the precise words, but to that purport) and so much incomplete, that she should have been full as unwilling to have taken a positive oath that she was married, as that she was not married."

N. B. This part of the Evidence was ordered to be read by the Clerk, who accordingly read it.

Mr. Dunning. I should be glad, if you would tell their lordships, what it was that was so particular in this business? if the lady ever explained it to you?—Mr. *Hawkins.* I never had an explanation from that moment. I had within myself a curiosity from the time that I carried the message to my lord Bristol from her grace, and his reception of it. I had rather imagined that there was some marriage of

which legal proofs could not be produced, but that was only my own notion: before that time I had no real authority at all; I did not know myself honestly what to think of it.

Did the lady ever explain to you, by what reason it happened, that the question, when it came to be put, came in so much more palatable a form than she expected it?—No, not in the least: I should not have presumed to have asked such a question; nor did she give me any explanation at all.

Was any thing ever said by lord Bristol, and communicated to the lady, respecting an intention of his to appeal from this sentence?—I know nothing of that.

What said her grace on that subject?—Her grace had told me, that the sentence was passed, and that it was irrevocable and final to them two, unless my lord Bristol, within a certain limited time, did something to keep the cause open. I do not know what that was. That there was, she believed, some demur at that time, as my lord Bristol was not satisfied with the sentence, and had made some demand by his proctor, if I understood right, for the costs of suit which were decreed, I believe, against him.

Do you know whether the costs of suit were ever paid by my lord Bristol?—I do not, but I believe they were. I was going on to say what I recollected upon that. They had some demurs upon the costs of suit; but that if my lord Bristol insisted upon it, she would give her proctor directions not to let such a thing stop the closing of the suit.

Do you then know whether my lord Bristol, who by the terms of the sentence was to pay the costs, did not, upon this, receive the costs he had been put to in the suit?—I know nothing more than I have mentioned: not a tittle more nor less.

Do you know of no other means that were used to satisfy my lord Bristol, and to prevent this cause from continuing any longer open?—No.

Do you know nothing of any bond that was given from any body to any body, respecting this cause and this question?—Not the least in the world.

Am I to understand, that you say you know nothing of any bond that has any direct, immediate, or other relation to this subject?—Not the least that ever I heard of.

You are not then a trustee in any such bond?—Oh no, certainly not.

Can you give us the date of the time when the first message was conveyed from lord Bristol to the lady through you?—I was endeavouring, before I came into the court, to recollect it, but I could not: I put nothing down in writing relative to it.

Can you recollect the year?—The message must have been immediately before the commencement of the suit, whenever that was.

I presume, though you used the terms, 'her grace,' and 'his lordship,' you perfectly well understood, that neither of the parties had a right to these appellations at the time these circumstances passed?—Yes, certainly.

Does any circumstance impress you with the recollection of the time of the year when this conversation passed, if you cannot tell us the exact year?—I might have enquired how long the suit lasted; but I protest I do not recollect now any particular circumstances to bring it to my mind.

Mr. *Wallace.* My lords, I have no question on the part of the prisoner to put to Mr. Hawkins.

By the Duke of *Ancaster.*

Did you attend the child?—I think once.

Was it a boy or a girl?—A boy.

Do you speak from your own knowledge that the child is dead?—No; but have no reasons to doubt it.

Do you know of your own knowledge, that that child was the child of the prisoner at the bar?—No, I could have no proof of that; for from the time that her grace was brought-to-bed of it, I never saw the child till I was sent for to it in its illness; perhaps I had hardly ever heard of it: I had never seen it.

Did you attend the duchess at the time she lay-in?—I did not at her lying-in: I was desired, in case at any future time it had been necessary, that I should have been a witness of the birth of that child.

Did you understand that child to be the legitimate child of the duchess of Kingston and Mr. Hervey?—I did suppose so at that time.

Was you told so by any body?—I could not be necessarily told so at that time, because I had been told of the marriage before.

Duke of *Grafton.* Were you, from the conversation that passed with the party at that time, convinced that it was a supposed, or that it was a real marriage; and were any expressions used relative to the concealing the birth of the child?—*Hawkins.* I understood at that time, that it was a real marriage

Duke of *Grafton.* Were there expressions made use of, that would not have been made use of in any other circumstance?—*Hawkins.* I do not remember any particular expression at all, only that I was desired to attend, with a view and purpose that I might be a witness to the birth of that child; being, as I suppose, thought more proper, as a physical man, to be in the room at the time of a delivery and the birth of a child than any other person.

By Lord *Lyttleton.*

Who first informed you of the marriage?—I should rather apprehend it came from the duchess, before I saw my lord Bristol.

Do you recollect how long that was ago?—I do not indeed; it was a great many years ago.

Do you remember to have heard any particular circumstances related to you by either of the parties, concerning the celebration of that marriage?—No, never more than what I have mentioned just now.

By Lord *Camden.*

Were you in the room at the time of the delivery?—To the best of my remembrance, I certainly was.

Did you ever see the child itself?—At the time of the delivery I dare say I did. Afterwards I never did, but when I was sent for on purpose to see it.

Had you then any certain knowledge of its being the prisoner's child?—It is impossible for me to say when I saw the child some months afterwards, that I could know it to be the same child.

By Lord *Ravensworth.*

Did you not understand that the duchess apprehended and was convinced that the sentence in the Ecclesiastical Court was final?—Undoubtedly so.

And that she was at liberty to marry again, unless the sentence was appealed from within a limited time?—Most certainly.

Who delivered the prisoner?—I was endeavouring to recollect before I came, who was present besides myself, and who delivered her grace; but I protest I have forgotten it, so as not to recollect. I could not recollect, it is so long ago. [Ordered to withdraw.]

The Hon. *Sophia Charlotte Fettiplace* sworn.

Att. Gen. How long have you been acquainted with the prisoner at the bar?—Mrs. *Fettiplace.* A great many years.

Att. Gen. Did you know the lady before the year 1744?

Mrs. *Fettiplace.* My lords, I have no other knowledge of any of the circumstances to be enquired after, than what arises from my connection formerly with the lady; and unless your lordships require it of me as a witness for justice, I should wish to be excused.

L. H. S. The lady must certainly disclose what she knows for the purposes of justice.

By Mr. *Attorney General.*

Did you know the prisoner at the bar before the year 1744?—I cannot recollect.

Did you know the prisoner before she was maid of honour to the late princess of Wales?—No, I did not.

What conversation have you ever had with the prisoner relative to her marriage with Mr. Hervey?—I believe I have heard her say that she was married to him.

Can you recollect what circumstances she has mentioned respecting that marriage, where, and at what time, and before what witnesses?—In Hampshire, in a summer house, in a garden.

Can you recollect upon what occasions these conversations have passed between you and the prisoner?—Upon my word, I cannot pretend to say that: it is long ago.

Do you recollect any conversation respecting the child which the prisoner had by Mr. Hervey?—I know nothing about it.

Can you recollect how often in conversation it has been said between the prisoner and you, that she was married to Mr. Hervey?—I believe but once.

Mr. *Att. Gen.* My lords, I shall not trouble Mrs. Fettiplace with any more questions.

L. H. S. Would the counsel for the prisoner ask the witness any questions?

Mr. *Wallace.* My lords, I shall not ask Mrs. Fettiplace any questions.

Sol. Gen. My lords, I would now call lord Barrington.

Lord *Barrington* sworn.

Sol. Gen. How long have you been acquainted with the lady at the bar?—Lord *Barrington.* Above 30 years.

Sol. Gen. Did you ever hear from the lady at the bar, that she was married to Mr. Hervey?—Lord *Barrington.* My lords, I am come here in obedience to your lordships' summons, ready to give testimony as to any matter that I know of my own knowledge, or that has come to me in the usual way; but if any thing has been confided to my honour, or confidentially told me, I do hold, with humble submission to your lordships, that as a man of honour, as a man regardful of the laws of society, I cannot reveal it.

L. H. S. When the last witness but one (Mr. Hawkins) was at the bar, he made something like the same excuse for his not answering the questions put to him. He was then informed by a noble and learned lord, and the whole court agreed with that lord, that such questions were to be answered in a court of justice.*

Lord *Barrington.* I have no doubt but that the question is a proper question to be asked by a court of justice, otherwise your lordships would not have permitted it to be asked. But, my lords, I think every man must act from his own feelings; and I feel, that any private conversation entrusted to me, is not to be reported again.

A Lord. His lordship will recollect the oath that he has taken, is, that he shall declare the whole truth.

Lord *Barrington.* My lords, as I understand the oath, I can decline answering the question that has been asked me without acting contrary to that oath, without being guilty of perjury. But, if it is the opinion of your lordships that I am bound by that oath to answer, and that I shall be guilty of a perjury if I do not answer, in that case, my lords, I shall think differently, for I will not be perjured.

Duchess of *Kingston.* I do release my lord Barrington from every obligation of honour. I wish, and earnestly desire, that every witness who shall be examined, may deliver their opinions in every point justly, whether for me or against me. I came from Rome at the hazard of my life to surrender myself to this Court. I bow with submissive obedience to every decree, and do not even complain, that an ecclesiastical

* See p. 572.

sentence has been deemed of no force, although such a sentence has never been controverted during the space of one thousand four hundred and seventy-five years.

Lord *Barrington*. My lords, I do solemnly declare to your lordships, on that oath that I have taken, and on my honour, that I have not had the least communication made to me of the duchess of Kingston's generosity. I have not had the least communication with her grace by letter, message, or in any other way, for more than two months; and I had no idea of being summoned as a witness here, until the Easter holy-days, so that her grace's generosity is entirely spontaneous, and of her own accord. But, my lords, I have a doubt, which no man can resolve better than your lordships, because your honour is as high as any men; I have a doubt, whether, thinking it improper that I should betray confidential communications before the duchess consented that I should, and gave me my liberty; whether her grace's generosity ought not to tie me more firmly to my former resolutions?

Duke of *Richmond*. For one, I think that it would be improper in the noble lord to betray any private conversations. I submit to your lordships, that every matter of fact, not of conversation, which can be requested, the noble lord is bound to disclose.

Lord *Mansfield*. I mean only to propose to your lordships, to avoid adjourning to consider this question or any thing further upon it at present, that the counsel might be allowed to call other witnesses in the mean time, and that lord Barrington may have an opportunity of considering of the matter, if the counsel should think proper to call his lordship again.—[This proposal was over-ruled.]

The Counsel against the Duchess desired to withdraw the Witness.

Lord *Camden*. My lords, I understand from the bar, that rather than your lordships should be perplexed with any question which may arise upon the noble lord's difficulty in giving his evidence at the bar, the counsel would rather wave the benefit of his evidence in the cause. My lords, if that be their resolution, and they think, that safely and without prejudice to this prosecution they may venture to give up that evidence, your lordships, to be sure, will acknowledge the politeness of the surrender. But, my lords, now I am upon my legs, you will give me leave to make one short remark upon this proceeding, and to hope that your lordships, sitting in judgment on criminal cases, the highest and most important, that may affect the lives, liberties, and properties of your lordships, that you shall not think it befitting the dignity of this high court of justice to be debating the etiquette of honour, at the same time when we are trying lives and liberties. My lords, the laws of the land, I speak it boldly in this grave assembly, are to receive another answer from those who are called to depose at your bar, than to be told that in point of honour and of conscience they *do* not think, that they acquit themselves like persons of that description, when they declare what they know. There is no power of torture in this kingdom to wrest evidence from a man's breast, who with-holds it; every witness may undoubtedly venture on the punishment, that will ensue on his refusing to give testimony. As to casuistical points, how far he should conceal or suppress that which the justice of his country calls upon him to reveal, that I must leave to the witness's own conscience.

Lord *Lyttleton*. The laws of the land have spoken clearly on this occasion, and if your lordships had applied them to the noble lord at the bar, he has told your lordships that he is willing to submit to your judgment. But, my lords, it is yet a question, whether or not the noble lord will be perjured? It is a question not decided by your lordships, that he will be perjured, if he *refuses* to betray a confidence. I am sure that I feel, and I apprehend your lordships as men of honour feel, the full weight of the noble lord's objection. He will speak to matters of fact, but he does not desire to speak merely to conversation. And, my lords, I am not surprised that he should make that objection: for if you consider how loose and inaccurate all evidence of conversation must be, it takes off in a court of justice much from its availment. The noble lord has told you, that confidential conversation may have passed between him and the noble lady at the bar: he has stated to you his doubts, and I apprehend he is not obliged to go on with his evidence, until your lordships have unanimously pronounced, that it is your opinion that he is obliged so to do.

L. H. S. If the counsel for the prosecution say, that they have no questions to ask the noble lord, he may withdraw.

Lord *Barrington*. My lords, might I be allowed to say a word or *two*, before I withdraw from this bar! It is impossible that any person can revere this high court, indeed any court of justice in this country, more than I do. It is not, my lords, from contumacy, of which I am incapable; it is not with any view or purpose that any of your lordships would disapprove, as individuals, I am certain, that I have taken the part which I have done. I do not say, that there are no cases, in which a person ought to reveal private conversation. There are cases, in my opinion, in which he should: there are cases, in my opinion, in which he should not: and, my lords, no person can draw the line but himself. But, my lords, I have recollected. (I am obliged to the counsel for the prosecution, who are willing to admit me to withdraw. I return them my thanks. I dare say in that they have consulted my feelings as much as they could, consistent with the duties of their station) but I have recollected, my lords, since the generous manner in which the duchess of Kingston has been pleased to absolve me from all ties, I have recollected, that she said, she wished and desired that I might say any

thing. If her grace thinks that any thing I can say, consistent with truth, can tend to her justification, I am then ready to be examined to private communications.

Sol. Gen. I do not desire to examine the noble lord. I stated to your lordships, that I do not think the cause, in which my duty engages me, will at all suffer by having deference to any difficulty that the noble lord may entertain. I will not examine the noble lord on the concession of the lady at the bar. The noble lord stands at your lordships' bar a witness. Having taken the oath, though I do not examine him, the prisoner may.

Mr. *Wallace.* At the same time that I express my astonishment at the offer, lord Barrington is not called to the bar as a witness for the prisoner. The noble lady at the bar has her witnesses, in her turn, to call, with which she shall trouble your lordships.

Duke of *Richmond.* I do not look on a witness at the bar to be the witness of the counsel or of the prisoner, but the witness of the House. I shall, therefore, ask a question or two of the noble lord. I will not distress the noble lord's feelings by enquiring into confidential matters. I will merely ask questions of fact. The first question I would ask the noble lord is, whether he knows any fact by which he is convinced that Mr. Hervey was married to Miss Chudleigh?

Lord *Barrington.* I do not know of any fact, which will prove the marriage between the duchess of Kingston and Mr. Hervey, of my own knowledge.

Duke of *Richmond.* The noble lord must leave it to the House to judge whether it will or not. But does his lordship know any fact relative to that matter?

Lord *Barrington.* I do not know any thing of my own knowledge that can tend to prove that marriage. I know nothing but what I have heard in the world, and from conversation.

Lord *Radnor.* I am afraid your lordships, by your acquiescence, have admitted a rule of proceeding here, which would not be admitted in any inferior court in the kingdom. I desire, therefore, to ask the noble lord, whether he knows any matter of fact relative to that marriage.

Lord *Barrington.* My lords, if I do, I cannot reveal it; nor can I answer the question without betraying private conversation.

[Moved to adjourn. Adjourned to the Chamber of Parliament.

After an adjournment of some time, the Lords returned to Westminster-hall.]

L. H. S. My lord viscount Barrington, I am commanded by the lords to acquaint your lordship, that it is the judgment of this House, that you are bound by law to answer all such questions* as shall be put to you.—Has the counsel for the prosecution any question to put to the witness at the bar?

Sol. Gen. We shall not ask the noble lord any questions.

L. H. S. Has the counsel for the prisoner any question to put to the witness at the bar?

Mr. *Wallace.* Not any.

Lord *Radnor.* Does the witness know from conversation with the lady at the bar, that she was married to the earl of Bristol?

Lord *Barrington.* My lords, I have already told your lordships the motives which induce me to think that I cannot, consistent with conscience, with honour, or with probity, answer such questions, as will tend to disclose confidential communications made to me. At the same time I informed your lordships, that if the oath went so far as that I should break that oath, if I did not answer all questions which could be put to me; if that was the determination of your lordships, I said I would not break my oath. My lords, I continue in the same opinion and principle. My own judgment, as far as it guides me, which is very imperfectly, does tell me, that I am not obliged to answer all questions that can be put to me. But, my lords, though nobody can draw the line of conscience, of honour, and of probity in this case but myself, yet in point of law, and in interpretation of law, and the oath I have taken, I am desirous of assistance from those who can best give it me, and I had much rather trust almost any man's judgment than my own. I do not dare to ask again your lordships' opinion on that point. But, my lords, might I be permitted to apply to the learned counsel who are near me; if it is the opinion of the learned counsel, that I am obliged by my oath to answer the noble lord's question, I will readily answer it.

Lord *Effingham.* I apprehend, that no question can be put in this court on a matter of law to the counsel at the bar.

Several Lords said, 'You may ask the counsel.'

Lord *Barrington.* My lords, I have put the question to the Attorney General, and I give him my thanks. He says, he thinks I am obliged by my oath to answer all questions. That being the case, I have nothing more to say, than humbly to beg your lordships' pardon for having given you so much trouble, and to beg and intreat that you will believe, that nothing but the tenderest and the strongest feelings, and the most determined resolution to do what was right in my situation, could have induced me to give you so much trouble.

Lord *Radnor.* Whether his lordship knows from conversation with the lady at the bar, that she was married to the earl of Bristol?

Lord *Barrington.* My memory I have found by long experience to be a very erroneous one, and especially with relation to things past long ago. To the best of my memory and belief, the duchess has never honoured me with any conversation on the subject for many, many

* See what passed on the examinations of Mr. Hawkins and Mr. Berkley.

years past; I believe I might say for above twenty years past. And, my lords, that being the case, I must answer that question very doubtfully: but after the solution which the learned counsel has given to my doubts, I mean not to conceal any thing from your lordships. Thinking it right to be examined, I think it right to give frank answers, and any doubt in any thing I say will arise from my not remembering well the circumstances. The duchess of Kingston, many (I should not say too much if I was to say thirty) years ago, did entrust me with a circumstance in her life, relative to an engagement of a matrimonial kind with the earl of Bristol, then Mr. Hervey.

Lord *Radnor*. Whether his lordship understood, that that matrimonial engagement, which had already passed, was a marriage?

Lord *Barrington*. I understood, there had been a matrimonial engagement entered into; but whether it amounted to a legal marriage or not, I am not lawyer or civilian enough to judge.

Lord *Radnor*. Did his lordship ever understand, that there was issue of that marriage?

Lord *Barrington*. Upon my word I cannot say; I do not know that the duchess ever made any communication of that sort to me. I had heard of it in the world, but I do not know that the duchess ever communicated to me the circumstance of her having had any issue.

Lord *Radnor*. Does his lordship know any thing of a bond entered into on the part of the prisoner at the bar, of late years, relative to the suppression of evidence, or the payment of costs of suit in the Ecclesiastical Court?

Lord *Barrington*. I never had the least communication from the duchess of Kingston, or from any person relative to any thing of the kind; I do not recollect that I ever heard of any such thing even in the world; and the duchess of Kingston has never communicated to me, in the course of her life, to the best of my memory or belief, any thing which was, at the time she was pleased to communicate it to me, in the least a deviation from the strictest rules of virtue and religion.—[Ordered to withdraw.]—My lords, is it too much to beg, that what I have said at the bar may be read over to me? Part of it is of a nice nature; I may have expressed myself improperly; the writer may have taken it down erroneously: I should be glad to have it read over to me, that I may correct it in your lordships' presence.—[Here the universal voice was 'Read, read!' but lord Barrington spared the House the trouble, by addressing himself to their lordships as follows:]—My lords, I find by the Clerk, that the part which is of the nicest kind with relation to me, wherein I expressed the difficulties and feelings I had on the subject of questions that I thought I ought not to answer, and why and on what ground I have since thought it my duty, understanding that my oath obliges me to it, to give my answers; I find, my lords, that part has not been taken down by the Clerk, and therefore I shall give your lordships no further trouble.

Mr. *Dunning*. My lords, we desire next to produce Mrs. Judith Phillips.

Mrs. *Judith Phillips* sworn.

Examined by Mr. *Dunning*.

You were the widow of Mr. Amis, were you not?—Yes.

Mr. Amis was parson of the parish of Lainston in Hampshire?—Yes.

Did you know a family of the name of Merrill?—I did.

Was, or was not, Mr. Merrill's house in that parish?—It was.

How long since did your husband die?—Seventeen years ago.

Do you know the lady at the bar?—Very well.

How long have you known the lady at the bar?—About thirty years.

Were you privy to her marriage in your husband's life-time?—I was not at the wedding; but I heard my husband say, he married them.

A Lord. That is not evidence.

Mr. *Dunning*. Had you not any other means of knowing that fact from the lady at the bar herself?—Mrs. *Phillips*. Yes.

Do you remember the lady at the bar coming to Winchester?—Very well.

When?—She came about the middle of February, 1759.

Was that in your husband's life-time, or since his death?—In my husband's life-time.

Was it long before, and how long before Mr. Amis's death?—Six weeks.

What was the occasion of the lady's visit to Winchester?—For a register of her marriage.

If you recollect any particulars of what passed upon that occasion, state them.—She came to the Blue Boar in Kingsgate-street, Winchester, and sent for me by six o'clock in the morning. When I went to her, she asked me if I thought Mr. Amis would give her a register of her marriage? I told her, I thought he would. Then I asked her to my house; and when she came, she asked me to go up with her to Mr. Amis, and ask if he would see her and give her a register of her marriage? I went up to Mr. Amis, and told Mr. Amis what the lady had desired. Mr. Amis desired to see the lady. Then I came down and told her, that Mr. Amis at that time was confined to his bed. The lady went to Mr. Amis, and told Mr. Amis her request. Then Mr. Merrill and the lady consulted together whom to send for, and they desired me to send for Mr. Spearing, the attorney. I did send for him; and during the time the messenger was gone, the lady concealed herself in a closet: she said, she did not care that Mr. Spearing should know that she was there. When Mr. Spearing came, Mr. Merrill produced a sheet of stamped paper, that he brought to make the register upon. Mr. Spearing said, it would not do, it must be a book, and that the lady must be at the making of it. Then I went to the closet, and told the

lady. Then the lady came to Mr. Spearing, and Mr. Spearing told the lady a sheet of stamped paper would not do, it must be a book. Then the lady desired Mr. Spearing to go and buy one. Mr. Spearing went and bought one, and, when brought, the register was made. Then Mr. Amis delivered it to the lady. The lady thanked him, and said it might be an hundred thousand pounds in her way: at the same time she added, that she had had a child by Mr. Hervey, and that it was a boy, but that it was dead; and that she had borrowed an hundred pounds of her aunt Hanmer to buy baby things. Before Mr. Merrill and the lady left my house, the lady sealed up the register, and gave it to me, and desired I would take care of it until Mr. Amis's death, and then deliver it to Mr. Merrill.

Did it accordingly remain in your hands until your husband's death, and did you then deliver it to Mr. Merrill?—I did.

Do you recollect, whether Mr. Merrill accompanied the lady from the time you first saw her in Winchester to your husband's house, or did Mr. Merrill join them afterwards when they were there?—He joined them afterwards.

Do you remember, whether any other entry was then made in this register-book, besides the entry of this marriage?—I don't remember any.

Do you recollect to have seen any thing of the lady at the bar since your husband's death?—Many times.

Do you recollect any conversation that has passed between you at any of those times?—After I had delivered the register to Mr. Merrill, I waited upon the lady at her house at Knightsbridge, and found her in the garden. I told her, I had delivered the register to Mr. Merrill. She thanked me for it; and desired I would take no notice of it: at the same time she said Mr. Swino was in the garden, and hoped I would take no notice to him of the affair.

Do you recollect any further conversation about this book, after Mr. Merrill's death, with the lady?—I was once a-fishing with the lady, and she told me some things that had passed in the family. She told me, that Mrs. Bathurst had used her very ill, for she had got all the papers Mr. Merrill had of her's at the time of his death. Upon which I asked her, what was become of the register? She told me the minister of the parish had it.

Was, or was not, the Mrs. Bathurst you have spoken of, the daughter of that Mr. Merrill?—She was.

Do you recollect any other conversation with the lady at the bar, after her marriage with the duke of Kingston?—Yes; I waited upon her in Arlington-street, after her marriage with the duke of Kingston. She said to me, Was it not very good-natured of the duke to marry an old maid? I looked her in the face and smiled, but said nothing then. She asked me, if Mr. Hervey had sent to me at the time of her trial? I said he had not sent to me.

[The book shewn to the witness.] Can you be sure, whether that is the book you have been speaking of?—I am very sure.

I believe there are the vestiges of the seals about it still?—There are.

Where it was sealed up?—Yes.

Look at the entries in the book; are they not your husband's writing? and were they not made in your presence?—They are my husband's hand-writing, and they were made in my presence.

They were made likewise in the presence of the lady at the bar, were they not?—They were.

Clerk reads:

'Marriages, births, and burials in the parish 'of Lainston. 2d of August, Mrs. Susannah 'Merrill, relict of John Merrill, esq. buried. '4th of August 1744, married the honourable 'Augustus Hervey, esq. in the parish church 'of Lainston, to Miss Elizabeth Chudleigh, 'daughter of colonel Thomas Chudleigh, late 'of Chelsea College, deceased. By me 'Thomas Amis.'

Mr. *Dunning.* My lords, I have done with this witness.

Lord High Steward. Would the counsel for the prisoner ask this witness any questions?

Mr. *Mansfield.* I should be glad first to see the book.—I would wish to know by what means you now subsist? what support you have?—Mrs. *Phillips.* Upon my own private fortune.

Where do you live?—At Bristol.

Is your husband living or dead?—Alive.

What employment was he in, before he lived at Bristol upon his fortune?—He was steward to the duke of Kingston, and a grazier.

Was he not turned out of the service of the duke of Kingston?—I believe he was not turned out.

Do not you know, whether he was or not?—He wrote a letter to the duke, and desired to leave him.

Do you know then, that he was not turned out?—Yes.

Had he been threatened to be turned out, before he sent that letter?—Not that ever I heard of.

Had your husband had any differences or disputes with the duke of Kingston?—No, not that I know.

Was his reason then for quitting the service of the duke of Kingston merely his own inclination, without any particular reason or cause?—He thought the duke looked cool upon him: for what reason he could not tell.

Had the duke ever expressed any cause of dislike to him?—Not that I know of.

How long have you left Bristol?—About four months.

Where have you lived?—Sometimes in one place, sometimes in another.

In what places?—Sometimes at the Turf coffee-house, sometimes in St. Mary-Axe.

How much of the time at the Turf coffee-house?---I really cannot say exactly.

You are not asked as to a week. Have you lived there the greater part?---The greater part.

Who has supported you at the Turf coffee-house?---Ourselves.

Have you paid the expences of your support there?---That I do not know any thing of.

Do you not know, that the whole of your expence at the Turf coffee-house is to be defrayed by the prosecutor, Mr. Evelyn Meadows?---I do not know it is.

Have you not understood so?---I have not.

Nor do you believe it?---I cannot tell what to believe, or what is to be done.

Cannot you tell, whether you believe that your expences at the Turf coffee-house are to be defrayed by Mr. Meadows?---No, I do not. I do not know any thing of that.

Do you not know, by whom you expect the expence of your support at the Turf coffee-house is to be paid?---I do not know by whom it is to be paid.

Have you seen Mr. Evelyn Meadows at the Turf coffee-house?---I have.

How often may you have seen that gentleman there?---I cannot tell.

Many times, or only once or twice?---I may have seen him twice or three times.

Have you not seen him oftener than that, there?---I have seen him frequently in the yard.

Have you not had frequent conversations with him?---Not frequent.

Have you not conversed with him sometimes at the Turf coffee-house, sometimes at other places?---No where, but at the Turf coffee-house.

Who has been present at such conversations?---My husband.

Who else?---No one else.

Has not Mr. Fozard been present at some of these conversations?---Never.

Have you not been at Mr. Fozard's house with Mr. Meadows?---Never; by accident on Christmas-day I called at his door, and he was there.

Were you in company with Mr. Meadows at Mr. Fozard's?---I was.

Does Mr. Fozard assist Mr. Meadows in the course of this prosecution?---I know nothing of that.

Do not you know, that Mr. Fozard has assisted Mr. Meadows in looking out for witnesses?---I don't know any thing about it.

Have you not yourself been present at conversations with Mr. Fozard about this prosecution?---Nothing, but what was merely accidental.

How often has that accident happened, that you have been present at conversations with Mr. Fozard about this prosecution?---I never was at Mr. Fozard's but twice.

Has Mr. Fozard been at the Turf coffee-house with you?---He came to see Mr. Phillips, when he had the gout.

How often might Mr. Fozard visit you at the Turf coffee-house?---He came to see Mr. Phillips, but not me.

How often might he visit Mr. Phillips there?---About three times.

Have you ever met Mr. Fozard at any other places besides the Turf coffee-house and his own house?---Never.

Do you know of any promise made to you or your husband of any benefit or advantage depending upon the event of this prosecution?---None in the world.

Did you never hear of any such promise being made to you or your husband?---Never.

Have you never said, that any such promise or offer was made?---Never, nor it never was.

Have you never said any thing to that purpose?---No, never to any body.

Have you never made any mention of any kind of benefit or advantage you were to receive from the evidence you should give on this prosecution?---Not in the least; I don't want it, nor wish it.

Did I understand you right, when you said, that at the time of the entry of the marriage in this register no other entry was made?---I don't remember that; I remember very well standing at the bed's feet when the register was made.

Do not you know whether any other entry was made at that time?---I don't, for I was backwards and forwards in the room.

How come you then to know, that the register of this marriage was made in the book at that time?---I saw it.

Did you read it at that time?---I heard Mr. Amis read it.

Did you hear him read any thing else besides the entry of the marriage?---Nothing but that, for I was going backwards and forwards in the room.

Do you know nothing at all, whether any thing else was entered besides that at the time of the marriage?---I did not see any thing but that; though it might, as I was going backwards and forwards.

Did you see the entry of the marriage in the book?---I did.

If you saw that, must not you have seen whether there were any other entries made on the same leaf?---I heard it read; I never saw it afterwards but when the lady sealed it up.

Did not you take notice that there were other entries?---I did not.

You took notice of nothing upon the paper but the entry of this marriage?---Of nothing else.

Did you keep the paper long enough before you, or did the lady at the bar keep the book long enough before her, for her to see whether what she heard read was written on the paper?---She held it in this manner (describing the manner) open, and I saw it as I stood by her: I did not read it, but heard it read.

Did all the persons, who were present, hear what was said about the hundred pounds lent by Mrs. Hanmer?---No, they did not; the

lady said she had borrowed 100*l.* of her aunt Mrs. Hanmer to buy baby things.

Who did the lady tell that to?—To Mr. Amis and to me.

Did she speak it loudly or softly, or how?—She spoke it as she was sitting by the bed-side talking to Mr. Amis.

When did you tell any body of such register?—I really cannot say exactly when, but I have said, I had it in my possession.

When did you first mention it?—I cannot tell.

Was Mr. Merrill present at the time when this entry was made in the register?—He was.

Was he in the room the whole time that this conversation passed, that you have mentioned, of lending 100*l.* by Mrs. Hanmer?—No, he was not.

Did Mr. Merrill come with the lady, or the lady before him, or without him?—The lady before him, for Mr. Merrill was gone to Lainston to his seat.

When Mr. Merrill came, did not the lady repeat the conversation that had been about the child and the hundred pounds?—There was nothing of that said before Mr. Merrill.

Was any thing said about making any other entry in the register, besides that of the marriage?—Nothing that I heard.

When did Mr. Merrill come into the room; before the entry was made in the book, or after?—Before.

Was Mr. Merrill in the room at the time that it was made?—He was.

Who was it brought the stamped paper?—Mr. Merrill.

Was Mr. Merrill in the room when the lady concealed herself, as you have said?—He was.

Who else was in the room?—No one except myself.

Now look at the book.—I know the hand perfectly well.

Is the whole of that, which is written on that leaf, the writing of your husband?—It is.

You have said that you went to Arlington-street; can you name any person that you saw there?—No one was in the room, when I went, except the lady.

Can you name any person that saw you there?—Only a servant for some time, and then a milliner came.

Can you name those persons?—I can't; I don't know them.

Can you name neither of them?—The servant was Fozard.

Can you name no other servants that you saw there?—No; I had an inflammation in my eye, and the lady was exceedingly kind to me: she ordered an egg to be boiled for me, and Fozard brought it, in order that it might be opened and laid on my eye.

Can you name any other servants whom you saw there?—I don't remember.

Lord *Camden*. My lords, I observe in the entry of the register the words 'was married' are struck through with a black line; I want to know of the witness whether she can account for that stroke?—Mrs. *Phillips*. I cannot.

Mr. *Dunning*. It is a repetition. There is marriage written in the margin. 'August the 24th, married.' The entry then proceeds, 'The honourable Augustus Hervey, esq. was married;' which being a repetition, I suppose they struck that through with a black line.

Lord *Camden*. I believe it is so.

Mr. *Dunning*. If your lordships please, the next witness to be called is, the rev. Mr. Stephen Kenchen.

The Rev. Mr. *Stephen Kenchen* sworn.

Examined by Mr. *Dunning*.

Mr. *Dunning*. You succeeded Mr. Amis in this church at Lainston, I believe?—*Kenchen*. I did.

When did you first see that book that he has in his hand, and how did it come there?—The first time that I saw the book was after the death of Mrs. Hanmer, aunt to Mr. Merrill, who was buried in the vault of that little church.

By whom was that book produced to you, and for what purpose?—In order to register Mrs. Hanmer's burial.

By whom?—By Mr. Merrill.

Did you accordingly make an entry of the burial of Mrs. Hanmer?—I made an entry of the burial of Mrs. Hanmer.

What then became of the book?—Mr. Merrill carried it back again to his own house.

When did you next see the book?—At the death of Mr. Merrill.

By whom was the book then produced to you?—I cannot say; either Mr. or Mrs. Bathurst, or in the presence of them both.

Did you then make an entry of the burial of Mr. Merrill?—I did.

What then became of the book?—I have had it in my possession ever since.

Mr. *Dunning*. My lords, I shall ask no more questions of this witness.

L. H. S. Mr. Wallace, would you ask this witness any questions?

Mr. *Wallace*. I have no questions to put to this witness.

Mr. *Dunning*. If your lordships please, we will now call the reverend Mr. John Dennis.

The Rev. *John Dennis* sworn.

Examined by Mr. *Dunning*.

Mr. *Dunning*. Look at that book. Were you acquainted with the hand-writing of the late Mr. Amis? You knew Mr. Amis, I presume?—*Dennis*. I knew him perfectly well.

Do you know his hand-writing when you see it?—I have seen his hand-writing often, as succeeding him in the living.

Did you ever see him write?—I have seen him write, but not often.

Look at that hand-writing; tell me whether you believe the two entries in the first page of that book are his hand-writing?—Yes, particularly his name, Thomas Amis, seems very much so.

Do you believe it to be his hand-writing?—I believe the whole to be his hand-writing. [Ordered to withdraw.]

Mr. *Dunning.* I do not know whether, on the part of the prisoner, they mean to put us on the proving, which it is necessary for us to do if they require it, the marriage with the duke of Kingston.

Mr. *Wallace.* We are ready to admit that fact. There is no doubt of her being married by the licence of the archbishop of Canterbury.

Mr. *Dunning.* You will give us the date.

Mr. *Wallace.* Mention what the day is.

Mr. *Dunning.* The 8th of March 1769, I understand.

Mr. *Dunning.* My lords, we are now going to prove a caveat entered by the lady, upon the apprehension of a suit intended to be instituted by Mr. Hervey in the Spiritual Court.

Mr. *James* sworn.

Mr. *Dunning.* Do you know any thing of the caveat entered at Doctors' Commons on the part of the lady at the bar?—*James.* Yes, the caveat is entered in this book (producing it).

Is that the proper book, in which such entries ought to be made?—It is.

The Caveat was read by the Clerk, and is as follows: 'The 16th of August 1768. Let no 'citation, intimation, or other process, or any 'letters of request for the same, to any other 'judge or jurisdiction whatsoever, issue under 'the seal of this Court at the suit or instance 'of the honourable Augustus John Hervey, or 'his brother, against the honourable Elizabeth 'Chudleigh, spinster, of any cause or suit ma-'trimonial, without due notice being given to 'Mr. Nathaniel Bishop, proctor for the said 'honourable Elizabeth Chudleigh, who, on his 'being warned thereto before the judge of this 'Court, or his lawful surrogate, will be ready 'by himself or counsel to shew just cause of 'this same Caveat, and why no such process 'or letters of request should issue thereupon.'

Mr. *Wallace.* The witness merely produces the book; he knows nothing of the fact of the entry being made.

James. I know Mr. Bishop's clerk's hand; this is his hand-writing.

Mr. *Dunning.* Perhaps the witness may know, that Mr. Bishop was the proctor employed by the lady in the course of that suit?

James. I have heard so.

Att. Gen. That appears on the record they have put in.

Mr. *Dunning.* I understand, that it is the pleasure of some of your lordships, that we should go into the proof of the marriage of the duke of Kingston?

Mr. *Wallace.* It is admitted on the part of the prisoner.

Mr. *Dunning.* But as some of the lords wish for the proof, we will examine it.

The Reverend Mr. *James Trebeck* sworn.

Mr. *Dunning.* Be so good as find the register of the marriage of the duke of Kingston.

Mr. *Trebeck* points it out.

Clerk reads. 'N° 92. Marriages in March '1769. N° 92. The most noble Evelyn Pier-'repont, duke of Kingston, a bachelor, and 'the honourable Elizabeth Chudleigh of 'Knightsbridge, in St. Margaret's Westmin-'ster, a spinster, were married by special 'licence of the archbishop of Canterbury 'this 8th of March 1769, by me Samuel 'Harpur, of the British Museum. This mar-'riage was solemnized between us,

'KINGSTON,
'ELIZABETH CHUDLEIGH,'

'In the presence of
'MASHAM,
'WILLIAM YEO,
'A. K. F. GILBERT,
'JAMES LAROCHE, jun.
'ALICE YEO,
'J. ROSS MACKYE,
'E. R. A. LAROCHE,
'ARTHUR COLLIER,
'C. MASHAM.'

Mr. *Dunning.* I am desired to apprize your lordships of a fact, which may or may not be proved, if thought necessary. Your lordships have heard in the evidence of the last woman an account of a certain Mr. Spearing, who was present. That Mr. Spearing could not be found. He, though mayor of Winchester, is now found to be amusing himself somewhere or other beyond sea, God knows where. We have witnesses to give your lordships that account, if your lordships think it necessary.—Will your lordships now please to hear the reverend Mr. Harpur?

The Reverend Mr. *Harpur* sworn.

Mr. *Dunning.* Did you perform the marriage ceremony between these parties?—Mr. *Harpur.* Yes.

Mr. *Dunning.* At the time mentioned in the register?—Mr. *Harpur.* Yes.

L. H. S. Have you any more witnesses to produce?

Mr. *Dunning.* We don't judge it necessary to offer to your lordships any more evidence in this stage of the business. If it should become so, we reserve to ourselves the right of examining them hereafter.

Mr. *Wallace.* I beg Mrs. Phillips may be called to the bar, that a letter may be produced to her, and that she may say whether it is her hand-writing.

Mrs. *Phillips* called.

Mr. *Wallace.* Is that your hand-writing?—Mrs. *Phillips.* The name is my hand-writing.

Mr. *Wallace.* Is that your letter?—Mrs. *Phillips.* It is my letter.

A Letter from Judith Phillips to her grace the duchess of Kingston read.

"My lady duchess; I write your grace this letter.—My heart has ever been firmly attached to your grace's interest and pleasure, and my utmost wish to deserve your favour and countenance. Suffer me not then in my declining years to think I have forfeited that favour and protection, without intentionally giving the most distant cause.

"May I entreat your grace to accept this as a sincere and humble submission for any failure of respect and duty to your grace; and permit me most humbly to entreat your grace's kind intercession with my lord duke to continue Mr. Phillips his steward, whose happiness consists only in acting and discharging his duty to his grace's pleasure. This additional mark of your grace's goodness we hope to be happy in; and in return, the remainder of our lives shall be passed in gratitude and duty. The person who carries this will wait to receive your grace's pleasure and commands to her, who remains, with the greatest respect, my lady duchess, your grace's most dutiful servant,

"J. Phillips."

"November 7, 1771."

Att. Gen. The evidence, your lordships will recollect, given by the witness was in answer to a question, whether her husband had or had not been turned out of his place? pointing the question so as to give your lordships, and to give the witness to understand, that they meant the circumstance of being turned out of his place should go personally to the discredit of her husband, and also imply some memory of that in the mind of the wife. The witness, in answer to that, told your lordships, with respect to such part of it as might be deemed to relate to her husband's credit in the business, that he had resigned his place under the duke. The letters which I have in my hand, and will just state to your lordships, if it be thought necessary before the calling of the witness, is that very correspondence, by which it appears that he did so resign his employment under his grace into his grace's hands. He wrote to his grace at Newmarket from Holm Pierrepont. The letter is dated the '17th of October 1771.' And he writes thus:

"I have ever done my duty with the strictest regard to your grace's interest, and with the most perfect respect. I have declined accepting a good settlement, to act conformable to your grace's pleasure, which her grace was pleased to promise should be made up to me, which must have escaped her grace's memory, as I have since had my rent considerably raised, and am much concerned to observe lately your grace's displeasure; and being conscious of a faithful discharge of my duty, I must be unjustly represented to your grace. I hope your grace will be pleased to permit my delivering up the charge of your grace's affairs, which, as an honest man, I can only properly keep, while satisfied myself, and honoured with your grace's approbation, &c."

In answer to which he received this letter:

"Mr. Phillips; Your letter came to me at Newmarket. After what has passed, there is no occasion for many words. Sherin will be at Holm Pierrepont some time next week, with my orders about settling your business, which I flatter myself you will readily comply with.

"I am your's, &c."

Att. Gen. I believe I may refer to your lordships' memory, that Mrs. Phillips mentioned his grace's having looked coolly on her husband, which occasioned his resignation.

A Peer. What is that, Mr. Attorney General, that you have been reading?

Att. Gen. The first is a copy of a letter to the duke; the other, the duke's original answer. If it is thought material enough to trouble your lordships with it, we can easily prove that this is his grace's hand-writing, and this the copy of his grace's letter, which was all that was necessary. [*Adjourned to Monday.*

The Fifth and Last Day.

Monday, April 28.

The Lords and others came from the Chamber of Parliament in the customary order. Proclamation for silence being made as usual,

The Duchess of *Kingston* was conducted to the bar, when her grace addressed the Lords in the following terms:

My lords; This my respectful address will, I flatter myself, be favourably accepted by your lordships: my words will flow freely from my heart, adorned simply with innocence and truth. My lords, I have suffered unheard-of persecutions; my honour and fame have been severely attacked; I have been loaded with reproaches; and such indignities and hardships have rendered me the less able to make my defence before this august assembly against a prosecution of so extraordinary a nature, and so undeserved.

My lords, with tenderness consider how difficult is the task of myself to speak, nor say too little nor too much. Degraded as I am by adversaries; my family despised; the honourable titles on which I set an inestimable value, as received from my most noble and late dear husband, attempted to be torn from me; your lordships will judge how greatly I stand in need of your protection and indulgence.

My lords, were I here to plead for life, for fortune, no words from me should beat the air: the loss I sustain in my most kind companion and affectionate husband, makes the former more than indifferent to me; and, when it shall please Almighty God to call me, I shall willingly lay that burthen down. I plead before your lordships for my fame and honour.

My lords, logic is properly defined, and well

represented in this high court. It is a talent of the human mind, and not of the body, and holds a key which signifies, that logic is not a science itself, but the key to science. That key is your lordships' judicial capacity and wisdom. On the left hand is represented a hammer, and before it a piece of false, and another of pure gold. The hammer is your penetrating judgment, which, by the mercy of God, will strike hard at false witnesses who have given evidence against me, and prove my intention in this pending cause as pure as the finest gold, and as justly distinguished from the sophistry of falshood.

My lords, your unhappy prisoner is born of an ancient, not ignoble family; the women distinguished for their virtue, the men for their valour; descended in an honourable and uninterrupted line for three centuries and a half. Sir John Chudleigh, the last of my family, lost his life at the siege of Ostend, at 18 years of age, gloriously preferring to die with his colours in his bosom, rather than accept of quarter from a gallant French officer, who, in compassion to his youth, three times offered him his life for that ensign, which was shot through his heart. A happy death! that saves the blush he would now feel for the unheard-of injuries and dishonour thrown on his unfortunate kinswoman, who is now at the bar of this right honourable house.

His grace the late duke of Kingston's fortune, of which I now stand possessed, is valuable to me, as it is a testimony to all the world how high I was in his esteem. As it is my pride to have been the object of affection of that virtuous man, so shall it be my honour to bestow that fortune to the honour of him who gave it to me; well knowing, that the wise disposer of all things would not have put it in his heart to prefer me to all others, but that I should be as faithful a steward, as I was a faithful wife; and that I should suffer others, more worthy than myself, to share these his great benefits of fortune.

My lords, I now appeal to the feelings of your own hearts, whether it is not cruel, that I should be brought as a criminal to a public trial for an act committed under the sanction of the laws;—an act that was honoured with his majesty's most gracious approbation; and previously known and approved of by my royal mistress, the late princess dowager of Wales; and likewise authorized by the ecclesiastical jurisdiction. Your lordships will not discredit so respectable a court, and disgrace those judges who there so legally and honourably preside. The judges of the Ecclesiastical Court do not receive their patents from the crown, but from the archbishops or bishops. Their jurisdiction is competent in ecclesiastical cases, and their proceedings are conformable to the laws and customs of the land, according to the testimony of the learned judge Blackstone* (whose works are as entertaining as they are instructive,) who says, "It must be acknowledged, to the honour of the spiritual courts, that though they continue to this day to decide many questions which are properly of temporal cognizance, yet justice is in general so ably and impartially administered in those tribunals (especially of the superior kind,) and the boundaries of their power are now so well known and established, that no material inconvenience at present arises from their jurisdiction. And should an alteration be attempted, great confusion would probably arise, in overturning long established forms, new modelling a course of proceedings that has now prevailed for seven centuries."—And I must here presume to add, as founded on truth, that that court (of which his majesty is the head) cannot be stopped by any authority whatsoever, while they act in their own jurisdiction.—Lord chief justice Hale says, "Where there has been a sentence of divorce (which is a criminal case,) if that sentence is suspended by an appeal to the court of Arches (as a superior court), and while that appeal is depending one of the parties marries again, the sentence will be a justification within the exception of the act of parliament, notwithstanding that the sentence has been appealed from, and consequently may be reversed by a superior court." And, my lords, how much more reason is there for its coming within the exception of the act in my case, since no appeal had been made?

My lords, I earnestly look up to your lordships for protection, as being now a sufferer for having given credit to the Ecclesiastical Court. I respectfully call upon you, my lords, to protect the spiritual jurisdiction, and all the benefit of religious laws, and me, an unhappy prisoner, who instituted a suit of jactitation upon the advice of a learned civilian, who carried on the prosecution, from which I obtained the sentence that authorized your prisoner's marriage with the most noble Evelyn duke of Kingston; that sentence solemnly pronounced by John Bettesworth, doctor of laws, vicar-general of the right reverend father in God Richard by divine permission lord bishop of London, and official principal of the consistorial court of London: the judge thereof, calling on God, and setting him alone before his eyes, and hearing counsel in that cause, did pronounce, that your prisoner, then the honourable Elizabeth Chudleigh, now Elizabeth dowager duchess of Kingston, was free from all matrimonial contracts or espousals, as far as to him at that time appeared, more especially with the said right honourable Augustus John Hervey.

My lords, had this prosecution been set on foot merely for the love of justice, or good example to the community, why did they not institute their prosecution during the five years your prisoner was received and acknowledged the undoubted and unmolested wife of the late duke of Kingston?

My lords, the preamble * of the very act on

* Vol. 3, chap. 7, 98.

* See vol. 14, p. 1011.

which I am indicted, plainly and intirely precludes your prisoner: it runs thus: "Forasmuch as divers evil-disposed persons, being married, run out of one county into another, or into places where they are not known, and there become to be married, having another wife or husband living, to the great dishonour of God, and utter undoing of divers honest men's children, and others, &c." And as the preamble has not been considered to be sufficient in my favour to impede the trial, I beg leave to observe how much your prisoner suffers by being produced before this noble house, on the penalty of an act of parliament, without benefiting by the preamble, which is supposed to contain the whole substance, extent, and meaning of the act.

My lords, upon your wise result on my unhappy case, you will bear in your willing remembrance, that the orphan and widow is your peculiar care; and that you will be tender of the honour of your late brother peer, and see in me his widow and representative, recollecting how easy it may be for a next of kin to prosecute the widows or the daughters, not only of every peer, but of every subject of Great Britain, if it can be effected by the oath of one superannuated and interested old woman, who declared seven years ago that she was incapable of giving evidence thereon, as will appear in proof before your lordships. And I may further observe to your lordships, that my case is clearly within the proviso of the statute on which I am indicted. In the third clause, it is "provided that this act shall not extend to any person, where the former marriage hath been, or hereafter shall be, declared by sentence of the Ecclesiastical Court to be void, and of no effect."

If there is supposed to have been a former marriage, the same must have been a true marriage, or a false one. If a true one, it cannot be declared void; and if a false one, or the semblance of one only, then only, and no otherwise, is it that it can be declared void.—Therefore must this proviso have respect to pretended marriages only, and to none other: and such only it is, that can be the objects of causes of jactitation, the sentence in which is a more effectual divorce and separation of the parties, than many divorces which have been determined to fall within this proviso.—The crime charged in the indictment was not a felony, or even a temporal offence, until the act of James the first: till then, it was only cognizable in the Ecclesiastical Court; and though an indictment could lie for a slight blow, yet the common law did not allow of a criminal prosecution for polygamy until that period: so that if the case comes within the exception of the only statute upon that subject, it is no offence at all; and Dr. Sherlock, bishop of London, has said, in such cases the law of the land is the law of God.

My lords, I have observed, that I had greatly suffered in fame and fortune by the reports of Mr. Hervey; and I beg leave to mention in what manner. Your prisoner was at that time possessed of a small estate in the county of Devon, where sir George Chudleigh, her father's eldest brother, had large possessions. The purchase of that estate was much solicited in that county; and having frequent opportunities to dispose of it, it was ever made an insuperable objection by the intended purchaser, that I could not make a clear title to the estate on account of Mr. Hervey's claim to your prisoner as his wife.

And your prisoner being also possessed of building lands for a great number of years, for the same reasons she never had the ground covered (valued at 1,200*l.* per annum.) And as your prisoner's health declined, and made it necessary for her to seek relief in foreign climes (which increased her expences beyond what her circumstances could support,) and her little fortune daily decreased by money taken upon mortgage and bond, as will appear by the evidence of Mr. Drummond; her royal mistress likewise in the decline of life, whose death would probably have deprived her of 400*l.* a year; the persecutions threatened on Mr. Hervey's side presented but a gloomy prospect for her declining life; your prisoner was induced, as she before observed to your lordships, to follow the advice of Dr. Collier, and instituted the suit of jactitation, your prisoner subscribing entirely to his opinion, and following his advice and instructions, which she presumes alone is a full defence against the charge of felony; for your lordships in your great candour cannot think, that a lady can know more of the civil law, than her learned civilians could point out to her.

And as a criminal and felonious intent is necessary to constitute the offence with which I stand charged, certainly I cannot be guilty in following the advice I received, and in doing what in my conscience I thought an authorized and innocent act.

My lords, though I am aware, that any person can prosecute for the crown for an offence against an act of parliament, yet I will venture to say, that few instances, if any, have been carried into execution without the consent of the party injured: and with great deference to your lordships' judgment I venture to declare, that in the present case no person whatever has been injured, unless your lordships' candour will permit me to say that I am injured, being now the object of the undeserved resentment of my enemies. It is plain to all the world, that his grace the duke of Kingston did not think himself injured, when in the short space of five years his grace made three wills, each succeeding one more favourable to your prisoner than the other, giving the most generous and incontestable proof of his affection and solicitude for my comfort and dignity. And it is more than probable, my lords, from the well known mutual friendship subsisting between us, that had I been interested, I might have obtained the bulk of his fortune for my own family. But I respected his honour, I

loved his virtues, and had rather have forfeited my life than have used any undue influence to injure the family. And though it has been industriously and cruelly circulated, with a view to prejudice me, that the first-born of the late duke's sister was deprived of the succession to his grace's fortune by my influence, the wills, my lords, made in three distant periods, each excluding him, demonstrate the calumny of these reports.

I must further observe to your lordships, in opposition to the charge against me of interestedness, that had I possessed or exercised that undue influence with which I am charged by the prosecutor, I might have obtained more than a life-interest in the duke's fortune. And though from the affection I bear to the memory of my late much-honoured husband, I have forborne to mention the reason of his disinheriting his eldest nephew, yet Charles, the second son, with his heirs, appear immediately after me in succession; William and his heirs follow next; after him Edward and his heirs; and the unfortunate Thomas, lady Frances's youngest son, is not excluded, though labouring under the infirmities of childhood at the age of manhood, and not able to support himself. For the late noble duke of Kingston repeatedly mentioned to your prisoner, "I have not excluded him, for he has never offended; and who can say God cannot restore him? Who can say that God will not restore him to health?" My lords, that good man did honour to the peerage, honour to his country, honour to human nature.

His grace the most noble duke of Newcastle appeared with the will, which had been intrusted to his grace for four years by his late dear friend. In honour to the lady Frances Meadows, the prosecutor was requested to attend at the opening of the will. He retired with displeasure, disappointed that his eldest son was disinherited, and unthankful, though the duke's fortune still centered in his four youngest sons and their posterity.

My lords, worn down by sorrow, and in a wretched state of health, I quitted England without a wish for that life which I was obliged by the laws of God and nature to endeavour to preserve; for your prisoner can with great truth say, that sorrow had bent her mind to a perfect resignation to the will of providence. And, my lords, while your unhappy prisoner was endeavouring to re-establish her greatly-impaired health abroad, my prosecutor filed a bill in Chancery upon the most unjust and dishonourable motives. Your prisoner does not complain of his endeavouring to establish a right to himself; but she does complain of his forming a plea on dishonourable and unjust opinions of his late noble relation and generous benefactor, to the prejudice and discredit of his much-afflicted widow: and not satisfied with this prosecution, as a bulwark for his suit in Chancery, he cruelly instituted a criminal prosecution, in hopes, by a conviction in a criminal cause, to establish a civil claim; a proceeding discountenanced by the opinion of the late lord Northington.

My lords, I have heretofore forborne, from the great love and affection to my late noble lord, to mention what were the real motives that induced his grace to disinherit his eldest nephew; and when my plea and answer in Chancery were to be argued, I particularly requested of the counsel to abstain from any reflections upon my adversaries, which the nature of their prosecutions too much deserved; and grieved I am now, that I must no longer conceal them. For as self-preservation is the first law of nature, and as I am more and more persecuted in my fortune and my fame, and my enemies hand about pocket-evidence to injure me in every company, and with double tongues they sting me to the heart, I am reduced to the sad necessity of saying, that the late duke of Kingston was made acquainted with the fatal cruelty with which Mr. Evelyn Meadows treated an unfortunate lady, who was as amiable as she was virtuous and beautiful; to cover which offence, he most ungratefully and falsely declared, that he broke his engagements with her for fear of disobliging the duke, which he has often been heard to say. This, with his cruelty to his sister and mother, and an attempt to quit actual service in the late war, highly offended the duke; and it would be difficult for him, or his father, to boast of the least friendly intercourse with his grace for upwards of eighteen years.

My lords, in a dangerous state of health, when my life was despaired of, I received a letter from my solicitor, acquainting me, that if I did not return to England to put in an answer to the bill in Chancery within twenty-one days, I should have receivers put into my estates; and also, that if in contempt of the indictment I did not return, I should be outlawed. It clearly appeared to me, my lords, as I make no doubt it does to your lordships, that if in the inclemency of the weather I risked to pass the Alps, my life would probably be endangered, and the family would immediately enter into possession of the real estates, and if female fears should prevail, that I should be outlawed. Thus was I to be deprived of life and fortune under colour of law. And that I might not return to these persecuting summonses, by some undue and cruel proceedings my credit was stopped by my banker for 4,000*l.* when there remained an open account of 75,000*l.* and at that instant upwards of 6,000*l.* was in his hands, my revenues being constantly paid into his shop to my credit. Thus was I commanded to return home at the manifest risk of my life, and at the same time every art used to deprive me of the means of returning for my justification. Conscious of the perfect innocence of my intention, and convinced that the laws of this country could not be so inconsistent as to authorize an act, and then defame and degrade me for having obeyed it, I left Italy at the hazard of my life. It was not for property I returned, but to prove my-

self an honourable woman. Grant me, my lords, but your good opinion, and then I stand justified in the innocence of my intention, and you can deprive me of nothing that I value, even if you should take from me all my worldly possessions; for I have rested on that seat where the poor blind Belisarius is said to have asked charity of every passenger, after having conquered the Goths and Vandals, Africans and Persians; and would do the same without murmuring, if you would pronounce me, what I hope your lordships will cheerfully subscribe to—that I am an honourable woman.

My lords, your late brother, the truly honourable duke of Kingston, whose life was adorned by every virtue and every grace, does not his most respectable character plead my cause and prove my innocence?

My lords, the evidence of the fact of a supposed clandestine marriage with Mr. Hervey depends entirely upon the testimony of Ann Cradock.

I am persuaded your lordships, from the manner in which she gave her evidence, already entertain great suspicions of the veracity of her testimony. She pretends to speak to a marriage ceremony being performed, at which she was not asked to be present, nor can she assign any reason for her being there.—She relates a conduct in Mrs. Hanmer, who she pretends was present at the ceremony, inconsistent with a real marriage. She acknowledges that she was in or about London during the jactitation suit, and that Mr. Hervey applied to her on that occasion; and swears that she then and ever had a perfect remembrance of the marriage, and was ready to have proved it, had she been called upon, and never declared to any person that she had not a perfect memory of the marriage, and that she never was desired either to give or with-hold her evidence; and from Mr. Hervey's not calling on this woman, it is insinuated he abstained from the proof by collusion with me. She also swears, that I offered to make her an allowance of 20 guineas a-year, provided she would reside in either of the three counties she has mentioned, but acknowledges she has received no allowance from me. Can your lordships believe, that if I could have been weak enough to have instituted the suit, with a conviction in my own mind of a real lawful marriage between Mr. Hervey and myself, that I would not, at any expence, have taken care to have put that woman out of the way? But, my lords, I trust that your lordships will be perfectly satisfied, that great part of the evidence of this woman is made for the purpose of the prosecution. Though she has denied she has any expectation from the event, or ever declared so, yet it will be proved to your lordships, that her future provision (as she has declared) depends upon it: and notwithstanding she has now brought herself up to swear that she heard the ceremony of marriage performed, yet it will be proved that she has declared she did not hear it. And it will be further proved to your lordships, that Mr. Hervey was extremely solicitous to have established a legal marriage with me for the purpose mentioned by Mr. Hawkins, and that this woman was actually applied to, and declared to Mr. Hervey's solicitor, that her memory was impaired, and that she had not any recollection of it, which was the reason why she was not called as a witness.

My lords, if she is thus contradicted in these particulars, and appears under the influence of expectations from this event of the prosecution, your lordships will not credit her evidence, that the complete ceremony of marriage was performed, or any other particulars which rest upon her evidence.

My lords, with respect to what your lordships have heard from the witnesses, of my desire at times to be considered as the wife of Mr. Hervey, your lordships in your candour will naturally account for that circumstance, after the unfortunate connection that had subsisted between us.

My lords, I call God Almighty, the searcher of hearts, to witness that at the time of my marriage with the duke of Kingston, I had, myself, the most perfect conviction that it was lawful. That noble duke, to whom every passage of my life had been disclosed, and whose affection for me, as well as regard for his own honour, would never have suffered him to have married me, had he not as well as myself received the most solemn assurances from Dr. Collier, that the sentence, which had been pronounced in the Ecclesiastical Court, was absolutely final and conclusive, and that I was perfectly at liberty to marry any other person. If therefore I have offended against the letter of the act, I have so offended without criminal intention. Where such intention does not exist, your lordships' justice and humanity will tell you there can be no crime; and your lordships, looking on my distressed situation with an indulgent eye, will pity me as an unfortunate woman, deceived and misled by erroneous notions of law, of the propriety of which it was impossible for me to judge.

My lords, before I take my leave, permit me to express my warm and grateful sense of the candour and indulgence of your lordships, which have given me the firmest confidence that I shall not be deemed criminal by your lordships for an act, in which I had not the least suspicion that there was any thing illegal or immoral.

My lords, I have lost, or mislaid, a paper, where I had put together my ideas to present to your lordships. The purport was to tell your lordships, that my advocate Dr. Collier, who instituted this suit of jactitation, is now in a dangerous state of health. He has had two physicians to attend him, by my order, yesterday, to insist and order his attendance to acquaint your lordships, that I acted entirely under his directions; that it was by his advice I married his grace the duke of Kingston, assuring me that it was lawful; that he had the honour of going to his grace the

archbishop of Canterbury to obtain a licence, and to explain every part that regarded the cause; that his grace was so just, so pious, and so good as to take time to consider whether he would grant us a special licence for the marriage. After mature consideration and consultation with great and honourable persons in the law, he returned the license to Dr. Collier, with full permission for our marriage. Dr. Collier was present at the marriage; Dr. Collier signed the register of St. George's church. Mr. La Roche has frequently attended the duke of Kingston to Dr. Collier, where he heard him consult the doctor if the marriage would be lawful, he said it would, and never could be controverted.

Under these circumstances, I wished to bring my advocate forth to protect me. He, my lords, is willing to make an affidavit, to be examined by the enemy's counsel, to submit to any thing that your lordships can command, willing to justify his conduct; but he has had the misfortune, my lords, ever since the latter end of August, or the first week in September, I do not well remember which, never to have been in bed. I apprehended, from seeing him yesterday, with your lordships' indulgence, that he had the saint Anthony's-fire: but my physicians, who have been with him, can give a better account, if you will permit them, of the state of his health, that your lordships may not imagine that he keeps back, or that I am afraid to produce him. If it is not to avail me in law, I ask no favour: but I petition your lordships, and would upon my knees, that you will hear the evidence that he will give to the justification of my honour, though it does not avail me in law.

My lords, I do request that Dr. Collier may be examined in the strictest manner, and by every enemy that I have in the world. My physicians saw him last night; and they can, previous to his examination, inform your lordships in what state they apprehend him to be.

Lord *Ravensworth.* After what I have just heard from the prisoner at the bar, it is impossible not to feel equally with the rest of your lordships: and, my lords, what came last from the prisoner at the bar I own strikes me with the necessity of permission being given, if it could be done, to have Dr. Collier examined.

Lord *Camden.* I am really, my lords, at some loss to know, upon what ground it is your lordships stand at this moment with respect to the evidence of Dr. Collier. I do not understand yet, that Dr. Collier is called by the prisoner or by her counsel. I do not yet understand, that in consideration of the infirm state of his health, the prisoner or her counsel do require from your lordships any specific particular mode of examination, by which your lordships might be apprised of the substance of his evidence. I understand neither of these things to be moved to your lordships: if they were matter of debate on either one or the other might probably arise; and then this is not the place for your lordships to enter into a consideration of it. With regard to the case itself, which the noble prisoner has made for one of her most material witnesses, it is undoubtedly such as would touch your lordships with a proper degree of compassion, as far as the justice of the Court can go, and your feelings are able to indulge; beyond that it is impossible, let your lordships' desire be what it may: for you to transgress the law of the land, or to go beyond the rules prescribed by those laws, is impossible. A witness so infirm that he is totally incapable of attendance! your lordships, if you are to lose his evidence, will lament the want of it: justice cannot be so perfect and complete without the examination of a necessary and material witness, as if you had it. But if a greater evil than that should happen (and it has frequently happened in the course of causes), which is death itself, which shuts up the mouth in everlasting silence, if this should arrest the witness before he could be produced, his evidence is lost for ever. If this witness should by his infirmity be totally unable to attend whilst this cause lasts, I am sorry to say your lordships must go on without him; it is impossible to wait until that witness can be produced. While the cause lasts (and your lordships will precipitate nothing in the course of justice) if he can be brought, you will make every accommodation to receive him, you will take every means in your power to make the attendance safe and convenient for him, you will receive him in any part of the cause, even at the last moment before it is concluded. So far your lordships may go; beyond that, I doubt, you cannot. But, my lords, I have now been speaking without a question, without a motion, without any thing demanded of your lordships by the prisoner or by her counsel.

Lord *Ravensworth.* I would beg leave to put it to those noble lords who sit upon the bench, whether there ever was an instance in a criminal cause of a witness being examined otherwise than in open court?

Lord *Camden.* The noble lord is pleased to put a question particularly pointed to such of your lordships as have been educated in the profession of the law, to know, 'whether any instance can be produced where a witness, not attending at your bar to be examined *vivâ voce*, has been permitted by commission, by delegation, or any other manner whatever, to give his evidence out of court, so that that evidence so given out of court, might be reported into the court, and stand as evidence on the trial?' I presume that is the point, in which the noble lord desires to know if any precedent can be produced. When that question is asked, and the answer is to be a negative, your lordships easily conceive how much the modesty of the answerer is to be affected, if he gives a full, a positive, and a round negative to that question. I therefore beg to be understood as confining the answer to my own knowledge. Within the course of my

own practice and experience, I never did know of such an instance; I never have to the best of my memory read of such an instance; I never heard of such an instance: I speak in the presence of those who are better versed in this kind of knowledge than myself; I speak before the law of the land, which is now upon your lordships wool-sacks. My lords, if any such case occurs to them, it will be easy for your lordships to apply to them; I know of no such; and I might add briefly one word on the subject, I hope I shall never see such an instance so long as I live in this world. What, my lords! to give up, and to part with, that noble privilege in the mode of open trial, of examinations of witnesses *vivâ voce* at your bar, with a cross examination to confront them in the eye of the world, and to transfer that to a private chamber on a few written interrogatories! I go too far in arguing the point: I never knew an instance. I am in the judgment of the House, and of the learned judges that hear me; if there ever was an instance, let it be produced, and in God's name let justice be done.

The Lords then proceeded to hear the witnesses.

L. H. S. Mr. Wallace, you may proceed to call your witnesses.

Mr. *Wallace.* The first witness I would call is Mr. Berkley.

Mr. *Berkley* sworn.

Mr. *Berkley.* My lords, what knowledge I had of this business arose from my being attorney to lord Bristol; and I must leave it to your lordships, whether I ought to be examined as being attorney for lord Bristol, consistent with honour to myself and the duty I owe to him.

Mr. *Wallace.* I know the delicacy of the situation of an attorney: I merely call Mr. Berkley to what passed between him and Mrs. Cradock, being sent to get her to attend and prove the marriage.

Lord *Mansfield.* With regard to the demurrer put in by Mr. Berkley to the question that is asked him, when they make him a witness, they subject him to cross-examinations; but the point is, whether he, as being concerned as solicitor for my lord Bristol, can demur to the question put to him to know, what this woman said when he went to desire her to come to give evidence? And as to that, there seems to be no colour to the demurrer; for the protection of attorneys is as to what is revealed to them by their client, in order to take their advice or instruction with regard to their defence. This is no secret of the client, but is to a collateral fact, what a party said to him upon such an application; and it has been often determined, that as to fact an attorney or counsel has no privilege to with-hold his evidence, if there is a doubt: even if he swears to an answer in Chancery he cannot protect himself from swearing, whether that is his client's hand or not, or to his having sworn it, or the execution of a deed: it does not come within the objection to an attorney revealing the secrets of his client. I suppose it is only mentioned to your lordships for a justification. If none of your lordships are of a different opinion, it will save time, and the witness will understand it to be the opinion of all your lordships.

Examined by Mr. *Wallace.*

I beg to know, whether you ever made any application to Mrs. Cradock relative to her being a witness to the marriage?—I did.

At what time?—It was after my lord Bristol was served with a citation to Doctors Commons.

For what purpose did you apply to her?—To know, what she knew relative to the marriage between lord Bristol and Miss Chudleigh.

What answer did Mrs. Cradock give to that?—My lord Bristol was present. She said she was very old, very infirm, and the transaction happened many years ago, and she could not at that distance of time remember any thing of the matter: upon which my lord Bristol seemed vastly surprized, and said, How can you say so? or to that effect.

Did she persist in not remembering any thing of the transaction?—She did, and said she remembered nothing of the matter; and that was the only time I ever saw her.

Mr. *Wallace.* My lords, I shall ask Mr. Berkley no more questions.

By Mr. *Attorney General.*

Were you sent to her as a person that was present at the marriage?—I was employed in order to collect evidence from different people, whom my lord Bristol directed me to go to, and other people, with respect to the marriage, as his lordship wanted to have a divorce; and in that way I saw Mrs. Cradock.

Did lord Bristol explain his want of a divorce at the time he sent you to the witness?—The direction I had from my lord was in May 1768.

Was it at that time that my lord Bristol told you he wanted a divorce?—It was.

What you have said was after the citation?—When I saw the witness, as well as I remember, it was after the citation.

Did lord Bristol describe the witness to you as present at the marriage?—He did. My lord said, that she could prove the marriage.

When lord Bristol expressed himself surprized at that disappointment, did he then express to you, that she was one of those present at the marriage?—I do not know that my lord did.

Was she never represented to you as a person present at the marriage?—I understood, as she was represented to me, that she was present at the marriage.*

Was her husband, Mr. Cradock, ever represented as being present at that marriage?—

* See Peake's Law of Evidence, chap. 3, s. 4, p. 188.

Mr. Cradock has often told me, that he was not.

The question that I mean to put upon that is, why was the husband called who was not present at the marriage, and the wife not called who was represented to be present at the marriage?—I know nothing of that; it went out of my hands afterwards to Doctors Commons.

Did you decline that part of the business in respect to Doctors Commons?—I apprehend, I could not act there.

Mr. *Wallace.* Are you an attorney or a proctor?—*Berkley.* An attorney, not a proctor.

[Ordered to withdraw.]

Mr. *Mansfield.* My lords, we are now going to call Mrs. Ann Pritchard to contradict part of the evidence of Ann Cradock. We beg the Clerk may read the part alluded to.

The Clerk of the parliament was ordered to read that part of the evidence; but not having taken it down, Mr. Gurney was ordered to produce his notes. When they were produced, the part alluded to could not be found; and

Mr. *Mansfield* addressed himself to the Lords thus: This witness, Ann Pritchard, is called to contradict Mrs. Cradock. In the first place, to prove that she has told this Mrs. Pritchard, that she had some expectations of advantage from this prosecution; and likewise, that she did tell this witness, that she did not hear any part of the ceremony read at the time when she said the lady at the bar and lord Bristol were married, though she has repeatedly told your lordships that she had no view of advantage from this cause, and that she had heard the whole of the ceremony read.

Ann Pritchard sworn.

Examined by Mr. *Mansfield.*

Do you know Mrs. Cradock?—Yes.

Have you ever had any conversation with Mrs. Cradock concerning the reading the marriage ceremony between the lady at the bar and lord Bristol?—No, I never had.

Did you ever hear Mrs. Cradock say any thing concerning that ceremony, or her having heard it, or not heard it?—Never, before she was examined.

What do you mean, before she was examined?—Before a master in Chancery.

When was that?—I cannot particularly say the time; it was about a month after I was examined, to the best of my knowledge.

When were you examined?—I cannot particularly say the time when she was examined.

Can you recollect how many months ago?—I cannot indeed; it might be a year and a half ago.

What did Mrs. Cradock say to you in that conversation, which she had with you, about her having heard or not having heard the marriage ceremony?—She related her examination before the master in Chancery concerning her grace's marriage.

In that conversation, did Mrs. Cradock say whether she had or had not heard the marriage ceremony read?—I never heard her relate any thing concerning the marriage ceremony. I understand the question now: I did not before. She told me, she did not hear the marriage ceremony.

L. H. S. Let the last question be asked over again.

Whether Mrs. Cradock did or did not say to you, Mrs. Pritchard, that she did or did not hear the marriage ceremony read?—She told me, she did not hear the marriage ceremony read.

Had you any conversation with Mrs. Cradock about any advantage which she expected from this prosecution?—I had.

What did Mrs. Cradock say to you in that conversation?—She told me she was to be provided for, but in what manner she could not say, till after the affair was over, lest it should be deemed bribery.

Did you hear any thing more said by Mrs. Cradock relating to that subject?—Not at that time, but at another time I have.

What did you hear from her at the other time?—I gave her an invitation to come to see me. She told me, it would not suit her until this affair was over; and then if she should get a good fortune, she might come and live with me.

Did you hear from Mrs. Cradock any thing said of any particular provision to be made for her, or any place to be got?—Her brother applied to my husband at the Custom-house, desiring him in case he heard of a vacancy to let him know.

Att. Gen. This is not evidence in the question now proposed. I know nothing of what will be brought; but this is not evidence.

Mr. *Mansfield.* Nothing that passes, unless it comes home to Mrs. Cradock, will be evidence, to be sure. The witness must relate it in her own manner.

Att. Gen. I object to the witness relating either in her own or in any other manner whatever, a conversation to which Mrs. Cradock is not a party.

Mr. *Mansfield.* It is under an apprehension that it will come to Mrs. Cradock, or it would not be asked.

Did you tell to Mrs. Cradock what you heard from her husband?—I told her myself, that her brother had been at the Custom-house to desire my husband, when there was a vacancy in the house, to let him know of it, as Mr. Meadows had promised to get him a place.

What did Mrs. Cradock say to you upon your telling her this?—She had never heard any thing about it.

Did Mrs. Cradock say any thing more to you about this place?—Her answer was, it was more than she knew, but that it would be equally the same.

What was meant by being equally the same?—She thought her brother was to provide for her out of it, or at least to allow her something.

By Mr. *Attorney General.*

How long have you been acquainted with Mrs. Cradock?—Five years.

How long with the prisoner?—From the 2nd of February last.

I wish to know whether any body was present at any of the conversations which you had with Mrs. Cradock, but yourself?—No.

I wish you would tell where they were?—Once at my own house at Mile-end.

At what time was that conversation held at your house at Mile-end?—It was on a Sunday, but I cannot particularly tell the month.

How long ago was that Sunday?—It was a very little time after she had been subpœnaed.

Do you know if it was a week, or more time, or less, after she had been subpœnaed?—It might be more than a week, I cannot tell particularly.

What reason have you to know, that it was within some short time after she had been subpœnaed?—As we were very intimate acquaintances, she came to dine with me. She told me, she longed to tell me what had happened since the last time she saw me.

But how long was that last time she saw you before that last time that she came to you again?—I cannot particularly say.

As near as you can go; was it a fortnight?—It might be a quarter of a year.

Have you any means of recollecting within a week or a fortnight of the time of her having been examined upon the subpœna?—I cannot possibly recollect, as not expecting ever to be called upon.

Does your intimacy continue with Mrs. Cradock?—It always did, until she has been confined at Mr. Beauwater's.

Did you ever mention this conversation to Mrs. Cradock, since the time it happened?—No, never.

Will you give an account to their lordships of the whole conversation which Mrs. Cradock held upon the subject of that marriage; whether she told you the whole story of the marriage?—She told me a great deal of it: I do not know the particulars.

It is important, that you should recollect as many particulars as you can, that Mrs. Cradock told you of that marriage. What particulars did Mrs. Cradock tell you of that marriage?—She told me that she had been examined by a master in Chancery, who asked her if she knew of the marriage between Augustus John Hervey and Miss Chudleigh? They asked her if she was in the church? She answered, she was. They asked her who was in the church? She told them, herself, Mr. Merrill and Mrs. Hanmer. They asked her, if she heard the ceremony? She told him, she did not. That was all the particulars I heard her relate.

Had not you the curiosity yourself to enquire after some more particulars?—I had not.

Did she ever tell you at what time of night it was?—Never.

Was any body present at the conversation about the reward that the witness expected?—No.

At what time was that conversation had?—It was after dinner, it might be at two o'clock on the Sunday; it was summer-time I know, but I cannot particularly say the month.

Was it the same Sunday that the former conversation passed?—No.

Whether, when the witness proposed, on her having a great fortune coming to her, that she should live with Mrs. Cradock, or Mrs. Cradock live with her?—Mrs. Cradock live with me.

What are you?—In a very creditable situation, and a pretty fortune. I live at Mile-end.

Do you carry on any business at Mile-end?—No.

Are you married?—Yes.

Has your husband any business?—Yes; a place in the Custom-house.

Lord *Grosvenor.* What do you mean by Mrs. Cradock's being confined at Mr. Beauwater's?—*Ann Pritchard.* I went to enquire for her: I was not permitted to see her.

By Lord *Denbigh.*

I beg to know upon what account you saw the prisoner in February last?—By an invitation to her house-keeper.

Did you see the prisoner herself at that time?—I did.

What passed between you and the prisoner?—I cannot particularly relate it; nothing material.

Did nothing pass relative to this trial?—Nothing.

Did nothing pass relative to the conversations between you and Mrs. Cradock?—I do not recollect there was.

Lord *Weymouth.* I think the witness has said, that Mrs. Cradock told her that she did not hear the ceremony read, and Mrs. Cradock has likewise told your lordships, that she was present when the ceremony was read: I should be glad to ask whether Mrs. Cradock gave any reason for not having heard the ceremony? whether, that she was at a distance in the church, or the clergyman did not speak loud enough?—*Ann Pritchard.* She was at too great a distance in the church.

Duke of *Richmond.* Did Mrs. Cradock tell you, that she had in her examination before the master in Chancery said, that she did not hear the ceremony read?—*Ann Pritchard.* She told me, she did.

A Lord. The counsel may produce that examination.

Lord *Camden.* I have been asking the same question, conceiving it would give light to your lordships, if it could be produced. I find that it is an examination *de bene esse.* Publication is not made, and the examinations are sealed up. [The witness was ordered to withdraw.]

Mr. *Wallace.* My lords, I shall call witnesses now to prove the consultation of Dr

Collier; and I shall follow that, my lords, with a proof of what advice he gave to the noble lady at the bar and the duke of Kingston in the presence of a witness I have to produce. My lords, we have sent, but find there is no possibility of bringing Dr. Collier, or he should have been here.---We will now call Dr. Warren.

Dr. *Warren* sworn.

Mr. *Wallace.* I wish Dr. Warren would inform your lordships, whether he has lately seen Dr. Collier.

Dr. *Warren.* I visited Dr. Collier yesterday, about eight o'clock in the afternoon, and found him very ill under a variety of complaints, particularly a St. Anthony's fire in his head and face, by which one side of it was so much swelled, that the eye was almost closed up. It appeared to me that he could not venture out without great hazard.

Attorney-General. I beg Dr. Warren may be asked, whether he thinks Dr. Collier's condition such, that he could not stir out without danger?---Dr. *Warren.* I said so, my lords.

Attorney General. What sort of danger do you mean, when you speak of the danger under which he would come out?---Dr. *Warren.* I think that he is in danger. I cannot say that it would certainly kill him, but it would be very imprudent in me to advise him to come out. [Ordered to withdraw.]

Mr. *Mansfield.* The witness now intended to be produced to your lordships is Mr. Laroche. The purpose for which he is to be produced is to tell your lordships, that he saw Dr. Collier frequently with the lady at the bar and the late duke of Kingston, during the suit in the Ecclesiastical Court; that he has himself heard Dr. Collier assure both the parties, the late duke of Kingston and the lady at the bar, after that sentence in the Spiritual Court, that they were perfectly free to marry, and might marry any one they pleased.

Mr. *Laroche* sworn.

Mr. *Laroche.* My lords, I did not know, until within these few minutes, that it would be necessary to call me. I will endeavour to recollect to the best of my knowledge. I have got some memorandums in my pocket, and I hope I may be at liberty to refer to them.

Lord High Steward. Are they in your own writing?—*Laroche.* A copy of it, and it has been in my possession ever since it was copied.

A Lord. Copied by his desire?—*Laroche.* Yes, from my own notes,* and in my presence, and has been in my own custody ever since.

Examined by Mr. *Mansfield.*

Did you know the late duke of Kington? and do you know Dr. Collier?—Yes, I both knew his grace the duke of Kingston and Dr. Collier.

Were you present at the marriage of the lady at the bar and the duke of Kingston?—I was.

Was Dr. Collier present also at the marriage?—He was.

Do you know, that Dr. Collier was consulted by the lady at the bar and the duke of Kingston, while the suit was depending in the Spiritual Court?—I do know, that I have frequently walked with his grace the duke of Kingston to Doctors Commons in a morning to Dr. Collier. I have gone also with the duchess in her coach, and the duke likewise, to Dr. Collier.

Has this happened frequently?---Many times.

Were you ever present with Dr. Collier and the duke of Kingston and the lady at the bar, after that sentence had been given in that court?—I was several times at Dr. Collier's chambers after the suit had been determined.

Were you present when Dr. Collier gave to the lady at the bar, or the late duke of Kingston, or both of them, any opinion concerning the effect of that sentence?—I was many times at Dr. Collier's chambers, and in conversation I have heard Dr. Collier tell the duke, that he might with safety marry the duchess of Kingston, Miss Chudleigh as she then was.

Have you heard that opinion, or to that effect, given more than once?---I cannot be exact: I have heard it said from Dr. Collier to the duke.

Have you heard that said also in the presence of the lady at the bar by Dr. Collier?—I think I have, to the best of my recollection. I went with the duke of Kingston, I breakfasted with him, as well as I can recollect, the morning that he was married: we then agreed to dine together at the Thatched-House Tavern. I went into the city with his grace first of all to Dr. Collier's to get the licence. Dr. Collier, when we came there, was not at home, but was gone to his grace's house with the licence in his pocket.

Mr. *Mansfield.* My lords, these are all the questions I have to ask Mr. Laroche.

Mr. *Dunning.* My lords, I should be glad to ask Mr. Laroche, what the occasion was of taking these opinions of Dr. Collier? whether it arose about any doubt entertained by the duke or the lady, or both, whether they were at liberty to marry?—*Laroche.* The duke certainly had a doubt upon his breast, until the suit of jactitation was over. In consequence of that sentence, at the decree of which I was present, and which declared her a single woman, he applied to Dr. Collier to know whether there was any thing further to go on that might impede his marriage? He was told, No, that she was a single woman, and he might marry her.

Were these conversations pending the suit, or after the suit was determined?—The last conversation was after the suit was over. During the time of the suit, I have frequently, I suppose when I was in town I walked five

* See Doe *v*, Perkins, 3 Term Rep. 749.

days out of six into the city with the duke, and then we called there to know how the suit went on.

Do you recollect how long the suit had been determined before the marriage with the duke of Kingston?—I should think, to the best of my recollection—I believe within three weeks. There were 14 days to put in an appeal; the appeal was revoked, and I believe they married the week after.

Did the duke's doubt continue until the day of the marriage?—He had no doubt after he had applied for the licence, and the licence had been granted.

What was the occasion of the conversation that passed upon the morning of the marriage between the duke and Dr. Collier?—There was no conversation upon it, as I remember, between them upon the morning of the marriage.

When did Dr. Collier inform the duke, that he might marry?—It was, I believe, after the revocation of the appeal; but it was after the sentence was obtained.

Will you be so good as to fix the time as nearly as you can, when both these conversations passed between Dr. Collier and the duke, and Dr. Collier and the duchess?—As for ascertaining a time, I cannot; but it was from the meeting of the parliament in the month of October 1768. If I remember right, it was the beginning of the sessions of parliament before last; and during that time I used often to walk with the duke to Dr. Collier's.

How many days was it before the marriage, if I am mistaken in supposing you said the day of the marriage?—It might be three or four days, or within a week.

Do you know that Dr. Collier had been in fact informed, that there had been a marriage between the lady and Mr. Hervey?—I know nothing at all of that.

Were you yourself informed at this time that there had been in fact a marriage between the lady and Mr. Hervey?—I never knew that there had been a marriage.

Had you been so informed, was my question?—From hear-say, and nothing else. I heard there was a suspicion of a marriage, and that she had put him upon the proof of that marriage, and that he had failed in his proof.

Had you, or had you not, been informed of the marriage by the lady herself?—Never.

Can you enable their lordships to judge, what was the occasion that drew the duke and duchess to make this application to Dr. Collier so recently before the marriage, and so long after the sentence?—I suppose, the meaning of the duke's going there was to ask Dr. Collier, who had the whole management of the affair, whether he could with safety marry the duchess.

Do you know whether any body had or had not suggested a doubt upon the subject?—There had been a doubt before the sentence, but after the sentence there was no doubt; but still he thought proper to ask him, because there was an appeal: that appeal was revoked, and after that appeal he married.

Mr. *Mansfield.* If your lordships will permit me, I will ask one question of Mr. Laroche. Whether in the opinion that Dr. Collier gave to the duke of Kingston in his hearing, Dr. Collier founded his opinion upon the effect of that sentence which had passed?—*Laroche.* He certainly did, in my conception of the matter.

Mr. *Dunning.* I should be glad to know, whether the witness meant to have it understood upon what Dr. Collier founded his opinion, that such a marriage, if it had been lawful, could be set aside by those proceedings?—*Laroche.* The words I heard were these: You may safely marry Miss Chudleigh, my lord, for you neither offend against the laws of God or man.

Lord *Fauconbridge.* After this, had they any doubt that they might lawfully marry?—*Laroche.* After the sentence pronounced in the Ecclesiastical Court, I am firmly of opinion, that neither of them had a doubt as to the legality of the marriage.

Mr. *Wallace.* My lords, I have many witnesses to prove facts, which I believe will be admitted by the gentlemen on the other side, because they have already been proved in another place: they are such as, the lady at the bar living continually in the state of a single woman, and transacting in that character matters of consequence relative to property: they are already contained in depositions in another place, and I shall offer to your lordships now that sentence which has been pronounced in Doctors' Commons: the officer swears he brought it from Doctors' Commons. Your lordships are in possession of it.

Att. Gen. I have already stated to your lordships the measure which was observed in giving evidence in that case in Doctors' Commons, both upon one side and the other; and I stated the measure observed upon the part of the prisoner in Doctors' Commons to be that of her having given evidence, that she acted as a single woman in a great many transactions.

Mr. *Wallace.* Then, my lords, I call no more witnesses.

L. H. S. Mr. Solicitor General, you will please to reply.

Sol. Gen. My lords, the custom which has prevailed in trials at your lordships' bar, authorizes the counsel on the part of the prosecution to observe upon the evidence that has been laid before your lordships, and to apply that evidence to the charge. In the present case, wishing to discharge my duty as counsel in a public prosecution without the least degree of unnecessary severity, or occasioning a momentary reflection of pain to the adverse party who stands at your lordships' bar; reflecting, on the whole course of the evidence that has been given; being in my own mind so clearly convinced as I am, that the evidence offered in support of the prosecution has not in the least degree been answered by any evidence that has

been offered in defence; but on the contrary, that the nature of the defence attempted supports, confirms, and gives credit to the charge; I find nothing on which I could with propriety observe in this period of the business at your lordships' bar, but the speech which has been made by the prisoner in defence. And I trust, your lordships will think that it is in no degree abandoning the duty I owe unto the credit and weight of a public prosecution, if I decline entering into observations, in reply to a mere argumentative defence, offered to your lordships by a prisoner in person. I therefore hope that your lordships will think, that I have not failed in my duty, in declining to trouble your lordships any farther upon this matter.

Mr. Solicitor General having finished his replication on the part of the prosecution, the duchess of Kingston was ordered from the bar.

The House was then adjourned to the Chamber of Parliament.

The Lords, and others, returned to the Chamber of Parliament in the customary order, and after some time, the House was adjourned again into Westminster-hall.

The Peers being seated, the Lord High Steward in his chair, and the House resumed, the Serjeant at Arms made proclamation for silence, as usual.

L. H. S. Your lordships have heard the evidence, and every thing that has been alleged on both sides; and you have also heard the opinion of the learned and reverend judges upon the questions stated to them; and the solemnity of your proceedings requires that your lordships' opinions on the question of Guilty, or Not Guilty, should be delivered severally in the absence of the prisoner, beginning with the junior baron; and that the prisoner should afterwards be acquainted with the result of those opinions by me. Is it your lordships' pleasure to proceed now to give your opinions upon the question of Guilty or Not Guilty?

Lords. Ay, ay.

Then the Lord High Steward stood up uncovered, and beginning with the youngest peer said,

John lord Sundridge (duke of Argyle in Scotland,) what says your lordship? Is the prisoner Guilty of the felony whereof she stands indicted, or Not Guilty?

Whereupon John lord Sundridge, standing up in his place uncovered, and laying his right hand upon his breast, answered, Guilty, upon my honour.

In like manner the several lords aftermentioned, being all that were present, answered as followeth:

Henry lord Digby, Charles lord Camden, George Venables lord Vernon, Edward lord Beaulieu, John James lord Lovel and Holland, Thomas lord Pelham, Frederick lord Boston, Nathaniel lord Scarsdale, Richard lord Grosvenor, William lord Wyeombe, Thomas lord Lyttelton, William lord Mansfield, Horatio lord Walpole, Thomas lord Hyde, Vere lord Vere, William lord Ponsonby, Andrew lord Archer, Henry lord Ravensworth, Matthew lord Fortescue, Thomas Bruce lord Bruce, Edward lord Sandys, George lord Edgecumbe, Henry Frederick lord Chedworth, Francis lord Godolphin, Thomas lord King, Robert lord Romney, Thomas lord Middleton, Edmund lord Boyle, Charles Schaw lord Cathcart, William lord Craven, John lord Clifton, Henry lord Paget, George lord Willoughby of Parham, John Peyto lord Willoughby de Broke, George lord de Ferrars of Chartley, George lord Abergavenny, Francis lord Le Despencer. Guilty, upon my honour.

Charles viscount Maynard, Thomas viscount Wentworth, George viscount Torrington, Frederick viscount Bolingbroke and St. John, David viscount Stormont, Thomas viscount Weymouth, George viscount Townshend, Richard viscount Say and Sele, Anthony Joseph viscount Montague, Edward viscount Hereford. Guilty, upon my honour.

Wills earl of Hillsborough, John earl Spencer, Jacob earl of Radnor, Robert earl of Northington, Henry earl Fauconberg, Henry earl of Darlington, Philip earl of Hardwicke, Richard Grenville earl Temple, William earl Fitzwilliam, John earl of Buckinghamshire, George earl Brooke, William earl of Harrington, Thomas earl of Effingham, John earl of Ashburnham, John earl Waldegrave, John earl Ker, Thomas earl of Macclesfield, Philip earl Stanhope, Henry earl of Sussex, Heneage earl of Aylesford, Charles earl of Tankerville, William earl of Strafford, Edward earl of Oxford and earl Mortimer, Niel earl of Rosebery, Hugh Hume earl of Marchmont, John earl of Breadalbane, George earl of Dalhousie, John earl of Loudoun, John earl of Galloway, James earl of Abercorn, George James earl of Cholmondeley, George Bussy earl of Jersey, George William earl of Coventry, William Henry earl of Rochford, Richard Lumley earl of Scarborough, Other earl of Plymouth, Henry earl of Gainsborough, Frederick Augustus earl of Berkeley, Henry earl of Doncaster, Frederick earl of Carlisle, William Anne Holles earl of Essex, John earl of Sandwich, Sackville earl of Thanet, George earl of Winchelsea and Nottingham, George Harry earl of Stamford, Basil earl of Denbigh, Henry earl of Suffolk and Berkshire, Francis earl of Huntingdon, Edward earl of Derby. Guilty, upon my honour.

Francis Seymour earl of Hertford, lord chamberlain of the houshold. Guilty, upon my honour.

William earl Talbot, lord steward of the houshold. Guilty, upon my honour.

Charles Watson marquis of Rockingham. Guilty, upon my honour.

Hugh duke of Northumberland. Guilty, upon my honour.

Henry Fienes Pelham duke of Newcastle.

Guilty erroneously, but not intentionally, upon my honour.*

Francis duke of Bridgewater, John Frederick duke of Dorset, James duke of Chandos, George duke of Manchester, William Henry Cavendish duke of Portland, Alexander duke of Gordon, George duke of Marlborough, William duke of Devonshire, Harry duke of Bolton, George duke of St. Albans, Henry duke of Beaufort, Augustus Henry duke of Grafton, Charles duke of Richmond. Guilty, upon my honour.

William earl of Dartmouth, lord privy seal. Guilty, upon my honour.

Granville Leveson earl Gower, lord president of the council. Guilty, upon my honour.

His royal highness Henry Frederick duke of Cumberland and Strathern. Guilty, upon my honour.

Then the Lord High Steward, standing uncovered at the chair, laying his hand upon his breast, said,

L. H. S. My lords, I am of opinion that the prisoner is Guilty, upon my honour.

L. H. S. My lords, all your lordships have found the prisoner Guilty of the felony whereof she stands indicted, one lord only excepted; who said, that she was guilty—'erroneously, but not intentionally:' is it your lordships' pleasure that she should be called in and acquainted therewith?—*Lords.* Ay, ay.

Proclamation was then made for the deputy-usher of the black rod to bring her grace the duchess of Kingston to the bar; which was done. Afterwards proclamation was made for silence, as usual.

L. H. S. Madam, the lords have considered the charge and evidence brought against you; and have likewise considered of every thing which you have alleged in your defence; and, upon the whole matter, their lordships have found you guilty of the felony whereof you stand indicted. What have you to allege against judgment being pronounced upon you?

The duchess of Kingston delivered a paper, wherein her grace prayed the benefit of the peerage according to the statutes.

Then his grace the Lord High Steward asked the counsel for the prosecution, whether they had any objection to the duchess's claim of the benefit of the peerage?

Att. Gen. My lords, not expecting to be called upon, I did not attend to the form of words used by the prisoner. However, I understand, that she claims the benefit of the statutes; not confining herself, I suppose, in the form of her claim, to one statute; but alleging herself to be a peeress, claims the benefit of both; meaning to insist, that the act, which exempts women from judgment of death, is to be construed with reference to that, which allows clergy to lords of parliament.

My lords, upon this claim I suppose two questions will naturally arise; one, whether it be competent in her situation to claim that judgment, or an analogous judgment to that, which would have been pronounced upon a lord in parliament convicted of the like offence; the other, what would be the extent, or possible extent of that judgment upon a lord of parliament, so convicted.

My lords, I speak to both these questions; because I conceive, that, without aggravating the offence, I may fairly assume, that all the qualifications, which were put upon it, have been fully and effectually proved; the marriage; the issue of that marriage; the fraud upon public justice; the additional aggravation, that it was no less a surprize upon the duke of Kingston, than a scandal to the rest of the world.

This being the true state of the case, it must occur to every noble lord's mind, that the laws of this country would be considerably disgraced, if it were possible to state to such a court such a crime, attended with all its circumstances and qualifications, as an object of perfect impunity.

In this point of view, I shall take it for certain, that, if I can establish in the judgment of your lordships my own firm persuasion, that this claim to avoid judgment of death cannot be made under the statute of Edward 6, or with any reference to it, but must resort to the act of William and Mary, I shall then have laid before your lordships that opportunity, which justice, undoubtedly, will be desirous to lay hold on, of pronouncing a judgment somewhat more adequate to the offence; though perhaps, in the opinion of many, far enough from adequate. Or, if, contrary to my present thoughts, she may claim any benefit from the first statute, yet the act of Elizabeth will enable your lordships to make some slight satisfaction to the law for so enormous a violation of it.

My lords, this I take to be a clear proposition, that, from the beginning of time to this hour, clergy was never demandable by women. By the ancient law of the land this privilege was so favourably used, that reading was sufficient proof of clergy: and all were taken to be clerks, who lay under no indispensable impediment to receive orders. This rule is laid down in all the books. Several statutes, nay the Provincial Constitution of 1531, adopt the distinction thus made between persons in holy orders, and other clerks, or lay clerks. But women were under this indispensable impediment. They might be professed, and become religious; but even a nun could not claim this privilege. This is proved by the same books: and lord Hale puts the case of manslaughter, where the husband shall have his clergy, and the wife no privilege. The statutes, which exempt women from judgment of death, expressly recite, that they were not entitled to clergy; and distinctly provide a new and different species of exemption.

Having reminded your lordships of this

* See vol. 19, p. 669.

clear rule in the law, I shall take up the statutes, which are material to this argument, in their order of time. This will lead me to consider; first, what is the true nature and extent of that exemption from capital punishment, which his clergy gives to a lord of parliament, by the first of Edward the 6th, and the 18th of Elizabeth; secondly, whether the 21st of James, or the third and fourth of William and Mary, contain any reference to those other laws.

In order to explain the true effect of the statute of Edward the 6th, I shall consider the situation in which the peerage stood with respect to clergy at the time of making it. I say, the situation of the peerage as to clergy; because it will not be doubted, I suppose, that they were entitled to this valuable privilege in common with others. So peculiar and cruel a distinction could not have remained in perfect silence for such a number of years. Nor, if they had been entitled to claim it upon peculiar terms, would those have been unnoticed. Besides, if there be no evidence of such a privilege at any time, how can it be claimed now?

Although the allowance of clergy was setting aside the conviction as to the person of the offender, his goods remained forfeit, and the king seized his lands under the record. By the 4th of Hen. 7, c. 13, it was to be allowed but once; and the convict was to be branded in open court, before the judge. And in the very year of the statute now under consideration, a long list of offences was deprived of it; and, even where it remained, slavery, with an iron yoke, was inflicted on the convict, as a vagabond.

It was thought too much to leave the lords of parliament exposed to those cruel and shameful stigmata; especially in cases, where they might make purgation and so be restored to the exercise of their high functions. Nay, in such instances even forfeiture was thought too much. It was also conceived by their lordships, that, in their case, capital punishment had extended too far. It was also thought proper to deliver a lord of parliament from the necessity of proving his title to clergy in the ordinary way. Therefore by the 1 E. 6, c. 12, § 14, it was enacted, "That in all and every case and cases, where any of the king's majesty's subjects shall and may, upon his prayer, have the privilege of clergy, as a clerk convict, that may make purgation; in all those cases and every of them, and also in all and every case and cases of felony, wherein the privilege and benefit of clergy is restrained, excepted, or taken away by this statute or act (wilful murder and poisoning of malice prepensed only excepted) the lord and lords of the parliament, and peer and peers of the realm, having place and voice in parliament, shall, by virtue of this present act, of common grace, upon his or their request or prayer, alledging that he is a lord or peer of this realm, and claiming the benefit of this act, though he cannot read, without any burning in the hand, loss of inheritance, or corruption of his blood, be adjudged, deemed, taken, and used, for the first time only, to all intents, constructions, and purposes, as a clerk convict, and shall be in case of a clerk convict, which may make purgation, without any further or other benefit or privilege of clergy to any such lord or peer from thenceforth at any time after for any cause to be allowed, adjudged, or admitted; any law, statute, usage, custom, or any other thing to the contrary in any wise notwithstanding." More shortly thus—At present, men prove their clergy by reading; and must forfeit, and be branded, before it may be obtained. For the future, all cases, where any of the king's subjects may now obtain privilege, as a clerk convict, who may make purgation, a lord of parliament, without reading, burning or forfeiture, shall be adjudged and used as a clerk convict, who may make purgation. All that was harsh in the law, was taken off the peerage: all that was left was privilege. The trial by the bishop and his clerks (which differed from trial by peers, no more in the case of a lord than of a commoner) was not substituted in the place of legal trial, but superadded to it, for his advantage. This was the only way, which had then been thought of, in any case, to avoid judgment of death. The reason of the thing, and the express letter of the statute unite to prove, that, till the eighteenth of Elizabeth, a lord of parliament, convicted of a clergyable crime, and being capable of purgation, must have been deemed and treated as a clerk convict, who might make purgation, and delivered over to the ordinary for that purpose.

The learned and laborious Staunford, our ablest writer, at least on this branch of the law, treats it as a thing without question. Fol. 130. "A lord shall have privilege of clergy, where a common person shall not have it. He ought to make purgation; and if so, he must be delivered to the ordinary, to be kept, till he has made his purgation. If he confesses, abjures, or is outlawed, he cannot have the benefit of this statute; because he cannot make purgation." Staunford flourished when this statute was made; wrote a few years after; and died before the eighteenth of Elizabeth. His therefore is a contemporary exposition of it, unentangled with the casual phrase of any subsequent act.

Hale, in his second volume, fol. 376, where he seems to differ from Staunford, as to the extent of the statute, agrees with him as to the nature of the privilege; which he calls The Clergy of Noblemen. At one time, judges would not deliver clerks to the ordinary, who had become incapable of purgation, by confession or otherwise. The church alleged, that nothing done before an unlawful judge was sufficient to sustain their process, or sentence. Whereupon the *Articuli Cleri* [See vol. 2, p. 131], provided, that all clerks shall be delivered to their ordinaries. But they were delivered, in the instances mentioned by Staunford, *absque purgatione faciendâ.* Now the case put in the

statute is, where any man may have the privilege of clergy, as a clerk convict that may make purgation. And a lord of parliament, being in the same predicament, was put in the case of a clerk convict that may make purgation, without reading or undergoing the pains which attended a commonor under these circumstances. Staunford therefore thought, that these exemptions did not reach to the case, where, before the statute, there could be no purgation for any man. And the opinion was so probable, at least, that a very eminent lawyer, of unexceptionable character, in the time of the great rebellion, actually burnt a peer, who confessed. Hale doubts; especially at this day, when delivery to the ordinary and purgation are both taken away by the eighteenth of Elizabeth. It is not obvious what difference that makes. "I think," says he, "it was never meant, that a peer of the realm should be put to read, or be burnt, where a common person should be put to his clergy." Both agree, that the peer should have had his clergy, and have been delivered to the ordinary, and have made purgation, exempt from the concomitant penalties; in some cases, says Staunford; in all, says Hale. But even Hale makes no doubt of peers being liable to imprisonment.

In the trial of lord Warwick, the chief justice lays it down, that the statute of Edward 6 exempted peers from the penalties of burning, and repealed the statute of Henry 7, as to so much. Then a peer was liable to burning before; and by the act of Henry 7, which, in terms, puts it upon persons admitted to their clergy. But how could it be seriously argued, that a thing so anxiously repealed never existed? I have consulted on this occasion as many books as I could think of referring to; and I do not recollect one, which supposes a time when a peer had not the benefit of his clergy.

Nothing, it must be confessed, could be more unprincipled, and incongruous, than to suffer the truth or justice of a conviction at common law to be questioned in the Ecclesiastical Court. But the church had not then lost its hold upon men's minds; nor would, probably, for some ages, but for its own glaring misconduct.

The trial called purgation, as it was had in the bishop's court, was a ridiculous mockery of justice; or became serious, only by the perjury which it produced. It was therefore abolished. But simply to abolish it would also have cut off that imprisonment, which followed a conviction in the bishop's court, and which (it should have been presumed) would always follow actual guilt. To remedy which, it was thought fit to give the court authority to punish by imprisonment for any time less than a year. This was proper in all cases; but particularly so in the cases of peers, and persons in holy orders, who were not liable to burning in the hand. It was therefore enacted by the eighteenth of Elizabeth, c. 7, s. 2, and 3, "That every person and persons, which at any time, after this present session of parliament, shall be admitted and allowed to have the benefit or privilege of his or their clergy, shall not thereupon be delivered to the ordinary, as hath been accustomed; but, after such clergy allowed, and burning in the hand according to the statute in that behalf provided, shall forthwith be enlarged, and delivered out of prison, by the justices, before whom such clergy shall be granted, that cause notwithstanding.

"Provided, nevertheless, and be it also enacted, that the justices, before whom such allowance of clergy shall be had, shall and may, for the further correction of such persons, to whom such clergy shall be allowed, detain and keep them in prison, for such convenient time, as the same justices in their discretion shall think convenient; so as the same do not exceed one year's imprisonment; any law or usage, heretofore had or used to the contrary notwithstanding."

The effect of these words, 'shall forthwith be enlarged and delivered out of prison, that cause notwithstanding,' is to give the person so enlarged exactly the same state and condition which he would have obtained, under the former dispensation of law, by going through the process of purgation, and so being delivered from the offence. This part of the act carries a great effect upon the construction of the whole. In conversation, I have heard the words, 'after burning in the hand,' supposed to be the phrase, upon which some doubt might turn, whether peers are included in the act. But, in the construction of such a statute, it is not enough to find a phrase, upon which some doubt might turn. It would be fitter for those who conceive the doubt, to proceed at least one step further; and state, to what extent their doubt goes. Is it doubted, whether purgation be taken away in the case of a peer, and the peer be restored to his law without it? Will any gentleman argue, that, at this day, a peer convicted of a clergyable crime, shall not be forthwith enlarged; but must be delivered to the ordinary to make his purgation? This point, I believe, never has, nor ever will be argued. If he is not to undergo purgation, *quo jure* is he exempt? Does any other statute exempt a peer from his purgation, or discharge him from his attainder, but this general statute of the eighteenth of Elizabeth; which, in its large phrase, comprehends every body? I protest I know of none. Or, does this statute exempt any, but those, who shall be thereafter admitted to clergy? The words, 'after burning in the hand,' do not make an essential or necessary article in the description of the persons to be discharged; nor create any term, or condition, upon which the discharge is to obtain. The description of the persons to be discharged is absolved in these words, 'all persons who shall be allowed the benefit of their clergy.' They are to be discharged absolutely. But when? and in what manner? Why, after the allowance of clergy, and burning in the hand

'according to the statute;' which is to say, in the cases provided by the statute; of which the case of a peer is not one.

The whole consequence is no more than this, that, in a case circumstanced like the present, where the honour of the law and the purity of manners require some example to be made, your lordships may follow the bent of your discretion, by resorting to the last clause in the 18th of Elizabeth. This I say, upon a supposition, that some peer stood convicted of the like offence, with similar aggravation; or that, upon the rest of the argument, it will be possible to give any woman the benefit of any statute, *pari ratione*, as peers have the benefit of clergy, under the first of Edward 6. But I hope to prove soon, that it is impossible to construe the subsequent statute in that manner. Consequently there will be due to this crime a very different sort of punishment than that which I have alluded to.

It will hardly be said, that these statutes relate to women of any condition. The expression excludes them distinctly enough. If that had been more general, the subject matter excludes them absolutely. They are no more clerks, than lords of parliament. They never underwent purgation; nor were delivered to the ordinary; they were therefore incapable of receiving these privileges: for these acts were merely to regulate an old right, not to give a new one. Both the statutes, which gave them their exemption, recite it as a general proposition, that women were not entitled to clergy. Nor have I even seen any statute, case, or book, wherein any condition of women is supposed exempt, but by virtue of the laws I shall state presently. It remains then to be considered, whether the exemption provided by those laws, has any reference to the statute of Edward 6.

The first statute, which exempts women from capital punishment in any case of felony is the twenty-first of James 1, c. 6, which runs thus: "Whereas, by the laws of this realm, the benefit of clergy is not allowed to women convicted of felony; by reason whereof many women do suffer death for small causes; be it enacted by the authority of this present parliament, that any woman, being lawfully convicted by her confession, or by the verdict of twelve men, of, or for the felonious taking of any money, goods, or chattels above the value of twelve-pence, and under the value of ten shillings; or as accessary to any such offence; the said offence being no burglary, nor robbery in or near the highway, nor the felonious taking of any money, goods, or chattels, from the person of any man or woman privily, without his or their knowledge, but only such an offence as in the like case a man might have his clergy, shall, for the first offence be branded, and marked in the hand, upon the brawn of the left thumb, with a hot burning iron, having a roman T upon the said iron; the said mark to be made by the gaoler openly, in the Court, before the judge; and also to be further punished by imprisonment, whipping, stocking, or sending to the house of correction, in such sort, manner, and form, and for so long time (not exceeding the space of one whole year) as the judge, judges, or other justices, before whom she shall be so convicted, or which shall have authority in the cause, shall, in their discretion, think meet according to the quality of the offence, and then to be delivered out of prison for that offence; any law, custom, or usage to the contrary notwithstanding."

This statute at least excludes all colour of reference to the first of Edward 6. Any woman convicted of grand larceny (if it be but a simple felony, clergyable in a man) shall be burnt. She was not put to demand benefit of the statute; to pray her clergy would have been too absurd; but, the larceny being stated in the record to be committed by a woman, judgment was forthwith entered of burning, and so forth. The statute is, moreover, confined to such larcenies, where, in the like case, a man might have his clergy. I take notice of these words at present, only for the sake of remarking that, in this statute, at least, they must relate to the quality of the offence, not to the condition of the offender.

My lords, the only statute, of which the prisoner can claim the benefits against judgment of death, is the third and fourth of William and Mary, c. 9, s. 6, which runs in these words: "And whereas, by the laws of this realm, women convicted of felony, for stealing of goods and chattels of the value of ten shillings, and upwards, and for other felonies, where a man is to have the benefit of his clergy, are to suffer death; be it therefore enacted and declared by the authority aforesaid, that, where a man, being convicted of any felony, for which he may demand the benefit of his clergy, if a woman be convicted for the same or like offence, upon her prayer to have the benefit of this statute, judgment of death shall not be given against her upon such conviction; or execution awarded upon any outlawry for such offence; but shall suffer the same punishment as a man should suffer that has the benefit of his clergy allowed him in the like case; that is to say, shall be burnt in the hand by the gaoler, in open court, and be further kept in prison for such time as the justices in their discretion shall think fit, so as the same do not exceed one year's imprisonment." Under this act, to avoid judgment of death, the prisoner must pray the benefit of this statute.

I collect from conversation, perhaps too idle to be referred to, that the argument will be laid thus. A woman convicted of a felony which would be clergyable in a man, shall suffer the same punishment as a man would in the like case, that is, as a man of the same condition with herself: but a peer would suffer no punishment: therefore a woman of that condition shall suffer none.

The words, 'in the like case,' must mean the same here, as in the twenty-first of James, 'convicted of the like offence.' And the words 'of

the same condition' must be wholly superadded, if they are admitted at all. But it is impossible to conceive, that, if the legislature had meant to create so important a distinction between different orders of women, it would have used no words for that purpose. Nor, indeed, can such a distinction be so created by any operation of law.

If, in favour of the prisoner, the slightest degree of punishment, which any man can suffer in the like case, is to be intended, every woman would claim exemption from burning, because inferior ecclesiastics are not burnt; and from forfeiture, because lords of parliament are neither burnt nor forfeit. But this absurd construction happens to be thrown out by the act itself, which appoints the punishment, it means, to be burning and imprisonment. The statute therefore will not suffer it to be understood, that any woman convicted of any felony, shall suffer no other punishment, than those who, it is now contended, are to suffer no punishment at all.

Upon these grounds I submit to your lordships, that the judgment to be pronounced upon every woman, of whatever quality or denomination, is that, which is prescribed by the third and fourth of William and Mary; and that there is no ground or warrant of law to insist, that a peeress can avoid judgment of death upon any other terms.

My lords, the whole question is upon burning. The imprisonment is the same either way. Now, if there be prudence or propriety of any sort in establishing such an exemption for peeresses, let that prudence or propriety be stated, where by the constitution of this country such an application ought to be made, to parliament. If the parliament should think fit to create new privileges, or add new distinctions to any order of men, or women, they are competent to do it. But it would be assuming too much for any court of justice. Your lordships sit here merely as a court of justice, not as a house of legislature. To do that by forced and arbitrary interpretation of law, which ought only to be done by act of legislature, is too much enhancing the prerogative of the judge; and too much confounding those authorities, which ought to have plainer marks and broader limits set between them.

Mr. *Wallace.* My lords, I did not suppose it would have fallen to my share to give your lordships any trouble upon this subject; and therefore I have not very lately looked into the statutes which have been mentioned; but I will state to your lordships in general, what I understand to be the privilege of peeresses at this day.

By the 20th Hen. 6, chap. 9, to obviate doubts which had arisen upon Magna Charta, peeresses are put upon a footing with peers with respect to trial and punishment; and by an equitable construction, peeresses by titles since created, as marchionesses and viscountesses, are within the act.

At the time of passing the act of Edward the 6th, the lords of parliament are mentioned, which at that time of day comprehended the whole peerage. In this situation were peers at the time of passing the statute of the 18th of Elizabeth, which statute cannot relate to them. Every person, who is to be admitted or allowed to have the benefit or privilege of clergy, should not after burning in the hand be delivered to the ordinary, as has been customary, but may be detained in prison. This provision clearly refers to the situation of commoners, and not of peers: it refers to those who were at the time of making the act liable; whereas peers were not in that condition; they were not to pray their clergy, but the benefit of that act, and to be delivered out without burning in the hand. The direction given by the act is to justices: an expression never applied, I believe, in any act to the lords in parliament sitting in their judicial capacity as a criminal court: the justices are to keep such persons in prison after they are burnt in the hand; which is a demonstration that inferior courts are alluded to; and it is under this statute imprisonment is inflicted upon persons intitled to their clergy.

At the time of passing the statute of the 3d and 4th of William and Mary, peers were exempt from burning in the hand and imprisonment in clergyable cases, which commoners were subject to. By this law women are put on the same footing with men, and the courts before whom they are tried are to inflict the same punishment as they are authorized to do upon men. These provisions make it, in my apprehension, extremely clear, that the peeresses were intended to be placed in the same condition with peers, as they were by Magna Charta, explained by the statute of Edward the 6th. Would it not be the most harsh and cruel interpretation, if the act was even doubtful, to subject a peeress to a punishment for the same crime which her husband is exempt from? The conditions of persons create distinctions in the construction of laws; but the attempt now made is to confound all ranks, and by supposed literal interpretation to involve one of your lordships' own situation in the punishment, which the legislature has been so anxious to extricate you from.

Mr. *Mansfield.* It is not till this moment, that I had any apprehension myself, that any question of this sort would be agitated before your lordships; and therefore I can only speak of the several statutes referred to from my general memory of them; but I apprehend that the construction of these statutes will not, cannot be such as is now contended for on the part of the prosecutor. The object of the construction wished by the prosecutor is this: that the laws of this country are to make a difference between one sex and the other; that they are now at this time of day to be so determined as to inflict a more severe, a more cruel punishment upon a woman than on a man, though

the offence committed be the same. Now, such a construction your lordships would never suffer, nor any court of justice in this country would suffer to take place, unless there should something be found in the law which necessarily requires it: and taking the several statutes together relating to this subject, I apprehend your lordships will be of opinion, that these statutes do not only not require, but that they exclude, such absurdity, such inhumanity.

My lords, the statute upon which the whole must be founded, as I conceive, is that of the 20th of king Henry the 6th, which, as well as I recollect from my memory, is ch. 11, which first provides expressly, though I believe it is considered only as a declaration of the common law, but provides, that peeresses should be tried, and, if I recollect the words rightly, should not only be tried, but should be judged in the same manner as peers: and remembering what has happened upon that statute, I must put your lordships in mind, that such has been the benignity of the construction upon it, that though only three ranks of peeresses are named, it has been clearly held in construction to extend to all. The three that are mentioned, I think, are duchesses, countesses, and baronesses. The construction is, that it extends to marchionesses and viscountesses, because they are intitled in the spirit and meaning of the law to the same privilege which is given to the other ladies by name. The clear result and effect of this statute is, to say in general terms, that women of that high rank should be tried and should be judged in the same manner as men. The terms used in the act are general. Whoever reads that law, will be astonished to hear any man contending, that in imposing judgment upon a peeress, your lordships are to be guided by a different rule from that which you would follow if you were passing judgment upon a peer. The next statute to be considered after this, as a general statute upon the subject, is that of the 3d and 4th of king William the third. Did that statute mean,—were the legislators that made it so forgetful of what was due to humanity, and to themselves and their own characters, as to mean,—that a distinction in punishment should prevail between one sex and the other, to the prejudice of that which is intitled to the greater indulgence and compassion? Most certainly not; because the express provision of that statute is, that women convicted of offences intitled to the benefit of clergy should suffer in the same manner as men would suffer convicted of the same offences.

My lords, no man, who can read that statute, and reason upon it, can help concluding that it was the object of that law to say, that where women were convicted of clergyable offences, they should be in as good a situation as men who were convicted of the like.

My lords, taking these two statutes of the 20th of Henry the sixth providing for the trial and judgment of peeresses, and the general statute of the 3d and 4th of William the third giving the benefit of clergy to women, I should think it impossible to say, that peeresses convicted of a clergyable offence were not to have precisely the same privileges as peers convicted of such offences.

My lords, if there be any rule of construction in the law, which is indisputable, for expounding statutes, it is this; that statutes, as we say, *in pari materiâ*, relating to one subject, are to be considered as one law, taken and interpreted together as throwing light one upon the other: no rule of construction is better established. Follow that rule of construction here. Take first the general law for the trial of peeresses and the judgment of peeresses in the same manner as of peers; then take the general law, giving the benefit of clergy to women in the same manner as to men; and who will not say, that that rule of construction does not necessarily tend to put both, upon the rank of men and women, in the same condition, when convicted of the same species of offence? But what are the particular acts of parliament, which have been referred to as requiring a different construction? By the first of Edward the sixth, it is extremely clear, that peers are not to undergo the ignominious punishment of burning. The statute that follows that of Edward the sixth, is the 18th of Elizabeth, which takes away the delivery to the ordinary, substitutes burning in its place, and then gives a power to imprison. Whoever reads that act, will see that it certainly was confined to cases, where punishment was to be inflicted by justices upon persons of an ordinary description, not persons of the rank of peers; and the statute strictly and clearly relates only to persons so having clergy allowed, as is prescribed by that statute: and if the 18th of Elizabeth is to have the construction which is contended for, I understand it must have effect also to inflict the punishment of burning upon peers. So much, my lords, for the statute of the 18th of Elizabeth. The 21st of king James was mentioned as first in part giving clergy to women: the 3d and 4th of king William the third is mentioned as alluding to it. It does so, but the provisions of the 3d and 4th of king William the third are general, that is, a general law extending the benefit of clergy to women in all cases. Now it is said there, that they shall have the same punishment as men; they are to be in the like situation as men. Then the act goes on to say, that is to say, burning and imprisoning.

My lords, what is the fair construction of this law? Why, that women shall be in the same situation as men; and where men are of such condition, that they would be burnt in the hand, that they would be liable to be imprisoned, women in like manner should be subject to burning in the hand, and should be subject to imprisonment: but no one ever heard, that the severe part of a law inflicting a punishment should be extended so by construction, where it was not so expressed. Now you must not against the clear provision of that law, that women should be in the same situation as

men, if you were to say, that a peeress convicted of a clergyable offence should either undergo the punishment of burning, or the punishment of imprisonment. No one can say upon the statute of Edward the sixth, that they are subject to either. The object of the statute of William the third was to make the punishment of such offenders precisely the same with regard to one sex as the other; and the true spirit and great object of that law must be directly acted against, if a peeress was to be put in a different situation from that of a peer, and to have a more severe and cruel punishment inflicted upon her, than would be upon him. These are the only general observations that occur to me now in taking the whole scope of the law: I therefore submit to your lordships, that the noble lady at the bar is entitled to the benefit of these statutes.

Attorney General. My lords, concerning the point which is now depending before the House, I fairly confess, that, when your lordships first called upon me to give my reasons why judgment of death should not be suspended upon the prayer of the prisoner, made in the manner in which that prayer was conceived, and upon the effects and consequences of allowing her the benefit of the statute in a more regular course, I would rather, if I might, have been excused from laying my thoughts before your lordships. I had heard a rumour, that men, whose learning and authority I greatly reverence, held a different opinion. This could not fail to raise much distrust of my own conclusions, although I had thoroughly considered the subject; and although I never read any proposition with more perfect conviction of the truth of it, since I learnt to read.

My lords, that idea, the only one I have been able to form, or adopt, is now very much strengthened. That cloud, which came over it from the rumoured prevalence of contrary notion, is very much removed. Because, if there be no opinion to the contrary, but what is to be founded on the argument I have heard to-day from those who are best able to sustain the contrary opinion, I am perfectly satisfied, it is impossible this should pass as a point of law, or receive the sanction of your lordships' concurrence.

My lords, what are the arguments? First, it is utterly inconceivable, that the law should put such difference between the two sexes. My lords, if the subject was laid by for a moment, only to make a handsome compliment to a very respectable part of this assembly, which well deserves all the attention it commands, it is impossible to quarrel with a turn of gallantry. But, resuming the subject, we are all agreed, that the law did actually put that very difference between the sexes for many centuries. And this uncourtly statute of Edward the sixth, proceeding upon the law as it found it, did not think of abolishing the distinction. It was quite beside the purpose of that act, which did not mean to qualify the severity of the criminal law in general, much less to make an equal distribution of it among the subjects at large. But, taking the law as it stood, it was found inconvenient, incompatible, and shocking to reason, that lords of parliament, who were to give their voices upon the most arduous affairs of a great empire, should do so under apperent stigmata and circumstances of open infamy. I don't rely on the gender of the words, but on the purpose of the act. Women are excluded by both. They were neither liable to the stigmata, nor held the high office which made them intolerable. Therefore bishops, whom the 28th and 32nd of Henry the 8th had, at that time, made liable to the whole case of other clerks convict, were included: women certainly not. The privilege was given, not to the peerage, but to the house of parliament, to be claimed by the members as such. It was not substantive; but an ingrafument on the right to clergy, which women never had. In truth, I have not heard a hint from the counsel on the other side to question the existence of this difference down to the third and fourth of William and Mary, upon which act they have chiefly relied in argument. They lay it down, that peers convict of clergyable crimes are exempt from all punishment, not being within the 18th of Elizabeth; that peeresses are to be tried and judged like peers; that the 3d and 4th of William and Mary puts women convict in the same condition as men; and that by some tacit reference to the former statutes, peeresses convict are not to be punished at all.

I have troubled your lordships already with my reasons for thinking, that in old time, peers enjoyed the benefit of clergy in common with other men, and upon the same terms; that in the 4th of Henry the 7th, burning was inflicted upon them as lay-clerks; that the statute of Edward the 6th, in the very moment of exempting them from the penalties incurred at law by conviction, adjudges them clerks, and delivers them for purgation in the bishop's court; that the statute of Elizabeth delivers all, who shall thereafter be admitted to clergy, from purgation, and discharges them, subject to such correction by imprisonment for less than a year, as the Court shall think fit.

It is not denied, that these words, in their plain and natural sense, embrace the case of peers. But, in this context, it is supposed they do not, because the clerks convict are to be discharged after allowance of their clergy, and after burning in the hand according to the statute. This last provision, they say, cannot refer to peers. Nay, one learned gentleman thought, that, if it should be construed to include peers, they must, by force of these words, be burnt in the hand.

I cannot follow this idea. I have no way of conceiving, how an act which inflicts, or rather reserves a penalty, according to the law as it then stood, can be interpreted to create a new penalty; or, by what chain of reasoning it is concluded, that where all convicts are to be discharged upon the allowance of clergy, and such burning as the law directs, these are not

to be discharged at all, for whom the law has not directed burning. Suppose the king should pardon the burning; it was thought, in lord Warwick's case, that would be a perfect discharge. Burning was not substituted in the place of purgation: that was a mere slip: it is contrary to the history: burning existed before the 18th of Elizabeth, in just the same extent as after. Imprisonment, at the discretion of the temporal judge, was the substitute for purgation; and is extended expressly to all, who are discharged from purgation. But it seems too late to argue this. Was it not expressly decided in the case of Searl and Williams, when prohibition went to stay the deprivation of a parson, who had been convicted of manslaughter, and discharged under the 18th of Elizabeth, although he could not be burnt? "For when the statute says after burning, it imports, where burning ought to be; otherwise the statute would do no good to clerks, for whom it was most intended." The case is reported in Hobart. The statute speaks universally of every body, those who were, and those who were not liable to burning; and discharges them all, after allowance of clergy, and burning according to law, as it had stood before; that is, 'reddendo singula singulis.'

The next objection is, that the word 'justices' will not apply to your lordships, even while you are sitting merely in the characters of judges. Therefore a statute, which is to be executed by justices, cannot relate to a peer, who is not triable by justices.

Is it then seriously contended, that your lordships, exercising your jurisdiction in the trial of a peer, will not do all the same acts of justice, which judges must do in the trial of a commoner? Upon reading many acts of parliament, your lordships will find, either, that you have no jurisdiction at all, or that you must exercise it under the character and denomination of justices. The same objection might have been made to lord Ferrers's execution;* the same to the burning a peer under the statute of Henry the 7th. By the word 'justices' I understand, in our law, all manner of officers who are entrusted with the administration of justice. So Spelman defines the word. In high antiquity, the name went to the greatest subject in this country; for I take the 'Justitiarius totius Angliæ' to have been above the 'Seneschallus regis.' Your lordships therefore will not disdain the name; for you sit here in no higher character than that, which, by just and natural construction, is attributed to the word 'justices.' Therefore, if no better objections can be raised than these, I apprehend the words of the statute sufficiently comprize the peerage. This also was laid down in the trial of lord Warwick.

But, my lords, if these are objections, whither do they go? Not only to subvert the statute of Elizabeth, in this most reasonable particular of giving some convenient correction, as the statute calls it, to a criminal found so upon record; but to restore a law, which has now for many ages been understood to be at an end; and I flatter myself, considering the account which the books all give of it, that purgation is at an end.

But I am called upon to look at the 20th of H. 6, c. 9. This was a mere declaratory law; reciting the 29th chapter of Magna Charta, 'nullus liber homo,' and so forth, and a very absurd doubt, whether 'homo' included both genders; and declaring, that "ladies shall be put to answer, and judged before such judges and peers" (here by the way judges and peers are synonymous) "as peers should be." But though, by Magna Charta, peeresses were to be tried by their peers, as other women were by theirs, there the privilege ends. All were, upon conviction, to receive the like judgment and execution: and, in the exemption from death, the difference was not between the ranks, but the sexes, of the convicts. And so the law undoubtedly continued, notwithstanding this statute.

But it was said, that, by the equity of this statute, marchionesses and viscountesses were included, though not named. This was to give countenance to the rule, that all statutes *in pari materiâ* shall be construed alike. There is great good sense in the rule. Marchionesses and viscountesses were clearly within the law declared; and consequently within the reason of declaring it: therefore duchesses, countesses, and baronesses were, by a sort of synechdoche, put for all peeresses. So where a privilege is saved to certain denominations of people, all others, who were before within the same privilege, will be within the saving, if there be nothing in the context to raise a distinction against them; particularly, if the saving be only declaratory, and not a positive exception. Nay, in a new law, things, equally within the reason of it, have been comprized in it by construction. But this borders upon arbitrary: parliament seems the properest judge of this reason. If peers, disqualified to vote, should claim the benefit of the 1st of Edward the 6th, it might be argued with some plausibility, that they are within the reason of the act. They are so certainly, in every point, except that of voting; and yet I should think it too much to overlook so material a distinction made by the statute itself. But if women, who were not concerned in any part of the subject matter, make the same claim, it would be making a perfectly new law to include them. Where then is the *paritas materiæ* between the act of William and Mary, for exempting women from capital punishment, and the 20th of Henry the 6th, which had nothing to do with punishment; or the 1st of Edward the 6th, which had nothing to do with women?

I did propose two statutes to be considered *in pari materiâ*, the acts of James and of William and Mary; the only two which confer upon any woman any exemption from capital punishment. I have not heard it denied,

* See his case, vol. 19, p. 885.

that if a peeress had stood convicted of the crimes mentioned in the first act, the punishment there specified must have ensued. This fixes the sense of these words, 'in the like case.' I am possessed therefore, of this ground, that the act of Edward the 6th did not touch the difference put by the law of clergy between the sexes; nor that of James make any difference as to the quality of the offender. We go entirely upon the act of William and Mary. It is inaccurate to say, this act puts women into the same condition with men; and still more, with men of the same quality respectively. There is nothing in it about the condition of the person. Where a man, convict of any felony, has clergy, a woman, convict of the like offence, shall not have judgment of death, but suffer the same punishment as a man would suffer, with clergy, in the like case. These words refer altogether to the quality of the offence. That very crime, which in one record, applied to a man, infers judgment of death, avoidable by his claim of clergy, applied in another to a woman, infers the specific judgment prescribed by the act. Nor are the two sexes put into the same condition, even as to punishment. All women avoided judgment of death; not so of all men. Some were indispensably incapable of holy orders: such cannot have their clergy at this day; nor had any other exemption from death before the 5th of Anne. Some could not prove their title to clergy by reading. Men could have their clergy but once: women the benefit of this statute *toties quoties*, till a subsequent act altered the law in this respect.

Still less can the words be twisted to create a difference as to the rank of the offender. It is hard, says a learned gentleman, to put the severest construction upon an act of this sort. The act is not penal. But the shorter answer is, there are not two constructions to chuse between. If the phrase had been left general, 'the same punishment as a man should suffer that had his clergy in the like case,' it might have been thought uncertain what that punishment should be; because different orders of men were liable to different measure of punishment in the like case; the bulk of men to forfeiture, burning, and discretionary imprisonment; inferior ecclesiastics to forfeiture and imprisonment; lords of parliament to imprisonment only. In such a text there might have been room to contend for a favourable construction; and yet, even then, I should have thought that the measure of punishment allotted to the bulk of mankind, undistinguished by peculiar privileges, must have been deemed the meaning of the legislature. But whatever might have been the construction of such a text, it must have applied equally to all women. They could not have been classed in casts, according to the condition of their respective husbands; the wife of a lord of parliament to be imprisoned; of an inferior ecclesiastic to be imprisoned and to forfeit; of other men to be imprisoned, to forfeit, and be burnt. The statute however has put an end to all question, by stating expressly the very measure of punishment allotted to all women.

Burnt in the hand in open court, it is said, shall not apply to peeresses, because they were never liable to be burnt at all. The position is true, not of peeresses alone, but of all women. But they were liable to judgment of death; for which this slighter punishment was a desirable commutation.

My lords, if there be any thing, in the nature of the punishment, unreasonable, or improper to be applied to women in general, or to noblewomen in particular, let the matter come before parliament. It is a legislative consideration, and parliament will entertain it according to the extent of the principle, which certainly will apply to many noblewomen of much higher rank than some peeresses, who, as the law now stands, are liable to that punishment. So, I think, they ought to remain. Guilt levels rank. A noblewoman, covered with the ignominy of such a conviction, cannot forfeit less than her estimation.

My lords, the only question is this: has any positive law granted the exemption now demanded, to wind up such a record as this with perfect impunity, a ridiculous disgrace to public justice? Has this been done in express terms; or in terms, whose necessary construction amounts to express?

My lords, when I have qualified the question in that manner, I have gone to the verge of judicial authority. And I do desire to press this upon your lordships as an universal maxim: no more dangerous idea can creep into the mind of a judge, than the imagination that he is wiser than the law. I confine this to no judge, whatever be his denomination, but extend it to all. And, speaking at the bar of an English court of justice, I make sure of your lordships' approbation, when I comprize even your lordships, sitting in Westminster-hall. It is a grievous example to other judges. If your lordships assume this, sitting in judgment, why not the King's-bench? Why not commissioners of Oyer and Terminer? If they do so, why not the Quarter sessions? Ingenious men may strain the law very far—but, to pervert it—to new model it—the genius of our constitution says, judges have no such authority, nor shall presume to exercise it.

The Lords then adjourned to the Chamber of Parliament;* and, after some time passed

* Die Lunæ, 22 Aprilis, 1776.

Ordered by the Lords spiritual and temporal in parliament assembled, that the following Question be put to the Judges, viz.

Whether a peeress, convicted by her peers of a clergyable felony, is by law intitled to the benefit of the statutes, so as to excuse her from capital punishment, without being burnt in the hand, or being liable to any imprisonment?

there the House adjourned again into Westminster-hall; when, after the usual proclamation for silence, his grace the Lord High Steward addressed the prisoner to the following effect:

Whereupon the Lord Chief Baron of the Court of Exchequer, having conferred with the rest of the judges present, delivered their unanimous Opinion upon the said Question, with his reasons, as follow, viz.

My lords; the question proposed by your lordships for our opinion is,

Whether a peeress convicted by her peers of a clergyable felony, is by law intitled to the benefit of the statutes, so as to excuse her from capital punishment, without being burnt in the hand, or being liable to any imprisonment?*

My lords, your lordships would probably expect, that on a question of this importance the judges would have desired time to have considered of it; but, as it was easy to foresee from the first appointment of this trial, that a question of this sort would probably arise, we have all looked into the several statutes, from which any light could be expected: and as on such a consideration we have been able to form an opinion, in which we all concur, we thought it our duty to deliver it immediately, and not obstruct the public business by unnecessarily protracting this trial, which has already taken up so much of your lordships' time.

I am therefore authorized by my brothers to say, we all concur in opinion, that a peeress convicted by her peers of a clergyable felony is by law intitled to the benefit of the statutes, so as to excuse her from capital punishment, without being burnt in the hand, or being liable to any imprisonment.

My lords, the question depends on several acts of parliament. The first I shall trouble your lordships with, is the 29 Hen. 8,† c. 9, which recites, "that by Magna Charta no freeman shall be taken, or imprisoned, or disseised of his freehold, or his liberties or free customs, or shall be outlawed, or in any wise destroyed, that is, forejudged of life or limb, or put to death, or shall be condemned at the king's suit, either before the king in his bench, that is, the King's-bench, or before any other commissioner or judge whatsoever, but by the lawful judgment of his peers, or by the law of the land; in which statute, (that is, Magna Charta,) no mention is made how women, ladies of great estate in respect of their husbands peers of the land, married or sole, that is to say, duchesses, countesses, or baronesses, shall be put to answer, or before what judges they shall be judged upon indictments of treasons or felonies by them committed or done; in regard whereof it is a doubt in the law of England, before whom and by whom such ladies so indicted shall be put to answer and be judged: our said lord the king, willing to put out such ambiguities and doubts, hath declared by authority aforesaid, that such ladies so indicted, or hereafter to be indicted of any treason or felony by them done or hereafter to be done, whether they be married or sole, that they thereof shall be brought to answer, and put to answer and judged before such judges and peers of the realm, as peers of the realm should be, if they were indicted or impeached of such treasons or felonies done or hereafter to be done, and in like *(autiel)* manner and form, and none otherwise."

Your lordships will observe, that this statute does not introduce a new law, but is a declarative law, explaining what the true meaning of Magna Charta was. 'Peers' in that statute means equals; and therefore any of the nobility must by Magna Charta be tried by the nobility who are their peers; for all nobility, whether barons the lowest, or dukes the highest degree of nobility, are all equals in this respect: and lord Coke, 2d Inst. 45, says, "though duchesses, countesses, and baronesses are only named in this declaratory statute, and marchionesses and viscountesses are omitted, notwithstanding, they are also comprehended in this 29th chapter of Magna Charta."

'Peers,' though originally meaning only equals, is now by common use applied to a particular part of the nation, distinguished from the rest by superior rank and privileges, which they derive from the king originally by writ or letters patent granted to them or their ancestors; and in cases of such ladies as are not so ennobled, they obtain that nobility by marriage to those who are so ennobled.

As the next statute, 1 E. 6, c. 12, s. 14, speaks of the benefit of clergy, it will be necessary to say something upon that subject. Lord Hale, in his second volume of his History of Pleas of the Crown, page 323, says, that "anciently princes and states converted to Christianity granted the clergy exemptions of places consecrated to religious duties from arrests for crimes, which was the original of sanctuaries; and secondly, exemptions of their persons from criminal proceedings in some cases capital before secular judges, which was the true original of this *privilegium clericale*. The clergy increasing in wealth, power, honour, number, and interest, claimed as a right what they at first obtained by the favour of princes and states, and by degrees extended these exemptions to all that had any kind of subordinate ministration relative to the church."

These exemptions never rose to so great an height in this kingdom as in other places; and therefore the clergy were not exempted here from civil suits, nor was this *privilegium*

L. H. S. Madam, the lords have considered of the prayer you have made, to have the benefit of the statutes, and the lords allow it you.

But, Madam, let me add, that although very

* See Leach's Hawkins's Pleas of the Crown, bk. 2, c. 33, s. 8.

† The stat. 20 H. 6, seems to be here intended.

little punishment, or none, can now be inflicted, the feelings of your own conscience will supply that defect. And let me give you this information likewise, that you can never have the like benefit a second time, but another offence of the same kind will be capital.

Madam, you are discharged, paying your fees.

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clericale allowed in the lowest crimes not capital, nor wherein they were not to lose life or limb, nor in high treason touching the king himself, or his royal majesty: but by 25 E. 3, c. 4, de Clero, in all other felonies the ordinary might demand the prisoner as a clerk, or the prisoner himself might demand the benefit of the clergy. "The canon law gave the privilege only to men in holy orders: our law, in favour to learning and the desire of the English bishops, extended it to lay clerks, i. e. any layman, that by reason of his ability to read was in a possibility of being made a priest." C. J. Treby, See vol. 13, p. 1015. The means of trying whether he was entitled to it was by reading. If he could read, he was delivered to the ordinary, that is, the bishop or the person who had ordinary jurisdiction there: but the ordinary was so much the minister of the temporal courts, and so subordinate to them, that if the ordinary refused to let the prisoner read, the temporal court could control, and order a book to be delivered to him; and if the ordinary said he could read when he could not, or *vice versa*, that he could not read when in reality he could, the temporal courts gave judgment according to the truth of the case; and those courts likewise directed, whether the prisoner should be delivered to the ordinary with purgation, or without purgation. In the last case they were to be kept in the ordinary's prison for life: if delivered with purgation, then the ordinary tried him for the fact whereof he was accused, by a jury of twelve clerks; and if he was acquitted, as was generally the case, he was discharged out of prison. Purgation was the convict's clearing himself of the crime by his own oath, and the oaths or verdict of an inquest of twelve clerks as compurgators. The proceeding was before the ordinary; and old books speak of their making proclamation for persons to come in against his purgation, and of their enquiring into his life, conversation, and fame, and of other formalities; in all which, several statutes say, there were great abuses.

The statute 4 H. 7, c. 13, reciting that "upon trust of the privilege of the church divers persons have been the more bold to commit murder, rape, robbery, theft, and all other mischievous deeds, because they have been continually admitted to the benefit of the clergy, as oft as they offended:" it enacts, that "every person not being within orders, which hath once been admitted to the benefit of his clergy, being again arraigned of any such offence, be not admitted to have the benefit or privilege of the clergy; and that every person so convicted for murder (which was then a clergyable offence) should be marked with an M on the brawn of the left thumb; and if he be for any other felony, to be marked with a T in the same place of the thumb; and those marks to be made by the gaoler openly in the court before the judge, before that such persons be delivered to the ordinary."

This statute prevented laymen having their clergy more than once; and the branding answered the purpose of discovering whether they had had the benefit of their clergy before, though it was necessary to prove it by other means, to prevent their having clergy a second time.

The 1 E. 6, c. 12, will come next to be considered; which, after repealing several new-created treasons and felonies, and taking away clergy in several other felonies, in sec. 14, enacts, that "in all and every case, where any of the king's majesty's subjects shall and may, upon his prayer, have the privilege of clergy as a clerk convict that may make purgation; in all these cases and every of them, and also in all and every case and cases of felony, wherein the privilege and benefit of clergy is restrained, excepted, or taken away by this statute (wilful murder and poisoning of malice prepensed only excepted) the lord and lords of the parliament, and peer and peers of the realm, having place and voice in parliament, shall by virtue of this present act, of common grace, upon his or their request or prayer, alledging that he is a lord or peer of this realm, and claiming the benefit of this act, though he cannot read, without any burning in the hand, loss of inheritance, or corruption of his blood, be adjudged, deemed, taken, and used, for his first time only, to all intents, constructions, and purposes as a clerk convict, and shall be in case of a clerk convict which may make purgation, without any further or other benefit or privilege of clergy to any such lord or peer from thenceforth at any time after for any cause to be allowed, adjudged or admitted; any law, statute, usage, or custom, or any other thing to the contrary notwithstanding: provided always, that if any of the said lords of the parliament, or any of the peers of this realm for the time being, shall fortune to be indicted of any of the offences limited in this act, that then they and every of them shall have his or their trial by their peers, as it hath been used heretofore in cases of treason."

From the time of this statute, whenever a peer has been convicted of any felony, for which a commoner might have the benefit of clergy, such peer, on praying the benefit of this statute, has always been discharged without burning or delivering to the ordinary: and there are a series of precedents from lord Morley's case, 1666, [vol. 6, p. 769], till one in this reign as late as 1765;* and C. J. Treby says,

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* See the Case of lord Byron in this Collection, vol. 19, p. 1178. See also more concerning benefit of clergy in vol. 12, p. 631, and the other cases and books there referred to.

L. H. S. My lords, this trial being at an end, nothing remains to be done here, but to determine the commission.

Lords. Ay, ay.

L. H. S. Let proclamation be made for dissolving the commission of High Steward.

Serjeant at Arms. Oyez! oyez! oyez! our sovereign lord the king does strictly charge

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" the statute 1 E. 6, exempts the peers convict of clergyable felonies from burning in the hand, and virtually repeals the statute, 4 H. 7, as to so much; and the statute 18 Eliz. requires burning in the hand only according to the statute in that behalf before provided; and there being no statute then or now in force to subject peers to such brand, they are in such case (upon the allowing the benefit of the said statute of E. 6, which is as much as clergy without reading or burning) freed from discredit and other penalties of the felony, as much as commoners are by having clergy formally allowed, and being burnt." Vol. 13, p. 1014. And he says, " a peer shall have this benefit without either clergy or burning, a clerk in orders upon clergy alone without burning, and a lay-clerk not without clergy and burning." Vol. 13, p. 1019. And I believe nobody can dispute but the law is so. The question therefore is, whether a peeress is not entitled to the same privilege? and we are of opinion that she is.

'Peers' is a word capable of including the whole body of the peerage, females as well as males; and every personal privilege conferred on peers is by operation of law communicated to peeresses whether by blood or marriage, though only males are mentioned. As trial by peers, though recognized in Magna Charta only as belonging to the male sex, 'nec 'super eum ibimus, nec super eum mittemus,' did by construction of law belong to females, as appears by 20 H. 6, which is only a declaratory law; so any other personal privilege, granted or confirmed to peers generally, is communicated to females, if it is of a nature capable of being communicated to and enjoyed by them; as trial by peers, freedom from arrest: Countess of Rutland's case, Moor 769, and 2 Co. 52. And if those privileges are so communicated, as they certainly are, why should not this given by 1 E. 6, the consequence of which is so reasonable and agreeable to justice, that a female offender shall not undergo a greater punishment than a male of her own rank would do for a crime of the same sort? But it was insisted at the bar, that between 1 E. 6, and 18 Eliz. a peer found guilty of a clergyable offence should be delivered to the ordinary as a clerk convict: and Staunford, 130, is quoted for that purpose, that by the words of this statute a peer ought to make his purgation; and if so, he ought to be delivered to the ordinary to be kept till he has made his purgation. That opinion of Staunford seems contrary to law in many particulars. The 1 E. 6, c. 3, had in effect suspended purgation, even as to commoners: therefore the legislature could never mean to introduce and establish purgation as to a peer, which Hobart says, 289, " is no ordinance of the common law, but is a practice among themselves, i. e. the clergy, rather overseen and winked at than approved by the common law:" and page 291, he says, " the perjuries were sundry in the witnesses and compurgators, in the jury of clerks, and the judge himself was not clear, all turning the solemn trial of truth by oath into a ceremonious and formal lie." It is not probable the parliament, intending a great distinction in favour of peers, so as to dispense with reading and burning in the hand, meant to leave a peer a prisoner in the custody of the ordinary, and to have his credit and capacity to acquire personal property, and enjoy the profits of his lands, to be decided upon in such a mock trial; and in fact there is no instance in any of the law books, where a peer convicted of a clergyable felony has ever been delivered to the ordinary, or has made purgation: and the jurisdiction of the ordinary to purge the clerk relates only to clerks in orders, or such as the common law considered as clerks; and a peer not being a clerk, he could not make purgation, the ordinary having no jurisdiction over him; and the words here, " have the privilege of clergy as a clerk convict that may make purgation, and shall be adjudged, deemed, taken, and used for his first time only to all intents, constructions, and purposes as a clerk convict, and shall be in case of a clerk convict which may make purgation," do not import or direct that he shall make purgation; but give a peer the same advantage as a clerk convict who might make purgation, i. e. an absolute discharge from all further punishment; and the statute, as to him, is to be construed to be a pardon: and it seems most probable, that peers never did make purgation; because, as all who made purgation were to be tried by a jury of clerks, such trial would be derogatory to their inherent privilege of being tried by their peers. Lord chief justice Hale, on this statute (2 H. H. P. C. 376) says, " I think it was never meant that a peer of the realm should be put to read, or be burat in the hand, where a common person should be put to his clergy; neither is it said, that he shall be discharged by his praying of the benefit of this statute, where a common person shall have the privilege of clergy and may make his purgation; but only where he may have the benefit of his clergy in the first clause of the statute: the other clause 'shall be in case of a clerk convict that may make purgation' is only for his speedier discharge and farther advantage, and not to restrain the general clause. But it is objected, that the statute 1 E. 6, c. 12," gives this privilege only to " lord and lords of the parliament, and peer and peers of the realm having place and voice in the parliament;" and that a peeress, not having place and voice in parliament, cannot have the benefit of this statute. This expression, " having place and voice in parliament," cannot mean to exclude all peers but such as sat in parliament; but to

and command all manner of persons here present, and that have here attended, to depart hence in the peace of God, and of our said sovereign lord the king, for his grace my Lord High Steward of Great Britain intends now to dissolve his commission.

describe some of the incidents of peerage, or to include bishops, who are lords of parliament though not peers: and if these words should confine the benefit of this statute to those only who actually sat in parliament, it would exclude peers minors, and papist peers, who, by statute 30 Car. 2, stat. 2, c. 1, are now rendered incapable of sitting or voting in parliament: the words therefore are merely descriptive, and not restrictive. And what makes it very plain is, that, in the 4th and 5th P. and M. c. 4, which takes away clergy from accessaries before the fact in murder and several other offences, there is a proviso that every lord and lords of the parliament, and peer and peers of this realm, having place and voice in parliament, upon every indictment for any of the offences aforesaid, shall be tried by their peers, as hath been accustomed by the laws of this realm. Here are the very words used in 1 E. 6, c. 12; yet it could never be doubted, but notwithstanding those words, peeresses must be tried by their peers for offences against that statute; and lady Somerset [see her case, vol. 2, p. 951] was tried by her peers for being accessary to the murder of sir Thomas Overbury, which was an offence against that very statute. What gave rise probably to this statute, 1 E. 6, c. 12, was another statute passed the same year, c. 3, providing for the punishment of vagabonds, by making them slaves for two years; in which act was a clause, that no clerk convict shall make his purgation, but shall be a slave for one year to him who will become bound with two sureties to the ordinary to take him into his service, and he shall be used like a vagabond; and a clerk attainted or convict, which by law cannot make his purgation, may by the ordinary be delivered to any man, who will give security to keep him as his slave for five years; and it shall be lawful to every person, to whom any shall be adjudged a slave, to put a ring of iron about his neck, arm, or leg. To avoid all possible question whether a peer could be subject to any of these provisions, this act, 1 E. 6, c. 12, provides for their immediate delivery, on praying the benefit of this statute. This statute 1 E. 6, c. 3, was repealed 3d and 4th E. 6, c. 16, but was in force when 1 E. 6, c. 12, was made. The next statute, 18 Eliz. c. 7, provides, that every person which shall be admitted and allowed to have the benefit of privilege of his clergy, shall not thereupon be delivered to the ordinary, as has been accustomed; but, after such clergy allowed and burning in the hand, according to the statute in that behalf provided, shall forthwith be enlarged and delivered out of prison by the justices, before whom such clergy shall be granted, that cause notwithstanding. Then follows the proviso, that the justices, before whom any such allowance of clergy shall be had, shall and may, for the further correction of such persons to whom clergy shall be allowed, detain and keep them in prison for such convenient time as the same justices in their discretions shall think convenient, so as the same do not exceed one year's imprisonment. This proviso plainly relates only to those persons mentioned in the clause, that is, such persons as had been burnt in the hand according to the statute in that case made and provided, meaning 4 H. 7. As peers therefore are not to be burnt in the hand, they cannot be imprisoned; for those only are to be imprisoned who have been burnt in the hand; and the word 'justices,' is more properly applicable to other courts of judicature than to this house. The 21 Ja. 1, c. 7, cannot relate to this question; for it relates to common persons, and was intended to put women on the same footing with men, as to small larcenies; and 3d and 4th W. and M. c. 9, does the same in all clergyable felonies. This shews the justice of allowing to the peeresses the same benefit of 1 E. 6, c. 12, as peers have; and it is natural to suppose, that when the legislature were putting women of inferior rank on the same footing as men, they would have put peeresses on the same footing with peers, had it not been conceived that the same privileges were already extended to both.

Upon the whole therefore, by stat. 1 E. 6, a peer convicted of a clergyable felony is intitled to his immediate discharge, without reading or burning in the hand, or being liable to imprisonment by 18 Eliz.

This privilege, given by statute, being such as may be enjoyed by a peeress, is by operation of law communicated to her, and puts her in the same situation as a peer; the consequence of which is, that a peeress, convicted of a clergyable felony, praying the benefit of this statute, is not only excused from capital punishment, but ought to be immediately discharged, without being burnt in the hand, or liable to any imprisonment.

To the mention in vol. 12, p. 682, *et seq.* of illiterateness in the clergy, and in persons of distinction among the laity, may be added from Mr. Barrington, "that so late as the year 1525, Adam Gordon earl of Sutherland and his countess, subscribe their names with a pen led by a notary public, as appears in the case of the countess of Sutherland in Dom. Proc. A. D. 1770." Observations on 1 H. 5, p. 382, Note [r] 4th edition of 1775. What Mr. Barrington in the same note says of Edward the 1st when prince of Wales I do not thoroughly understand. For other particulars respecting such illiterateness, see Warton's Life of sir Thomas Pope, and the passage in Fox cit. by Mr. Walter Scott in note 2, to canto 3, of the Lady of the Lake.

Voltaire, (Dict. Philos. art. Clerc) notices be-

Then the white staff being delivered to the Lord High Steward by the gentleman usher of the Black Rod on his knee, his grace stood up uncovered, and holding the staff in both his hands, broke it in two, and declared the commission to be dissolved; and then, leaving the chair, came down to the woolpack, and said, Is it your lordships' pleasure to adjourn to the Chamber of Parliament?

Lords. Ay, ay.

L. H. S. This House is adjourned to the Chamber of Parliament.

Then the peers and others, returned back to the Chamber of Parliament in the same order they came down, except that his royal highness the duke of Cumberland walked after the lord chancellor.

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nefit of clergy. The passage affords an amusing instance of the ease with which his sententious flippancy compresses into a very small space a copious mass of false statement and impertinent reflection. "On était si savant vers le dixième et onzième siècle, qu'il s'introduisit une coutume ayant force de loi en France, en Allemagne, en Angleterre, de faire grace de la corde à tout criminel condamné qui savait lire; tant un homme de cette érudition était nécessaire à l'état. Guillaume le bâtard, conquérant de l'Angleterre, y porta cette coutume. Cela s'appelloit bénéfice de clergie, 'beneficium clericorum aut clergicorum.'

"Nous avons remarqué en plus d'un endroit, que de vieux usages perdus ailleurs se retrouvent en Angleterre, comme on retrouva dans l'île de Samothrace les anciens mystères d'Orphée. Aujourd'hui même encore ce bénéfice de clergie subsiste chez les Anglais dans toute sa force pour un meurtre commis sans dessein, et pour un premier vol, qui ne passe pas cinq cents livres sterling. Le criminel qui sait lire demande un bénéfice de clergie: on ne peut le lui refuser. Le juge, qui était réputé par l'ancienne loi ne savoir pas lire lui-même, s'en rapporte encore au chapelain de la prison, qui présente un livre au condamné. Ensuite il demande au chapelain, 'Legit?' lit-il? Le chapelain répond, 'Legit ut clericus,' il lit comme un clerc. Et alors on se contente de faire marquer d'un fer chaud le criminel à la paume de la main. On a eu soin de l'enduire de graisse, le fer fume et fait un sifflement, sans faire aucun mal au patient réputé clerc."

Concerning the doubt (mentioned, p. 640 and afterwards), whether 'homo' included both genders, see Barrington's Observ. on 10 Ed. 3, stat. 3; 20 H. 6, c. 9, and 1 Edw. 6.

For more concerning trials of Peers and Peeresses, see the Case of lord Ferrers, vol. 19, p. 886.

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552. Proceedings against JOHN HORNE, Clerk, on an Information in the King's-Bench by the Attorney-General, for a Libel: 17 GEORGE III. A. D. 1777.

In this Case, the report of the proceedings had upon the Trial at Guildhall, and upon the Attorney-General's Motion for Judgment in the Court of King's-bench at Westminster, was published* by the Defendant, Mr. Horne. I have subjoined an account, (compiled from Mr. Cowper's Reports and Brown's Cases in Parliament) of the subsequent proceedings before the House of Lords.

1. THE TRIAL AT GUILDHALL.

London, to wit. BE it remembered, That Edward Thurlow, esq. attorney general of our present sovereign lord the king, who for our said present sovereign lord the king prosecutes in this behalf, in his proper person comes into the court of our said present sovereign lord the king before the king himself, at Westminster, in the county of Middlesex, on Thursday next after fifteen days from the day of St. Martin in this same term, and for our said lord the king giveth the court here to understand and be informed, that John Horne late of London, clerk, being a wicked, malicious, seditious, and ill disposed person, and being greatly disaffected to our said present sovereign lord the king and to his administration of the government of this kingdom and the dominions thereunto belonging, and wickedly, maliciously, and seditiously intending, devising, and contriving to stir up and excite discontents and seditions* among his majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his said majesty's subjects from his said majesty, and to insinuate and cause it to be believed that divers of his majesty's innocent and deserving subjects had been inhumanly

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* With the following title: 'The Trial at large of John Horne, esq., upon an Information filed Ex Officio by his majesty's attorney-general, for a Libel, before the right hon. William earl of Mansfield, in the court of King's-bench, Guildhall, on Friday the 4th of July, 1777. Published by the defendant from Mr. Gurney's short-hand notes.

'———Nec bellua tetrior ulla est,
'Quam servi rabies in libera colla furentis.'

* As to the operation of these words, see lord Ellenborough's Judgment in the Case of the King against Phillipps, 6 East, 464.

murdered by his said majesty's troops in the province, colony, or plantation of the Massachusets-Bay in New-England, in America, belonging to the crown of Great-Britain, and unlawfully and wickedly to seduce and encourage his majesty's subjects in the said province, colony, or plantation, to resist and oppose his majesty's government, on the 8th day of June, in the 15th year of the reign of our present sovereign lord George the third, by the grace of God of Great-Britain, France, and Ireland, king, defender of the faith, &c. with force and arms at London aforesaid, in the parish of St. Mary-le-Bow, in the ward of Cheap, wickedly, maliciously, and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following: 'King's-Arms tavern, 'Cornhill, June 7, 1775. At a special meeting 'this day of several members of the Constitu-'tional Society, during an adjournment, a gen-'tleman proposed that a subscription should be 'immediately entered into by such of the mem-'bers present who might approve the purpose, 'for raising the sum of 100*l.* to be applied to 'the relief of the widows, orphans, and aged 'parents of our beloved American fellow-sub-'jects, who, faithful to the character of Eng-'lishmen, preferring death to slavery, were for 'that reason only inhumanly murdered by the 'king's' (meaning his said majesty's) 'troops at 'or near Lexington and Concord, in the pro-'vince of Massachusets' (meaning the said province, colony, or plantation of the Massachusets-Bay in New-England, in America,) 'on 'the 19th of last April; which sum being im-'mediately collected, it was thereupon resolved 'that Mr. Horne' (meaning himself the said John Horne) 'do pay to-morrow into the hands 'of Mess. Brownes and Collinson, on account 'of Dr. Franklin, the said sum of 100*l.* and 'that Dr. Franklin be requested to apply the 'same to the above-mentioned purpose; John 'Horne' (meaning himself the said John Horne) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present sovereign lord the king, his crown and dignity: and the said attorney-general of our said lord the king for our said lord the king further gives the court here to understand and be informed, that the said John Horne being such person as aforesaid, and again unlawfully, wickedly, and seditiously intending, devising, and contriving as aforesaid, afterwards, to wit, on the 9th day of June in the 15th year aforesaid, with force and arms at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously printed and published, and caused and procured to be printed and published, in a certain newspaper, intitled, The Morning Chronicle and London Advertiser, a certain other false, wicked, malicious, scandalous, and seditious libel, of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following; that is to say, 'King's Arms tavern, Cornhill, 'June 7, 1775. At a special meeting this 'day of several members of the Constitutional 'Society, during an adjournment, a gentleman 'proposed that a subscription should be imme-'diately entered into by such of the members 'present who might approve the purpose, for 'raising the sum of 100*l.* to be applied to the 'relief of the widows, orphans, and aged pa-'rents of our beloved American fellow-subjects, 'who, faithful to the character of Englishmen, 'preferring death to slavery, were for that rea-'son only inhumanly murdered by the king's' (again meaning his majesty's) 'troops at or 'near Lexington and Concord, in the province 'of Massachusets' (meaning the said province, colony, or plantation of the Massachusets Bay in New England, in America) 'on the '19th of last April; which sum being imme-'diately collected, it was thereupon resolved 'that Mr. Horne' (again meaning himself the said John Horne) 'do pay to-morrow into the 'hands of Mess. Brownes and Collinson, on 'the account of Dr. Franklin, the said sum of '100*l.* and that Dr. Franklin be requested to 'apply the same to the above-mentioned pur-'pose; John Horne' (again meaning himself the said John Horne) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity: and the said attorney general of our said lord the king for our said lord the king further gives the Court here to understand and be informed, that the said John Horne being such person as aforesaid, and contriving and wickedly and maliciously devising and intending as aforesaid, afterwards, to wit, on the 9th day of June, in the 15th year aforesaid, with force and arms at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously did print and publish, and cause and procure to be printed and published, in a certain other news-paper, entitled, The London Packet, or New Lloyd's Evening Post, a certain other false, wicked, scandalous, malicious, and seditious libel of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following; that is to say, 'King's Arms tavern, Cornhill, June 7, 1775. 'At a special meeting this day of several 'members of the Constitutional Society, during 'an adjournment, a gentleman proposed that 'a subscription should be immediately entered 'into (by such of the members present who 'might approve the purpose) for raising the 'sum of 100*l.* to be applied to the relief of the 'widows, orphans, and aged parents of our 'beloved American fellow-subjects, who, faith-'ful to the character of Englishmen, preferring 'death to slavery, were for that reason only.

'inhumanly murdered by the king's' (meaning his said majesty's) 'troops at or near Lexington and Concord, in the province of Massachusets' (meaning the said province, colony, or plantation of the Massachusets Bay in New England, in America) 'on the 19th of last 'April; which sum being immediately collected, it was thereupon resolved, that Mr. 'Horne' (again meaning himself the said John Horne) 'do pay to-morrow into the hands of 'Mess. Brownes and Collinson, on the account 'of Dr. Franklin, the said sum of 100*l.* and 'that Dr. Franklin be requested to apply the 'same to the above-mentioned purpose; John 'Horne' (again meaning himself the said John Horne) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said lord the king, his crown and dignity: and the said attorney general of our said lord the king for our said lord the king further gives the Court here to understand and be informed, that the said John Horne being such person as aforesaid, and contriving and wickedly and maliciously devising and intending as aforesaid, afterwards, to wit, on the 9th day of June in the 15th year aforesaid, at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously did print and publish, and cause and procure to be printed and published, in a certain other newspaper, entitled, The Public Advertiser, a certain other false, wicked, scandalous, malicious, and seditious libel of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following; that is to say, 'King's Arms tavern, 'Cornhill, June 7. At a special meeting this 'day of several members of the Constitutional 'Society, during an adjournment, a gentleman 'proposed that a subscription be immediately 'entered into (by such of the members present 'who might approve the purpose) for raising 'the sum of 100*l.* to be applied to the relief of 'the widows, orphans, and aged parents of our 'beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring 'death to slavery, were for that reason only 'inhumanly murdered by the king's' (meaning his said majesty's) 'troops at or near Lexington and Concord, in the province of Massachusets' (meaning the said province, colony, or plantation of the Massachusets Bay in New England, in America) 'on the 19th of 'last April; which sum being immediately collected, it was thereupon resolved that Mr. 'Horne' (again meaning himself the said John Horne) 'do pay to-morrow into the hands of 'Mess. Brownes and Collinson, on the account 'of Dr. Franklin, the said sum of 100*l.* and 'that Dr. Franklin be requested to apply the 'same to the abovementioned purpose; John 'Horne' (again meaning himself the said John Horne) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity: and the said attorney general of our said present sovereign lord the king for our said lord the king further gives the Court here to understand and be informed, that the said John Horne being such person as aforesaid, and contriving and wickedly and maliciously devising and intending as aforesaid, afterwards, to wit, on the 9th day of June in the 15th year aforesaid, with force and arms at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously did print and publish, and cause and procure to be printed and published, a certain other false, wicked, malicious, scandalous, and seditious libel of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following; that is to say, 'King's Arms tavern, Cornhill, June 7. 'At a 'special meeting this day of several members of the Constitutional Society, during 'an adjournment, a gentleman proposed that 'a subscription should be immediately entered 'into (by such of the members present who 'might approve the purpose) for raising the sum 'of 100*l.* to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to 'the character of Englishmen, preferring death 'to slavery, were for that reason only inhumanly murdered by the king's' (again meaning his said majesty's) 'troops at or near Lexington and Concord, in the province of Massachusets' (meaning the said province, colony, or plantation of the Massachusets-bay in New-England, in America) 'on the 19th of last 'April; which sum being immediately collected, it was thereupon resolved that Mr. 'Horne' (again meaning himself the said John Horne) 'do pay to-morrow into the hands of 'Mess. Brownes and Collinson, on account of 'Dr. Franklin, the said sum of 100*l.* and that 'Dr. Franklin be requested to apply the same 'to the above-mentioned purpose; John Horne' (again meaning himself the said John Horne) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present sovereign lord the king, his crown and dignity: and the said attorney-general of our said present sovereign lord the king for our said lord the king further gives the Court here to understand and be informed, that the said John Horne being such person as aforesaid, and contriving and wickedly and maliciously devising and intending as aforesaid, afterwards, to wit, on the 9th of June in the 15th year aforesaid, with force and arms at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously did print and publish, and cause and procure to be printed and published, a certain other false, wicked, malicious, scandalous, and seditious libel, in which said last-mentioned libel are contained, amongst other things, divers false,

scandalous, malicious, and seditious matters of and concerning his majesty's government, and the employment of his troops, according to the tenor and effect following; that is to say, 'King's Arms Tavern, Cornhill, June 7. At a 'special meeting this day of several members 'of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into '(by such of the members present who might 'approve the purpose) for raising the sum of '100*l.* to be applied to the relief of the widows, 'orphans, and aged parents of our beloved 'American fellow-subjects, who, faithful to the 'character of Englishmen, preferring death to 'slavery, were for that reason only inhumanly 'murdered by the king's' (again meaning his said majesty's) 'troops at or near Lexington 'and Concord, in the province of Massachusets' (meaning the said province, colony, or plantation of the Massachusets Bay in New England, in America) 'on the 19th of last April,' in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present sovereign lord the king, his crown and dignity: and the said attorney-general of our said lord the king for our said lord the king further gives the Court here to understand and be informed, that the said John Horne being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously intending, devising, and contriving as aforesaid, afterwards, to wit, on the 14th day of July, in the 15th year aforesaid, with force and arms at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous and seditious libel of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following: 'I' (meaning himself the said John Horne) 'think it proper to give the unknown 'contributor this notice, that I' (again meaning himself the said John Horne) 'did yesterday pay to Messieurs Brownes and Collinson, 'on the account of Dr. Franklin, the sum of '50*l.* and that I' (again meaning himself the said John Horne) 'will write to Dr. Franklin, 'requesting him to apply the same to the relief 'of the widows, orphans, and aged parents of 'our beloved American fellow-subjects, who, 'faithful to the character of Englishmen, pre'ferring death to slavery, were for that reason 'only inhumanly murdered by the king's' (meaning his said majesty's) 'troops at or 'near Lexington and Concord, in the province 'of Massachusets,' (meaning the said province, colony, or plantation of the Massachusets Bay in New England, in America) 'on the 19th of 'last April; John Horne,' (again meaning himself the said John Horne) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present sovereign lord the king, his crown and dignity: and the said attorney-general of our said lord the king for our said lord the king further gives the Court here to understand and be informed, that the said John Horne being such person as aforesaid, and again unlawfully, wickedly, and seditiously intending, devising, and contriving as aforesaid, afterwards, to wit, on the 15th day of July, in the 15th year aforesaid, with force and arms at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously printed and published, and caused and procured to be printed and published, in a certain other news-paper, intitled, The Public Advertiser, a certain other false, wicked, malicious, scandalous, and seditious libel of and concerning his said majesty's government and the employment of his troops, according to the effect following; that is to say, 'I' (meaning himself the said John Horne) 'think it proper to give the unknown 'contributor this notice, that I' (again meaning himself the said John Horne) 'did yesterday 'pay to Mess. Brownes and Collinson, on the 'account of Dr. Franklin, the sum of 50*l.* and 'that I' (again meaning himself the said John Horne) 'will write to Dr. Franklin, requesting 'him to apply the same to the relief of the 'widows, orphans, and aged parents of our be'loved American fellow-subjects, who, faithful 'to the character of Englishmen, preferring 'death to slavery, were' (for that reason only) 'inhumanly murdered by the king's' (again meaning his said majesty's) 'troops at or near 'Lexington and Concord, in the province of 'Massachusets' (meaning the said province, colony, or plantation of the Massachusets Bay in New England, in America) 'on the 19th of 'last April; John Horne,' (again meaning himself the said John Horne,) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said lord the king, his crown and dignity: and the said attorney-general of our said present sovereign lord the king for our said lord the king further gives the Court here to understand and be informed, that the said John Horne being such person as aforesaid, and contriving and wickedly and maliciously devising and intending as aforesaid, afterwards, to wit, on the said 15th day of July in the 15th year aforesaid, with force and arms at London aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously did print and publish, and cause and procure to be printed and published, a certain other false, wicked, malicious, scandalous, and seditious libel of and concerning his majesty's government and the employment of his troops, according to the tenor and effect following; that is to say, 'I' (meaning himself the said John Horne) 'think it proper 'to give the unknown contributor this notice, 'that I' (meaning himself the said John Horne)

'did yesterday pay to Messieurs Brownes and 'Collinson, on the account of Dr. Franklin, 'the sum of 50*l.* and that I' (again meaning himself the said John Horne) 'will write to 'Dr. Franklin, requesting him to apply the 'same to the relief of the widows, orphans, and 'aged parents of our beloved American fellow-'subjects, who, faithful to the character of 'Englishmen, preferring death to slavery, 'were for that reason only inhumanly mur-'dered by the king's' (again meaning his said majesty's) 'troops at or near Lexington and 'Concord, in the province of Massachusets' (meaning the said province, colony, and plantation of the Massachusets-Bay in New England, in America) 'on the 19th of last April; 'John Horne' (again meaning himself the said John Horne) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and against the peace of our said present sovereign lord the king, his crown and dignity: whereupon the said attorney-general of our said lord the king, who for our said present sovereign lord the king prosecutes in this behalf, prays the consideration of the court here in the premises, and that due process of law may be awarded against him the said John Horne in this behalf, to make him answer to our said present sovereign lord the king touching and concerning the premises aforesaid, &c. E. THURLOW.*

Friday, July 4, 1777.

As soon as the court was opened, the special jury were called over: eleven only appearing, Mr. Attorney General prayed a tales. The box containing the names of the common jury standing open upon the table, the Associate took out a paper, and, shewing it to Mr. Horne, asked, if he had any objection to that man's being sworn on the jury? Mr. Horne replied, "I object to that name, and for this reason: I desire that the box may be shut and shaken; and when that is done, I shall have no objection to any name." The box was accordingly shut and shaken, and a name drawn out; but another of the special jury coming into court, the talesman was not sworn.

The following Special Jury were sworn:

Joseph Dalmer, Cursitor-street, merchant.
Philip Bulkley, Fleet-street, druggist.
James Brant, Cheapside, silkman.
David Buffar, Cheapside, woollen-draper.
William Watts, Fore-street, goldsmith.
Nathaniel Lucas, Fore-street, merchant.
William Abdy, Oat-lane, goldsmith.
Thomas Smith, Milk-street, merchant.
Tho. Brooks, Cateaton-street, linen-draper.
M. Stanton, Aldermanbury, warehouseman.
Wm. Loydd, Christ-church, woollen-draper.
Henry Morris, Fleet-street, silversmith.

Then the Information was opened by Mr. Buller.

Mr. *Horne.* My lord, with your lordship's permission, I believe it is proper for me, at this time, before Mr. Attorney-General proceeds, to make an objection; and to request your lordship's decision concerning a point of practice in the proceeding of this trial. Have I your lordship's leave?

Lord *Mansfield.* Certainly.

Mr. *Horne.* Gentlemen of the jury——

Lord *Mansfield.* No. Not to the jury. If you make an objection to the irregularity of the proceedings, you must address me.

Mr. *Horne.* I am well aware of it: and I hope that your lordship will, upon this and other occasions, hear me before you suppose me to be in the wrong. I was not going to address my argument nor my objection to the jury; if your lordship will only permit me to request their attention; because I have frequently observed upon trials, that in all cases almost, when application has been made to the judge to decide upon any objection, the jury have been generally supposed to be in a manner out of court; and I therefore now address myself to the jury, only to request their attention, and for no other purpose.

Lord *Mansfield.* Very well. Go on.

Mr. *Horne.* Gentlemen of the jury, what I have said to his lordship, if you heard it, may perhaps make it unnecessary for me to address you. Gentlemen, though what I am going to say to his lordship respects a matter of law and practice of the Court, yet I meant to request your attention, because you may find perhaps that the decision may concern you to hear it. My lord, I understand (and I think I see good reasons why it should be so) that it is the usual practice and wholsome custom of the Court, in trials of this kind, that unless the defendant examines witnesses in his defence, the defendant's answer closes the pleading: and it is not the practice, in that case, that the counsel for the prosecution should reply. But, my lord, in the late trials of the printers, for printing and publishing the advertisement now in question, I observed that Mr. Attorney-General claimed and exercised the peculiar privilege of replying, notwithstanding that no witnesses had been called for the defendant. My lord, with your lordship's permission, I mean to submit my reasons to your lordship in support of my objection to this claim of Mr. Attorney-General in the present trial.

Lord *Mansfield.* You come too early for the objection; because the objection, if there is any foundation in it, should be when he gets up to reply.

Mr. *Horne.* My lord, I own I did expect that Mr. Attorney-General would urge something of that kind against what I have said. I stopped, expecting that answer from him; because, my lord, he may, very likely, imagine it to be a part of the duty of his office to baffle me in any manner, and to take all advantages

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* Afterwards lord Thurlow and Lord Chancellor.

which he can, whether fair or unfair, against me, and to obtain a verdict against me by any means—there are reasons why he should attempt to do so; and therefore, I own, I expected that the Attorney-General would have urged that against me. But, my lord, I apprehend, with great submission, that this, and this only, is the proper moment———

Lord *Mansfield*. Mr. Horne, I will do so far for you. If the defence that you are to make may in any manner be guided or governed by a knowledge, whether the Attorney-General has or has not a right to reply; if Mr. Attorney-General acquiesces in it, I have no objection to your being apprized how it stands beforehand; because otherwise it would come after you had made your defence: and if you mean to calculate your defence in some way differently, upon the expectation of his having or his not having a right to reply, I will willingly (I dare say the Attorney-General makes no objection to it) hear you upon that point now.

Att. Gen. None in the world.

Mr. *Horne*. Your lordship has hit upon one of the very reasons that I was going to lay before you. But, my lord, I had rather that this had come as a matter of justice, than as an acquiescence from the Attorney-General; because I suppose that every defendant, who shall hereafter stand in my situation, will have the same right; and, if it comes as a matter of favour from the Attorney-General, those for whom I am much more concerned than myself, may not perhaps meet with that genteel acquiescence. However, I thank the Attorney-General. I shall beg then, my lord, at present to make my objection. I am sure I should have been permitted to make it, because the arguments which I had to use would have been such as would more particularly have affected your lordship's mind. If then I am permitted, I suppose that I am now to object to the right of reply.

Lord *Mansfield*. You are now to object to the right of reply.

Mr. *Horne*. My lord, if I should forget any thing upon this occasion, so new to me, and make any mistakes, I shall beg leave to refresh my memory with what I have written down. My lord, I have been taught by the best authorities, that the established practice and approved rules of the court are so, only because they are reason, and reason approved by long experience; and they obtain as rules and practice only for that cause. My lord, I believe I shall not be contradicted by your lordship, when I aver, that it is the established practice and approved rule of the Court, in trials of this kind (where the Attorney-General does not prosecute) that if the evidence brought for the prosecution is not controverted by any other evidence on the part of the defendant, but the fact, as far as it depends upon testimony, taken as the prosecutor's evidence left it; that then the defendant's answer closes the pleading. And this, my lord, has obtained and been established as the approved rule and practice of the Court, because it is supposed the method best calculated for the obtaining of justice; that is, for the conviction of the guilty and the acquittal of the innocent; for both are to be regarded: and when that is done, then only, I suppose, is justice done. Now, my lord, the reason of this practice is not, like some others, so covered over by the rust of ages, or disguised by the change of circumstances, as that it should be difficult now to discover it. On the contrary, it is, to my understanding and apprehension, as plain and evident now as it was the first day that it was introduced. But that is no part of my business to enter into: the reason of the practice it does not belong to me to give. It is sufficient for me to say that such is the practice, and being the practice, it must be supposed the best method of obtaining justice. Then, my lord, I humbly submit it to your lordship, that if this is the best method for obtaining of justice, a contrary method must be attempted for some other end; and that end must be injustice, or the conviction of the accused by any means. My lord, the practice, and this exemption from it, which Mr. Attorney-General claims, cannot both stand: one or the other must be given up; because they cannot both be the best method and most likely means for the obtaining of justice. Now, my lord, that the king, or that the attorney-general in his name, should be permitted to pursue any other method or practice than that established method which is best calculated for the obtaining of justice, seems to me completely absurd. For the king, such as the law and such as reason conceive him, can have no other interest but in the obtaining of justice, impartial justice. And if it was possible, my lord, to conceive a king even with a leaning or an inclination on either side, it must rather be that his subjects should be found innocent than guilty. But this claim of Mr. Attorney-General, my lord, absurdly supposes the contrary; and that the king has an interest in their being convicted; and that therefore easier and readier means, and greater means, are to be allowed to the king for obtaining a conviction, than are allowed to any other person, my equal or my inferior. And yet, my lord, I must acknowledge that the claim which I am now objecting to, is not a new one. My lord, in the reign of James the second, that man (for he never was for one moment a king) claimed the peculiar right, prerogative, and power of dispensing with the laws of the land. Sir Edw. Herbert, the chief justice of those days, and the other judges, decided in favour of that claim.* Thank God, my lord, the glorious Revolution—(and I call it so: it shall not have less praise from me because it is now grown uncourtly)—the glorious Revolution put an end to that iniquity. Unfortunately for this country, the principles which produced that and many other iniquities are now again revived and fostered; and

* See the Case of sir Edward Hales, vol. 11, p. 1165, of this Collection.

amongst many other most shameful doctrines, this doctrine of a dispensing power is now revived again—under another shape and form indeed; but it is the same power. It is now a prerogative to dispense with the rules and methods of proceeding; that is, my lord, to dispense with the laws: for the rules and methods of proceeding (and I have heard your lordship say it in other cases) are parts of the laws of the land. My lord, I have been told (and that by a greater authority than any almost that now lives) that "the methods and forms of justice are essential to justice itself." And, my lord, the forms and methods of proceeding are particularly tender in that part of the laws which is calculated for the protection of innocence. My lord, the penal laws are made to bring criminals and offenders to justice; but the forms and methods of proceeding of the courts of justice are appointed singly to distinguish the innocent from the guilty, and to protect them against exorbitant power. My lord, in the case of this particular privilege which the Attorney-General claims, I think I could spend a day in shewing how many received legal maxims and truths it violates: for truth is of such a nature that it has a thousand branches issuing from it; and falshood, let it be as careful as it can, will run against some one or other of them. I do really believe I could fairly spend a day in shewing the absurdity of this claim. But yet, to my great disadvantage and my great sorrow, when, in the late trial of the printers, the defendant's counsel objected to this claim of Mr. Attorney-General, your lordship interfered hastily, and saved Mr. Attorney General the trouble of vindicating his claim. Your lordship saved him from the embarrassment he would then have found, and which I am confident he will now find, to produce one single argument of reason or justice in behalf of his claim: and this your lordship did by an absolute overbearing of the objection, without even permitting an argument. And, my lord, that is a very great disadvantage to me, as well as it was to the defendant in whose cause he made it: for, my lord, the very ingenious counsel—(I beg the gentleman's pardon for attempting to distinguish him by that epithet; there is no want of ingenuity at the bar)—but the very honest counsel who made that objection, would have been able to support it in a very different manner from any in which I can expect to do it. My lord, the trial may take up some time; therefore I will no longer hold you on this objection. I shall reserve to myself the right, which I did exercise in condemning the action of the king's troops (which I did then call, and do still, and will to-morrow call, because contrary to law, a murder) so I shall reserve it to myself, and not now take up more of the time, to say what I shall think proper by argument and reason on the decision of your lordship; which decision must come after your lordship shall have heard the Attorney-General's answer, and my reply:—for I take it I have a right to reply. I shall then reserve that power to myself to speak as freely of it as I should do of any other indifferent action in the world.

Lord *Mansfield.* There is no occasion for Mr. Attorney-General to say any thing. I am most clear that the Attorney-General has a right to reply if he thinks fit, and that I cannot deprive him of it; and there is no such rule, that in no case a private prosecutor or private plaintiff shall not reply, if new matter is urged which calls for a reply; new questions of law, new observations, or any matter that makes a reply necessary. No authority at law has been quoted to the contrary. A party that begins has a right to reply; there is not a State Trial where the solicitor-general or the attorney-general have not replied; and I know of no law that says in any case the prosecutor may not reply. But, for the saving of time, rules by usage of the bar are received. Two gentlemen don't examine the same witness, but yet they do very often.* They don't reply when there is no evidence for a defendant, and nothing new to make it necessary to reply: then they don't do it; but if a question of law was started, which nobody thought of in the beginning, they do it then: then they have a right to reply, and must reply, for the sake of justice. And therefore I apprize Mr. Horne that the Attorney-General certainly has a right to reply.

Mr. *Horne.* Your lordship must be very sensible how untoward is my situation in this case. This is only a repetition of what happened before; if your lordship will thus do the business of Mr. Attorney-General for him. My lord, you now take from me what you give to him; you take from me that right of reply which by the practice of the court I have, whilst you give to him that right of reply which by the practice of the court he has not. I have a right to reply to the Attorney-General's answer to my objection, but I have no right to reply upon the judge. I beg the Attorney-General may do his own business. He is full of reason and argument. He smiles. Indeed he well may. My lord, he can surely prove the justice of his claim himself, if there is any in it. My lord—

Lord *Mansfield.* Sir—hear—Your proper reply to the judgment I have given is a motion to the Court; I never here decide.—It is speaking to no purpose to persuade me where I have no doubt.—The Attorney-General here will be of the same opinion with me. But your proper reply to me, is a motion to the court; and if the suffering him to reply is against law, it is an irregularity in the trial, for which the verdict will be set aside. You will have a remedy.

Mr. *Horne.* O, my lord, I have already suffered under your lordship's directing me to remedies.† The most cruel of all poisoners are those who poison our remedies. Has your lordship forgotten?—I am sure you have not forgotten that I have, once before in my life, had the honour to be tried before your lordship

* See the Case of Doe *v.* Roe, 2 Campbell's Nisi Prius Rep. 280. † See vol. 6, p. 215.

for a pretended libel. My lord, this matter of reply I know so well to be the practice, not only from the intelligence I have had upon that subject, but from that very trial at Guildford, on the action brought against me by the present lord Onslow. My lord, I could then have contradicted his evidence. I will just mention two or three particulars in this case. It was the most scandalous one that ever came before a court. (Your lordship cannot forget the particulars in that trial.) I was prosecuted by him for a libel. On the first action which he brought, I obtained a nonsuit. Upon that, a fresh action was brought. To that fresh action (in order to try it in Surrey, where the plaintiff had his influence) in that fresh action, words spoken a year or two before were added, words of a different nature, and upon a different subject. We came to trial before your lordship, and I do remember some very strong cases (which indeed I intended to have published) of your lordship's practice in that trial. But, my lord, however impatient I may be thought to be, I am very patient under personal injuries. I have never complained of the practices used against me on that trial, nor of the mistakes (to speak gently) which your lordship made. Your lordship then told me, as now, that I should have a remedy—

Attorney-General. I beg leave to object to this way of proceeding in a trial. What can it be to the issue that is joined in this cause, any part of the history of what related to the trial at Guildford?

Lord *Mansfield.* If I remember right, you had a remedy there, for it was determined not to be actionable.

Mr. *Horne.* True, my lord; but it cost me 200*l.* The remedy was almost as bad as the verdict would have been.

Lord *Mansfield.* There must be an end.

Mr. *Horne.* Not of this objection.

Lord *Mansfield.* No; an end of going out of the cause. You must behave decently and properly.

Mr. *Horne.* I will surely behave properly.

Lord *Mansfield.* This is over. I tell you beforehand, I apprize you of it (which is going out of the way), that it is not in my power to deprive the prosecutor of replying, if he sees cause to desire it.

Mr. *Horne.* Now then, my lord, I entreat you to let me decently tell you of the situation you put me into. When I offer to prove by argument the right which I have to make my objection at this time, your lordship kindly stops me, and takes it for granted. Then, afterwards, it seems, it is you who apprized me. You tell me you have, out of the rule, apprized me: yet, because I accepted that which I knew to be my right, as an apprisal which you were willing to give me, not meaning however to preclude myself from the argument, your lordship makes use of my acceptance of this apprisal to defeat my objection. First, your lordship interferes to save Mr. Attorney-General from attempting to give a reason, which you both know he cannot give; and then Mr. Attorney-General gets up to save your lordship in his turn, and to stop me from explaining your lordship's conduct. Thus between your lordship and Mr. Attorney-General, a defendant is in a blessed situation! [Here some promiscuous altercation ensued, after which Mr. Horne proceeded.] What I was speaking of was merely this; that the practice——[Here again some interruption] I was going to shew your lordship (in answer to what fell from you, and not distinct from this cause, nor from what your lordship had said) I was going, and decently going, to shew your lordship, that it was the practice of the court that the prosecutor should not reply unless evidence is called for the defendant. I was going to shew it to your lordship from my own particular case before your lordship at Guildford, and that I suffered under it considerably; and I mentioned the instance. I am sure that is not wandering from the point, when your lordship has said, that it was not the practice of the court. If the Attorney-General had said so, I should have had a right to reply to him. But I must say, as before, if your lordship is to do the Attorney-General's business, and so cut off my reply, and then Mr. Attorney-General is to get up and say, This has nothing to do with the cause; between the Chief Justice and the Attorney-General, what am I to do? My lord, I beg leave to mention to your lordship, that if the Attorney-General had said truly, and if I had wandered from the case, it would not be wonderful that I, unused to these matters, should wander a little; and your lordship should have some indulgence to my situation. My lord, I was going to mention to your lordship my own case: all I know of law is from my own case, and from what I have been a witness of myself. I, in that case, at Guildford, did suffer a false evidence to procure (by your lordship's mistaken direction) a bad, false verdict; because I was told by my counsel (some of the first counsel in this country) that the words themselves were not actionable; and therefore, though I could have proved by gentlemen in court that the words sworn against me were not spoken by me; yet my counsel told me it was better for me to let those words go as proved, than, by calling evidence, to give to the prosecutor a right of reply, which otherwise he would not have: therefore I suffered the words to be supposed to have been spoken, rather than give to my adversary a right to a reply. But now I find he had that right without my calling evidence; that is, I am told so by your lordship, though I have been told otherwise by all the counsel and all the trials I have ever been at. My lord, as for quoting laws for the practice, I hope your lordship does not expect me to quote law in a matter of practice, and indeed in hardly any other matter, except the law that I have learned from your lordship. I was a constant attender of your lordship some years ago, and I have gathered from your practice some things which I take to be, and some which I take not to be

maxims of law. Now, in that case I mentioned at Guildford, I suffered words to go as proved, which I could have disproved—and there are gentlemen in court now who know the fact, and would have been the evidences—I suffered words to go as proved, because I would not give the prosecutor a right to reply. Your lordship directed the jury to find a verdict for the words; and your lordship said, if your direction was mistaken (because my counsel had argued that the words were not actionable) your lordship told my counsel—(he published a pamphlet afterwards:—he was much hurt at it) you said that what he had advanced surprised you; that it was new law; such as you had never heard before—(he was much hurt at it; he felt it: he was hurt at your lordship's declaration: he published a pamphlet afterwards addressed to your lordship, which I am sure you must remember).—My lord, in consequence of your lordship's direction, a verdict was given against me for 400*l.*; and you said, if you were mistaken in your directions, that I had a remedy; I need only appeal to the court: I had a remedy. What sort of a remedy? The expence of the remedy was almost equal to the verdict. The verdict was set aside, that is true; but your lordship knows that a verdict makes the defendant pay his own costs. I should have had the costs, if the verdict had not been given against me. What sort of remedies are these, that are worse than the fair honest punishment that can be inflicted upon the charge? Therefore I do intreat that your lordship will not send me to remedies which I hardly know how to take; especially as I have always found that such kind of remedies from your lordship are like giving a man a wound, and then telling him where he may find a plaister: it is not a thing that I should wish to do, nor would your lordship like to suffer it. And as your lordship says that no law has been quoted to prevent his reply, I intreat that I may hear from Mr. Attorney-General, or from yourself, that law that gives him a right to reply.

Lord *Mansfield* (to the Attorney-General). Go on with the trial.

Mr. *Horne*. I shall hear no reason then from either of you? Well! if so, I must submit under it.

Attorney General. My lord, and gentlemen of the jury, there is nothing in this case (unless the behaviour of the defendant should constitute that something) that can make it at all different from the most ordinary case of a plain delinquent in a most gross offence being brought before a court of justice. I have looked round with a degree of examination to see if I could see whether there was one amongst the numerous bystanders that I saw here, who had conceived a favourable impression from so extraordinary an interposition as one has heard to-day. I certainly should not rise to take off or repel loose slander scattered about without being pointed at any one individual particularly, much less should I take notice of that sort of slander which, affecting to point itself, only disgraced itself in the manner of that affectation. For my own part, I should think I was stooping exceedingly below that character and that situation in the world which I hope I am entitled to, if I were to set myself to defend my own peculiar part from any aspersions that have been thrown upon me. It is the duty of my office to prosecute with integrity those whom, according to the best of my judgment, I believe to be fair objects of prosecution. It is the duty of my office, as far as I can govern that duty, to conduct the prosecution with the utmost clearness and the fullest honour. And if I have taken a part in this, or in any prosecution that any man can fairly stand forth, in a manly style, and challenge directly and pointedly, let it be challenged, and let me be called upon to answer it. But to be told that I stand here ready to take all manner of advantages, fair or unfair, against the delinquents whom I call into justice, it is a sort of aspersion below refutation; and I will not stoop to take notice of it, unless it should condescend upon some particular act in my conduct that makes me an object of that species of animadversion. Whether I am or whether I am not to reply in such a cause as this, it is, in this moment of it, not so much irregular to advance it, as impossible to foresee. When I read over the case, when I consider the effect of it, I cannot foretel the slightest occasion to trouble you by way of reply: for of all the plain and simple matters that ever I had occasion to lay before a court of justice, there is the least degree of complication in that which I am about to state to you now.

This is an information brought against *Mr.* Horne for being the author and the original publisher of this libel. The crime that I put most upon is that which I stated last, that he was the original publisher of this libel. It is in that respect that his crime appears to me to differ most from those that have been called into justice before. The circumstance of his name being printed at the bottom of the libel was an additional aggravation in this respect, because it seemed to imply a bolder insult upon manners and decency, and the laws of the country, than a simple publication of a libel without that name would have been. It *seemed* to imply this, because, while that name lay hid behind the printer of the paper, the stoutest champion for sedition could not have defied the laws with greater security; for, though it stood in capitals upon the front of many thousand pages, yet it was as inscrutable and impossible for me to follow, as if the name had not appeared upon the paper at all. For the rest of it, I put it upon the publication, chiefly because that seems to be the whole object and drift of the composer of the libel: for as a composition it is absolutely nothing. I do not mean to speak of it by way of derogation from the parts and talents of the ingenious gentleman (whose parts and talents I never heard so

much of as I have done to-day) I do not mean to speak it in derogation of them; no doubt but he could have writ a better thing: but his understanding was industriously let down and suppressed; and the very purpose of this writing was to make it ribaldry and trash. For the intention of it was (as it appears to me) the intention of it was nothing more than to defy the laws and justice of the country, proclaiming, as it were, thus: either punish this libel, or confess that there are no laws in the country by which a libel can be punished. Others have entertained sufficient malice against this country; others have been anxious enough to excite sedition; but this is written chiefly with the purpose of telling mankind—"Thus I dare do! I dare insult the laws without having any earthly thing to state to the public, except an insult upon the laws." Sometimes a libel is covered (though thinly covered enough) with the pretence of informing mankind, or of discussing public subjects for the use of mankind: here is not even the affectation of giving information: here is not even the affectation of discussion: but the writer tells you in so many blunt words (of no kind of meaning in the world but to convey reproach and scandal) that the persons who were employed by the government are guilty of murder; and the persons who employed them consequently involved in the same guilt. For what is the nature of the libel that is published—"King's Arms tavern—At a meeting held during an adjournment" (I do not mean to make any observation upon the meeting during an adjournment)—"a gentleman proposed that a subscription should be entered into"—(this I conceive to be a device—not a very rich one in point of invention—but a device to introduce that which follows) "a gentleman proposed that a subscription should be entered into by such of the members present who might approve of the same, for the purpose of raising the sum of 100*l.* to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanly murdered by the king's troops."*—Murdered by the king's troops! What kind of palliation (justification it is absurd and nonsense to talk of) but what kind of palliation can be given to the charging men with the crime of murder, by writing against them in a news-paper? Is it to be laid down for law, or a thing to be tolerated in a civilized country, that crimes of the most heinous sort shall be imputed to men by a public reviler in a news-paper, who yet dares not stand forth as an accuser? Is that to be tolerated in a civilized country,—the writing against men that they are guilty of murder who are not to be accused of that crime? Is it to be tolerated in a country where an orderly government prevails, and while the form of government subsists, to write against the transactions of that government, as if stained with all the crimes under heaven, and calculated for no earthly purpose but of committing those crimes? To suppress liberty (the only object for which government is or ought to be erected) to suppress that liberty by the means of murder, is imputed to the transactions of the government of the freest country now under heaven! and it is called liberty to do that! whereas men must be short-sighted indeed, a man must be drivelling like an idiot that does not see that the maintaining of regular government is the true, the only means of maintaining liberty. Is it liberty to put the characters of persons, the properties of every individual, under the tyrannous hand of anarchy, and of every man that thinks proper to seize them, uncontroled by law? Is that liberty? And is there any one by-stander of the most ordinary understanding that hears me now speak, that has so gross an understanding as to imagine that he would be more free if it were in the power of any man that thought proper to revile his character, (which is the question which is now immediately subjected to you) or to injure him in his person or fortune, or in any other manner whatever? This therefore is not to be coloured, as far as I can foresee, by any kind of argument whatever. The nature of the libel is too gross to be commented upon; it does no honour to any body that has been concerned in making it.

I shall content myself with proving the fact of this paper having been written, of this paper having been published originally by Mr. Horne; and the conclusion to be made upon that is too obvious a one, and too broad a one, for me to foresee at least any kind of difficulty about it. It was my duty to lay it before you. I, charged with the duty of my office, have brought it here; it is your duty to judge of it. You, charged by the oath that you have taken, are to determine upon it. If you can be of opinion that this licentiousness is fit to be tolerated, according to the old and established laws of this country; if you are of opinion that the fact is not proved upon the defendant in the manner in which it is stated by the witnesses; it will be your duty, your oaths will bind you to acquit him: but if the fact should be proved, if it should stand as clear as to my judgment and apprehension it now stands, you will be constrained by the same necessity of duty, and by the additional sanction of an oath, to entertain exactly the opinion of it which I have found myself constrained to entertain. I have no wish (I did not know Mr. Horne) I have no wish to prosecute any one individual; nor have I been desired, if I had such a wish, to prosecute him. And I hope I may add, that no desire could have compelled me to prosecute a man whom I myself had not thought guilty, notwithstanding any thing that has been said on the contrary side. I go upon the evidence as it is in my possession; I go upon the evidence

* Some account of this business is exhibited in Stephens's Memoirs of Horne Tooke, vol. 1, pp. 435, *et seq.*

as it is in my power to produce it. If there be any evidence on the other side, and if that is sufficient to refute the imputation which the evidence that I have to produce lays upon him, I shall be as ready to examine that with exactly the same degree of candour, and, I hope, of uprightness, as I have done the present. My duty is done by laying the matter before you. Your duty, I am sure, will be done to your own honour and the support of public justice by the verdict you will give upon the occasion.

EVIDENCE FOR THE PROSECUTION.

Thomas Wilson sworn.

Examined by Mr. *Solicitor General.**

Sol. Gen. Look at those papers. (The several Manuscripts from which the advertisements were printed in the newspapers. The witness inspects them.)

Do you know whose hand-writing those papers are?—They look like Mr. Horne's hand-writing.

Do you know Mr. Horne?—I have seen him write.

Do you take these to be his hand-writing?—They are like his hand-writing. I will not upon my oath say that they are his hand-writing; I believe that they are.

(The manuscripts of the two advertisements read in court.)

Henry Sampson Woodfall sworn.

Examined by Mr. *Wallace.*

What business are you?—A printer.

Do you print any newspaper?—Yes.

What paper?—The Public Advertiser.

Mr. *Wallace.* Look at these two papers (shewing the witness the manuscripts of the advertisements. The witness inspects the manuscripts.)

Have you ever seen these papers before?—Yes.

When did you see the first of them?—About the 7th of June 1775, as near as I can recollect.

By what means did you come by the sight of it?—Mr. Horne, the defendant, gave it me.

For what purpose?—To publish in the Public Advertiser.

Did you accordingly publish it?—I did.

Had you any other directions from Mr. Horne?—Yes. He desired me to send it to several other papers, which I did.

Do you recollect the names of any of them?—The whole, I believe, of them; I cannot exactly recollect.

Did you follow his directions?—I did.

Was any thing paid for it?—Yes. Mr. Horne paid the bill.

For the publication?—Yes.

Mr. *Wallace.* Look at those news-papers (shewing the witness the Public Advertiser of June the 9th, and of July 14, 1775. The witness inspects newspapers.)

Are those papers published by you?—I print that paper, and I suppose they are.

Cross-examined by the Defendant.

Mr. *Horne.* I am very glad to see you, Mr. Woodfall. I desire to ask you some questions. Pray what was your motive for inserting that advertisement?—Your desire.

Had you no other motive?—I was paid for it, as the advertisement is paid for.

Pray was it by accident, or by my desire, that there should be witnesses to see me write that advertisement?—By your desire.

And did I, or did I not, formally, before that witness, when called in, deliver that paper as my act and deed, as if it had been a bond?—Yes.

It is true, I did. Did I not always direct you, if called upon, to furnish the fullest proof that you could give?—You did, Sir.

Now then, Sir, if you please, say whether I have ever written any thing in your newspaper before?—Yes, frequently.

How many years ago, do you think?—The first remarkable thing that I remember, was something about sir John Gibbons, about his mistaking Easter for a feast or a fast.

How long ago is that?—About the year 1768, about the election time.

That is about nine years ago?—Yes.

Have I at any time desired you to screen me from the laws?—No.

Has not the method of my transactions with you at all times been, that you should at all times, for your own sake, if called upon, give me up to justice?—Certainly; that has always been your desire.

Pray, Sir, were you not once called upon by the House of Commons for something that I wrote in your paper?—Yes, Sir.

Do you remember that I did or did not, when I took care to furnish such full proof of this advertisement, give you the reason for it?—I cannot say I recollect the reason.

I will mention it. Whether was this the reason? That in the last transaction before the House of Commons it was pretended they let me off, because they could not get full evidence. Do you remember whether I rehearsed that or not; and said, that if they now chose to take notice of this advertisement, they should not want full evidence?—I do recollect that conversation.

You remember that was the reason I gave?—I do.

Will you please to look at these newspapers? (shewing several papers of the Public Advertiser to the witness. The witness inspects them). Do you know these news-papers?—I do.

Do you believe that you published them?—I do.

Look at the dates. I will call them over to you from a list—May the 30th and the 31st; June the 6th, the 9th, the 10th, the 12th, the

* Alexander Wedderburn, afterwards earl of Rosslyn, and successively Chief Justice of C. B. and Lord Chancellor.

15th, and the 16th, 1775?—I have looked at the papers: they are all of my publication: the date of one of them I cannot make out; it is June something.

We will go on—June the 21st and the 27th, 1775; then there is January the 11th, February the 8th, February the 7th, the 11th, June the 2d, and June the 30th, 1777?—They are likewise of my publishing.

Pray, Sir, do you recollect the contents of the paper of May 30, 1775?—No, upon my soul, I do not.

You are upon your oath.—I know that indeed.

Read that part (pointing a part out); read from "In provincial congress, April 26, 1774," down to that part (pointing it out).

Mr. *Wallace.* The officer should read it; though not now. You will be intitled to read it, when you come to your defence.

Mr. *Horne.* Pray do you know Mr. Arthur Lee?—Yes.

Did you ever receive any account from him relative to the persons who were killed at Lexington and Concord?—I really do not recollect.

Do you recollect that you ever published his name to an account?—I think I did; relating to his agency for some colony.

Look at that, and see whether you remember that, and how you received it? (Witness inspects Public Advertiser of May 31, 1775.)—Yes. I think I received this from Mr. Arthur Lee.

Pray who was Mr. Arthur Lee?—He is of the bar. I have seen him in Westminster-hall. He was there at the trial of Mr. Wright the printer, upon this very affair. I believe he was retained there.

Pray was he retained in your cause when you were to be prosecuted for this advertisement?—He was.

And why did you retain him? Had you any particular reason?—I presumed he knew more of the subject of the advertisement than I did.

Did he ever tell you any thing upon the subject?—We have had private conversation together as a matter of news.

Did he ever tell you he had lodged affidavits with the lord mayor of London?—He did.

Sir, did you ever tell me so?—I do not recollect.

Pray when had you, for the first time, any notice of a prosecution for the publishing of this advertisement?—About two years ago.

Pray did that prosecution go on?—No.

Do you know why?—Yes. I let judgment go by default.

The first time?—I was never called upon till last January.

It began two years ago; and you were never called forward upon it till last January?—I think that was about the month.

As near as you can recollect?—Yes.

When were you first applied to, or were you ever applied to, to be a witness in this cause?—I was not.

You never were?—No.

How came you to be an evidence?—I heard that if I could produce my author, matters might be better for me; and as you had no sort of objection (which you told me at the time) I did of course produce those copies that appeared there to Messrs. Chamberlayne and White, the solicitors for the treasury.

Should you at any time, if you had been called upon, have declared that I was the author of that advertisement?—Most certainly; for you desired it.

And would have given your evidence?—Yes.

Whom was the application made by?—It was no sort of application at all; I heard of it.

By whom?—My brother.

You never refused to furnish evidence against the author?—No.

You never were applied to, to do it?—No; I was not.

You have said that I never desired you to conceal me from the law for any thing you published from me. Did you ever receive any letter or message from sir Thomas Mills in your life?—A private letter I have.

But did not that private letter relate to the public paper?—Never.

Did you never receive any message not to insert any thing in your paper about lord Mansfield's earldom?—No.

Upon your oath?—Upon my oath, to the best of my recollection, I never did.

From any quarter?—No.

Sir, were you ever sent for by lord Bute?—No; I never saw him.

Were you not sent for for inserting a paragraph about the king's marriage?—No; I am not consulted by the higher powers, I assure you.

If I had thought you were, I never should have trusted you: I do not think you are.—I am much obliged to you for your good opinion.

Mr. *Horne.* I will give you no more trouble.

William Woodfall sworn.

Examined by Mr. *Wallace.*

Please to look at that paper (shewing the witness the manuscript of the advertisement. The witness inspects it). Have you seen that paper before?—I have.

When did you first see it?—Mr. Horne delivered it into my hands in my brother's compting-house on the 8th of June, to be inserted in the London Packet and Morning Chronicle; both which papers I print.

Was it accordingly inserted in those papers?—It was.

Look at those papers (shewing the witness several papers of the Morning Chronicle and London Packet. The witness inspects them). Are those papers published by you?—They are.

Cross-examined by the Defendant.

Mr. *Horne.* Mr. William Woodfall, I will not repeat all the same questions to you. Did you ever receive any application?——No.

Your answer is of the quickest. Had you not better hear the question?—I presume you meant to ask the same question you put to my brother; as you laid an emphasis upon the word 'you.'

Did you ever receive any letter, or message, or desire, or request, of any kind, in any manner, not to insert any thing in your paper relative to lord Mansfield's earldom, on your oath?—On my oath, I never received any letter.

Message, or request, of any kind, in any manner, Sir, from sir Thomas Mills, I ask you?—No, I think not.

You must be a little more positive, because my question will not admit of a 'think.'—I do not recollect I did.

Then take a little time.—I don't recollect that I did. I know very well, that some person or other, once, mentioned it to me.

That is an application. To mention it to you is a stronger application than a letter.—I had some conversation about it. I don't recollect that I was desired not to publish it.

Was it to request you not to insert squibs or any thing?—I recollect I did insert it.

What?—Lord Mansfield's promotion to an earldom.

What was that application? That you 'would' insert paragraphs about it, or 'would not'?—It was a conversation, not of the nature of business; nor any express desire to me; some conversation, as might be between two friends.

Upon your oath, you had never any application to omit inserting any thing of that kind?—Upon my oath, I don't recollect that I had.

Nor have you ever said that you had?—If I don't recollect that I received any application to keep out any thing relative to it, I consequently cannot have spoken of it.

Did you, or did you not, ever speak of it?—Not that I am aware of.

But you will not swear positively you never did?—I had no direct application to me to keep out any thing.

'Direct'—My question was 'direct' or 'indirect,' or of any kind.—I mean to answer 'direct.' I don't recollect that I was ever applied to, to keep out any thing; or that I ever said I was applied to, to keep out any thing.

More than that you cannot recollect?—No.

[The Associate read the advertisements in the several papers that had been proved and put into court on the part of the prosecution.]

Att. Gen. My lord, we have done.

Mr. *Horne.* Gentlemen of the jury; I am much happier, gentlemen, in addressing myself to you, and I hope and believe I shall be much more fortunate as well as happy, than in addressing myself to the judge. I have been betrayed, gentlemen, I hope, into no unseemly warmth; but yet into some warmth. I have felt myself like a man first put into hot water; but I have now been long enough in it to be perfectly cool. And, gentlemen, some small allowances might have been made for me by my judge who presides upon this cause, when he considers the peculiar disadvantages in which I stand here before him. Gentlemen, I am an absolute novice in these matters; and yet opposed to gentlemen some of the most eminent in their profession, and some of the most conversant in practice. But that is not all; I have a farther disadvantage. I stand here, gentlemen, before you, a culprit as well as a pleader; personally and very materially interested in the issue of the cause which I have to defend. And every gentleman in the court must know—(some perhaps by their own experience, all by the reason of the thing)—how very different is the sportful combat with foils from that which is seriously disputed with unbated swords; and how frequently the fluttering of the heart, in the latter situation, has been known to enfeeble the steadiest wrist, and to dazzle the clearest and most quick-sighted eye. Gentlemen, I have read even of counsel, eminent in their profession, conversant in practice, approved and applauded for their ingenuity in the defence of others, who, when they came to stand in the same situation in which I now stand, have complained to the Court (and met with an indulgence which I have not), they have complained to the Court of the same disadvantage which I now feel. Gentlemen, I have listened to Mr. Attorney-General's declamation with as much patience, and, I believe, with much more pleasure, than any one in the court. That pleasure I do acknowledge was personal to myself; arising from the futility of the support which Mr. Attorney-General has attempted to give to the serious charge which he has brought against me; a pleasure, however, mixed with some pain, when I consider the wretched times at which we are arrived; when a gentleman of his natural sagacity is, I own, justified by recent experience for supposing it possible to obtain from a London jury a verdict for the crown, upon a mere commonplace declamation against scandal and indecency in general, without one single syllable of reason, or law, or argument, applicable to that particular charge which he has brought against me, and which you are now upon your oaths to decide. Gentlemen, you know, as well as I do, that I am personally and in all respects an absolute stranger to every one of you. I am glad of it. I do not expect or desire from you either friendship, or favour, or indulgence. It is your duty to do impartial justice, and I only request your attention. I began with requesting it; and I requested your attention, that you may be able to judge for yourselves, and that the verdict which you shall give—personally as it respects myself it is totally indifferent to me—but that the verdict which you shall give, may be really your own, as it ought to be, and not the judge's. That is the only thing I request of you, and I request it, because it is your duty and your oath.

Gentlemen, as for the charge that is brought against me, you cannot be ignorant that I am

charged with the only unpardonable crime which can, at this time, be committed. I am accused of a libel.

Murder and sodomy, you know, have in these our days often found successful solicitors: and the laws against popery (though unrepealed and in full legal force) are, when resorted to, thought, by the magistrate who presides here, too rigorous to be suffered to have their free course against a religion so destructive of the civil rights of mankind, and so favourable to absolute and arbitrary power. But whilst that has been favoured beyond the laws, nothing beyond the laws has been thought rigorous and severe enough against the charge of libel. Murder, attended with the most aggravating circumstances, has been repeatedly pardoned; and treason, the blackest treason, against the family on the throne, and (what is of much more consequence to us than any family) against the free constitution of this country, has been not only pardoned, but taken into favour; and the estates of convict traitors have been restored to them and to their families.* Whilst mercy and forgiveness, gentlemen, have been thus flowing unnaturally in a full stream over the highest mountains of iniquity, has any one of you ever spied the smallest rivulet descending towards the valley of the libeller? Has any man charged with a libel (and what has not been charged as a libel?)—has any man so charged ever yet met with mercy? Gentlemen, I do not call back again these things to your remembrance in order to arraign them; that is not my present business: I only mention them to gain from you, the only thing I wish, your attention. You will be pleased then, gentlemen, as one motive for your attention, to remember the nature of the crime charged.

Gentlemen, if the nature of the crime and the rancour with which it is pursued, if that affords a strong reason for your particular caution and care and attention in this sort of trials, a much stronger reason indeed will be afforded you by the nature of the prosecution. It is called an information *ex officio*.† The term *ex officio* is a very gentle expression for a very harsh thing. *Ex officio* (the gentleman well explained it to you, when he boasted of his conscience, and his integrity, and duty; for it the means of great persecution. In truth it seems a power necessary for no good purpose, and capable of being put to a very bad one. For, although a man may doubt whether a grand jury in times of violent party would always find a bill of indictment or present, yet there can be none but that a court of King's-bench would grant an Information, wherever it could, by any administration, be applied for with the least foundation."

And in another place he says, "The prerogative which an Attorney-General assumes of filing an Information against whomsoever he pleases, is certainly a reproach to a free people; and if the regular information awarded upon special motion by the King's-bench were likewise taken away, I do not think the constitution would be injured by it: in which case the old common law method of indicting for a libel, as a violation of the peace, would be the means that every body must resort to; and in my opinion a grand jury are very competent and the properest judges, whether any publication be destructive to the welfare of the state or not." And for this last clause which I have cited, he refers to the valuable treatise upon Grand Juries, called, 'The Security of Englishmen's Lives,' attributed to Mr. Sommers.

The attempt at the time of the Revolution to take away Informations in the court of King's-bench, is noticed in the 'Letter concerning Libels, Warrants,' &c.; but I had not the passage in my recollection when I wrote the Note to the Case of sir William Williams, vol. 13, p. 1369. In the case of Rex *v.* Mary Jones and another, mentioned in that Note, the vexatious operation of the Attorney-General's Information was, that it caused two poor Welsh persons, convicted of a minor offence against the revenue laws, to come from the principality to the bar of the court of King's-bench at Westminster, in order to receive judgment, which would have been passed upon them in their own neighbourhood, if the proceeding against them had been by indictment.

In the case of Philipps and others, Trin. 4 G. 3. 3 Burr. 1564, lord Mansfield declared, that the Court would never grant an Information upon the application of the Attorney-General, in cases prosecuted by the crown; because the Attorney-General has a right himself *ex officio* to exhibit one: and in the same case he said, "the Attorney-General may, if he thinks proper, summon the parties to shew cause, why an Information should not be exhibited, before he signs it."

And in the case of the King *v.* William Davis Phillips, esq. Pasch. 7 G. 3. 4 Burrow, 2089, De Grey, Attorney-General, having (on the part of the crown) moved for a rule upon the defendant to shew cause, why an Information should not be granted against him, the

* Mr. Horne's mention of the restoration of the estates of convict traitors alludes to the Case of general Fraser, eldest son of lord Lovat who was executed in 1746. See the proceedings against him, vol. 18, p. 530. See, also, stat. 14 G. 3, c. 22; 24 G. 3, stat. 2, c. 57; 28 G. 3, c. 63.

† In the celebrated 'Letter,' which has been ascribed to Lord Chancellor Camden, and also to Mr. Solicitor General Dunning, 'concerning Libels, Warrants, the Seizure of Papers, and Sureties for the Peace or Behaviour, &c. by the Father of Candor,' are alleged with great ability many objections against the Attorney General's Information *ex officio*, of which the author says, "It is a power, in my apprehension, very alarming; and a thinking man cannot refrain from surprise, that a free people should suffer so odious a prerogative to exist. It has been, and may most certainly be again,

is certainly so)—*ex officio* means, that which he does from a sense of duty. If in this you consider only just what meets the ear, there is no harm in it; it is a good thing: duty is a good thing. But if you examine the real force and consequences of the term, as here applied, you will find it to contain every thing that can be imagined illegal, unjust, wicked, and oppressive. For my own part, I am astonished that any man, at this time of day, exercising such powers as are not according to law, and are much less according to reason, should talk to you, with an open face, of integrity, of honour, of duty, of conscience; and that, instead of aggravating and shewing you in what the charge which he has brought against me, in what my crime consists, he has employed half his harangue in boasting of his own character. If any man in the court who had not known that I was the defendant had come in at the time that that gentleman was talking of his integrity, his conscience, and his duty; I ask, would he not immediately have concluded that Mr. Attorney-General was the defendant then making his defence? He must. Let the gentleman's integrity and honour be as great as he tells you it is; what has that to do with me? What has that to do with the charge which he has brought against me? except indeed this; that, having nothing really to charge me with, he sets up his own great, immaculate character in opposition to mine; that you may give a verdict against me, because he is a man of honour, an uncorrupt man, a pure man of integrity, and would not charge me, if he did not think me guilty. Let him think what he pleases; if you do not think me guilty, I care very little what he professes to think. I know that he is manly enough; and I honour that part of his character. He bears a man's heart in his bosom, and (though his office has made him hold the language he does) I defy him not to respect me. I know he does. I am sure of it.

Gentlemen, I said that *ex officio* contained every thing that was illegal, unjust, wicked, and oppressive; and I will prove it to you. *Ex officio*—(a little specimen of it you have seen)—*ex officio* means a power to dispense with all the forms and proceedings of the courts of justice, with all those wise precautions which our laws have taken to prevent the innocent from being oppressed by exorbitant and unjust power———

Gentlemen, I was thrown off my guard. I own I was. I had prepared an argument; which I believe his lordship perceived: he therefore granted me what I intended to have inforced; and, having granted it to me, that grant was made use of to prevent me from gaining any argument in answer, of any kind. You must have taken notice of it; it is your duty to take notice. Juries have been too much considered as men out of court; and when an application has been made to the judge to determine upon a point of law, the jury has been considered as having nothing to do with the matter. No more they have, indeed, to decide it. But the jury has this to do with the matter: they are to make a true deliverance; and they will see and will judge whether the defendant has justice done him or not, even in the practice of the court. I know nothing of the law: I am not sorry for that: this is not a question of law; and I am happy to have Mr. Attorney-General's authority to say, that it is "the plainest, the simplest question; and that it was too obvious for him to foresee a difficulty in it." He said, it was "the plainest of all the plain and simple matters that were ever laid before a court;" and being so, you are the best judges of it. And indeed the nature of a libel always makes a jury the best judges of it; for a libel (if it be so) is intended for mischief: it must therefore be intelligible to the people, or no mischief could be produced by it. If a man writes a libel that a common jury could not understand, (and you are a special jury, gentlemen) he must fail in his design. Observe then, gentlemen, this advertisement is the plainest and simplest of all the matters that were ever laid before a court in which the Attorney-General was concerned: and in these two years and a quarter that he has had to bring it to trial, he has not been able to see a difficulty in it; and yet he has had a special jury to determine it: a common jury could not be left to determine it: and that I will explain to you hereafter. I

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motion was rejected, upon the ground, that if the Attorney-General thought it right, that an Information should be granted, he might grant it himself; if he did not think so, he could not expect the Court to do it: and lord Mansfield said, "If the Attorney-General should have any doubt about the propriety of it, he might send to the person complained against, to shew him cause why he should not grant it."

With respect to an Attorney-General sending to a person to shew cause why an Information should not be filed against him, see what was said in parliament upon the conduct of the Attorney-General of Ireland in the case of Fitzpatrick, A. D. 1812, 23 Parl. Deb. pp. 996. 998. 1081. 1086, 1087. 1111, *et seq.*

For more concerning the Information *ex officio*, see the Case of sir William Williams, vol. 13, p. 1369. See, also, 16 New Parl. Hist. pp. 40. 1127. 1175.

Mr. Hargrave has, more extensively than has yet appeared in print, investigated the subject of the Information *ex officio*, as well as that of the examinableness of commitments by a House of Parliament or Court of Justice, for contempt or breach of privilege. It is to be hoped that the result of his investigations may be made public.

See, also, distinctions as to the rights of the Attorney-General in matters of practice, when he proceeds for the crown as formal prosecutor; and when he proceeds for the crown as actual prosecutor, in 2 Stra. 216, (cit. vol. 17, p. 211), and 4 Burr. 2458.

know very well, that not only juries, but many other persons who apply even to the practice of the law, never trouble their heads to take into consideration altogether the enormous wickedness of the powers claimed in this sort of prosecution. It shall be my business therefore to explain it to you. You shall judge of the honour, and integrity, and conscience of the gentlemen who use them and enjoy them.

And, first of all, an information means no more than an accusation. Appeal, indictment, information, are, as I take it (and I shall be corrected if I am wrong; it will be well corrected both by the Attorney-General and the Judge)—I take it they mean no more than accusation; and they have a different specific name because of the different manner in which that accusation is brought forwards. Then, gentlemen, this is an accusation by duty; out of duty: and by this means, by this his duty, the Attorney-General is enabled, contrary to the laws of the land, to accuse whom he pleases, and what he pleases, and when he pleases. And (if he pleases) he only accuses them, and never brings it to trial: he goes on harassing the subject with information upon information, if he pleases, and never brings the man to trial. If, however, out of his mercy, or out of his resentment, he does chuse at last to bring it to a trial; why, gentlemen, he, in general, tries it by whom he pleases. Gentlemen, when it comes to trial, he tries it in what manner he pleases, he takes what advantages he pleases, and no reason will be given for those advantages. Gentlemen, during the course and progress of the trial, if, notwithstanding those advantages he has already taken, he sees some reason to suspect that the verdict is likely to go against him, he claims a right to stop it if he pleases, without any decision; for he claims a right to withdraw a juror, as it is called; that is to say, You shall not come on to a verdict. The Attorney-General must not deny it, unless indeed the practice of the Court is changed in that particular.

The practice of the Court we see does sometimes change: for I have it now from the Judge, that in all cases the prosecutor has a right to reply; which truly I did not before think to be the practice: but, however, the Bar will take notice now; for they will soon have cases in which they may enjoy that benefit and privilege, if it be one: the prosecutor has a right to reply, even though no evidence is called for the defendant. I shall see some more new methods of proceeding in trials; I have seen a good many. I think there must be somewhere or other in the court a gentleman with spirit enough,—some gentleman or other—many I hope there are, who will (upon some trial where they may be prosecutors), who will take that advantage that has been allowed to-day, and will offer to reply where no evidence is called. There were some half words I know dropped about matter of law, but I hope that will be made plain.

Well; but if the Attorney-General does not stop the cause without coming to a decision, but thinks he shall get a verdict in his own favour, and therefore suffers the cause to go on; if he loses the verdict, he suffers none of those displeasing consequences which other men must suffer; for the crown pays no costs—none at all:—he can prosecute as often as he pleases, and whom he pleases, and pays no costs! But that is not all. Suppose he has convicted six, seven, or eight men for the same offence, he exercises the sovereign power of pardon; he calls to judgment which of them he pleases, and lets go by which of them he pleases. It has happened in the prosecution for this very paper:—out of several convicts, but three have been called up to judgment. That in some part I shall explain to you. But that is not all: the man or the men whom he calls up to judgment, he, the prosecutor, aggravates their punishment as he pleases; and that I will prove to you. In that, I think, I shall not be contradicted, because I have the authority of the judge who is now trying this cause.

So that in every stage of the business you will find that there is an unjust, an illegal, a wicked, and an oppressive advantage. And that you may not think that I am declaiming without any proofs, I will so far trespass upon your time as to come a little more to particulars.

And first, gentlemen, for the beginning of such a prosecution. He brings it on as he pleases; he has no resort to a grand jury, or the country to accuse; but, contrary to express law, and what is much stronger, contrary to the strongest and the very fundamental reason of that law, he has no recourse at all to a grand jury; and that because it is the pretended suit of the crown. Now, gentlemen, if we want to enquire (which is not often done, I know, in courts of justice) why any grand jury? why a grand jury at all? It is not owing to the nature of the offence; grand juries are in capital offences and in small offences. Why are a grand jury to find the accusation? for you must not be led away by technical terms. Information, appeal, indictment, all mean one and the same thing; accusation brought by different persons, that is the only reason of their different appellations. If that is not the reason of the difference of the names, I shall be corrected.

Then why a grand jury? I would tell you in my own words, if I had not the words of a person more to be relied upon. Sir John Hawles says—these are his words—"The true reason of a grand jury—"

But, gentlemen, I shall just obviate an objection first, because I shall not have an opportunity after it is made. It may be objected, that I have taken this from the State Trials; and I have heard from the bench that the State Trials are no authority. I have also heard from an officer very high in the law, and of very great acknowledged abilities, who sits by the side of the Attorney-General, that they are

a much better authority (I speak it because I heard him say so) that they are a much better authority than the scrawl of a nameless Reporter. But I will tell you why the State Trials in certain cases are the best authority; and that is, for this reason: because they are equally good authority, whether what they relate is true or false. It is a strange assertion, but their authority is equally good for the purpose for which they are brought, whether the things they tell are true or false. I have heard them called from the bench (and called so for very good reasons) "libels upon the judges."—"The State Trials are so far from being an authority, that they are libels upon the judges."—Are they so? Then they are still better authority than if they were true; that is, authority for the purposes for which they are brought; that is, for the condemnation of the wicked doctrines which they expose. For are they libels upon the judges? Was the intention of those who wrote them to blacken their characters? Would the libellers then at that time of day (some a hundred, two, or three hundred years back, or according to the length of time) would an enemy have put into the judges' mouths doctrines which were honourable? No; if he intended to libel them, he has falsely made them the propagators of those doctrines which their souls abhorred. Can there then be a stronger evidence about the opinion which men had formerly concerning these doctrines? If there cannot, then there can be no stronger authority against the doctrines exposed by the State Trials. True or false, the State Trials are the best authority which can be had; and better if they are false than if true.

Then, gentlemen, I will proceed to my authority: "The true reason of a grand jury is the vast inequality of the plaintiff and defendant; and therefore the law has given this privilege to the defendant on purpose, if it were possible, to make them equal in the prosecution and defence, that equal justice may be done between both. It considers that the judges, the witnesses, and the jury, are more likely to be influenced by the king than by the defendant: the judges, as having been made by him, and as it is in his power to prefer or reward them higher: and though there are no just causes for them to strain the law, yet there are such causes which, in all ages, have taken place, and probably always will. Nor was it, nor is it, possible but that the great power of enriching, honouring, and rewarding, lodged in the king, always had and yet must have an influence on the witnesses and jury; and therefore it is that the law has ordered that at the king's prosecution no man shall be criminally questioned" (this is a criminal question) "no man shall be criminally questioned unless a grand jury, upon their own knowledge, or upon the evidence given them, shall give a verdict that they really believe the accusation is true."*

If, gentlemen, there are other reasons for a grand jury than these, if there are others, you will have them; and though it will not be permitted to me to do (what with the utmost extent of my ignorance of the law, which is very great, I am still sure I could do by common-sense and reason—I mean, refute those other reasons;) I say, though I shall not be permitted to do that here, you and all the world will be able, at your cooler hours, to determine upon the force of those reasons that shall be given, from whatever authority they may come. And in this respect I shall be happy; for I shall have the honesty and the understanding of the public at large to judge of those doctrines which my imbecility might not permit me sufficiently to refute.

Gentlemen, it is true that the court of King's-bench has also assumed a power of accusing men. They say they may safely be trusted with it. I believe their claim illegal; but I have nothing to do with it: and I acknowledge that it is much safer there, than in the hands of an Attorney-General, who is whipped in and whipped out just as the minister, whose friend he is, goes in or out.

But that is not all. The court of King's-bench cannot grant an information without an affidavit, without an accusation upon oath; no one of the judges of the court of King's-bench can do it; and yet they are a little more independent (they have fewer hopes, and therefore fewer fears) than the Attorney-General; yet no one of the judges of the court can accuse a man. It must be the whole court, and they must do it in consequence of an oath. If I am wrong, you will have the pleasure of contradicting it (turning to the Attorney General). But the Attorney-General accuses men neither upon the oath of others, nor yet upon his own oath. If he believes the matter of the accusation true, it is but the belief of one man, and he a prejudiced man, and the most improper man in the kingdom for his authority to be taken in such a case. But, gentlemen, what is much worse, it frequently happens that no man whatever avows the accusation, or believes it; no, not the Attorney-General himself who files the information. I will prove it by-and-by, even in the case of the Attorney-General who filed this declaration. Gentlemen, I shall desire by-and-by, for your satisfaction and mine, to find out whether there is one man in the country that believes me guilty of the crime laid to my charge; a crime of that nature that is to have a punishment which is called by the law a temporary death, an exclusion from society, imprisonment. The apparent object of this prosecution is to take what little money out of my pocket I may have there, and to imprison me, and so exclude me from that society of which I have rendered myself unworthy. However, I have the pleasure to see that there sits a gentleman by the judge who is now trying me, who, as well as myself, has charged the king's troops with murder; a charge which at that time excited

* See vol. 8, p. 838.

great abhorrence and detestation against him. The judge and that gentleman have been laughing all the time of this trial; they have enjoyed each other's company exceedingly [a great laugh for some minutes of the whole audience]. Well, gentlemen, (turning towards lord Mansfield and Mr. Wilkes) I have caused another laugh between the gentlemen; but it gives me pleasure to think, that if ever I am to come out of prison again (if you are so kind as to put me there) I too may have the honour (if it be one) of sitting cheek by cheek with the judge, and laughing at some other libeller. I said, if I come out again—because if it is possible that I should be put there for this charge, I believe that will never happen. I will never cease repeating the charge I have made, till those men are legally tried and acquitted who are guilty of what I call murder. I will not be contented with one, nor with two, nor with twenty juries. I will repeat the charge of murder upon the troops every day, if this doctrine gets so far even as to a doubt; and I call upon the Attorney-General now, if he may, if he can, if he will venture without the permission of those ministers whose humble servant alone he is; if he may venture, I call upon him to pledge himself to bring an information for a seditious libel against the king and the government every time I charge the troops with murder. I promise him I will give him business enough, and I hope he will (if he may venture to do it) promise to file an information every time I charge them with murder when they commit it.

But, gentlemen, I have wandered; though, if I am to be shut up so soon, a few excursions before it may be excused me.

The Attorney-General does not apply then to the grand jury, and there is no person whose accusation upon oath it is.

When he has filed his information, he proceeds or not upon it as he pleases; he files fresh informations if he pleases, when he pleases, as often as he pleases; he uses it if he pleases as a vexatious method which may harass and ruin and destroy the greatest fortune in this country. It has been used vexatiously. I do not say by the present Attorney-General; I do absolutely acquit him of that; he never, that I know of, has been guilty of that practice: but I do know Attorney-Generals who have: but that I may not seem to libel all the world, I will not mention them nor the case.* When the Attorney-General has brought his accusation, and renewed and delayed it as much as he pleases, if he chuses to try it, I said, he tries it by almost whom he pleases. It may seem perhaps a strange thing for me to say to a jury who are trying my cause; but it is a fact; for he is always sure to have a special jury for the trial of this sort of charge. Libel is always tried by a special jury. Now this seems a very comical thing; for there is an expence attending it. The gentleman, I suppose, would not be thought to be unnecessarily lavish of the income of the crown, which has lately been found so deficient: he surely would not voluntarily throw it away. And yet a man that came from Brentford (my clerk formerly) had two guineas for his expences. He is a very honest man; it was a very lucky matter for him: I wish, for his sake, that he might be called a witness against me once a week upon such a prosecution. Now if the ground of the charge happens to be, as this is, "of all plain and simple matters that ever were laid before a court the most simple;" it is a very strange circumstance that the Attorney-General should chuse to have a special jury to try a thing in which there is nothing special! Special juries were never intended or appointed for that purpose. They were intended to examine into merchants accounts, or any critical or nice matter; for you know we are told that you have nothing to do with the law: you do not therefore want any legal education; and yet special juries are always made use of in matters of libel. And indeed why should they not? It costs the Attorney-General nothing. In the case of any other prosecutor, it would be at his expence; but the crown pays this, that is, the people pay it against themselves. However, that is no objection to Mr. Attorney-General; for if you look at the law-expences in the civil list of the last year 1776, as they are delivered in to parliament, you will find that they amount to the little insignificant sum of 60,000*l.* A defendant against the crown is in a blessed situation! But as the expence is no reason against the Attorney-General chusing to try it by a special jury, he has a very strong reason for chusing a special jury; and that is, because, by that means, he tries it by almost whom he pleases: I do not mean by the particular individuals whom he pleases, but generally by that description of men that he pleases. Now this, gentlemen, is particularly unfortunate in my case; for the Attorney-General said (I heard him say it upon the first trial for this advertisement) that nine-tenths of the people approved of all the measures of the ministry relative to America. The method of striking a special jury seems at first sight fair enough. Forty-eight men are struck from a book. The defendant and the prosecutor each strikes off twelve. That seems very fair and just; but it is very far from being so [illegible]; for if nine-tenths of the people (which he himself acknowledged) are of that way of thinking (a way of thinking contrary to what I may well seem to be) you will observe that the Attorney-General strikes off two-tenths and half a tenth out of the forty-eight; so that he will be sure not to have one man of my way of thinking concerning America: I mean, it will be so, if at least they know what they are about: so that you see there is sure to be a little prejudice against the defendant in the minds of the jury. If is true, indeed, that the opinion of the jury concerning the measures relative to Ame-

* This allusion was I believe designed to apply to sir Dudley Ryder.

rica has nothing fairly to do in this cause; but the prejudice may be extended from one thing to the other. We all know very well how men's minds are apt to run. But that is not all. This prejudice will be the case, even though the special jury are fairly struck: but they are not fairly struck. I believed so; but I never was sure of it till this case of mine: and whatever I may suffer, I think it a cheap purchase to know what I now know by this means. The special jurors in the counties, especially in Middlesex, great numbers of them, are qualified by the crown; they are esquired by the crown; and these crown esquires always attend upon the special juries. In the city, gentlemen, to which you belong, you know very well whether the description of merchant has or has not changed within some years past. You know, I dare say, many of you, what merchants were—what merchants are. You all know well that the very numerous and extensive contracts which are going forward bring a swarm of merchants in amongst you. Every man that has a contract becomes a merchant; every man that has a contract is liable to be struck upon a special jury, and he is sure to attend, if he is taken: and you must observe besides, that the Solicitor of the Treasury, who is constantly in this employ of striking special juries, knows all the men, their sentiments, their situations, their descriptions, and the distinction of men.

Now, gentlemen, for the method of striking a special jury, which I shall not wonder that you are not acquainted with: and for the counsel, it is a matter that they are not concerned in. Observe, I do not lay these things to the charge of the Attorney-General; he only uses the powers which others put into his hands.—The special jury, you may imagine, are taken indifferently, and as it may happen, from a book containing all the names of those who are liable to serve. I thought so when I read the act of parliament appointing the manner in which they should be taken; but when I came to attend to strike the special jury, a book with names was produced by the sheriff's officer. I made what I thought an unexceptionable proposal: I desired the Master of the Crown-Office,* (whom I do entirely acquit, and do not mean the slightest charge upon) I desired the Master of the Crown-Office that he would be pleased to take that book; open it where he would; begin where he would, at the top or

* Within the period of a few years after this trial, Mr. Horne (I have not, in my cursory inspection of Mr. Stephens's Memoirs of him, discovered when the additional name of Tooke was assumed) twice, as candidate for a call to the bar, presented himself to the Masters of the Bench of the Inner Temple: and upon both occasions sir James Burrow voted for his call. The former of these attempts by Mr. Horne Tooke to be called to the bar was made in Trinity term 1779; when only three benchers (sir James Burrow, Mr. Baron Maseres, and Mr. Wood) voted in his favour, and eight voted against him. Upon this occasion the benchers of the Inner Temple had consulted those of the other three Inns of Court respecting the propriety of calling to the bar a gentleman in priest's orders (Mr. Horne had received priest's orders). Eleven benchers of Lincoln's-inn, who took the matter into consideration, reported, June 16, 1779, their unanimous opinion that it was not proper to call to the bar a person in priest's orders. And a verbal answer, expressing a like opinion, was sent from the benchers of the Middle Temple and of Gray's-inn. See 2 Luders's Rep. of Election Cases, p. 281, Note.

Mr. Tooke made his second attempt to be called to the bar in Trinity term 1782. At this time lord Shelburne, afterwards the first marquess of Lansdowne, was First Lord of the Treasury, and as it was known that he wished well to the application (as did his friend lord Ashburton), it is probable that a successful issue was expected: the attempt however failed. I believe that in favour of Mr. Tooke voted the earl of Suffolk, sir James Burrow, Mr. Baron Maseres, and Messrs. Coffin, Jackson, and Wood; and that on the other side voted Messrs. Annesley, Daines Barrington, Baron, Barton, Bearcroft (in 1788 Chief Justice of Chester), Coventry, and Hall.

In Mich. term 1793 the benchers of the Inner Temple sent to the other law societies an inquiry, whether a person in deacon's orders was admissible to the bar. In Trin. term 1794, a delegation from the other societies met a deputation from the Inner Temple, at which aggregate meeting it was the opinion of all the deputies of the four Inns of Court, that a person in deacon's orders ought not to be called to the bar. In that same term Mr. Tooke's name being again inserted among the candidates for admission to the bar no bencher moved his call.

Particulars concerning the last mentioned proceedings are to be found in the Order Book of the Inner Temple; in the Black Book of Lincoln's-inn, under dates Dec. 13, 1793, June 2, July 9, July 22, 1794; and, I conjecture, among the documents of the other societies.

It may be observed, that on April 30th, 1792, Mr. Tooke had in person conducted his defence to an action instituted by Mr. Fox, for certain costs occasioned by a petition against his return to parliament as member for Westminster. In the minds of those who wished to preserve the decencies of the tribunals of justice, and to guard against wanton insults to her ministers, Mr. Tooke's deportment in that cause of his own, could not, I think, excite or encourage an inclination to authorise him to conduct the causes of others.

In the case of Hart (Pasch. 20 Geo. 3, reported in Dougl. 353) lord Mansfield laid down, that "all the power of the Inns of Court concerning admission to the bar is delegated to them from the judges, and that in every instance the conduct of those societies is subject to the con-

at the bottom; and only take the first forty-eight names that came. I said, I hoped that to such a proposal the Solicitor of the Treasury could have nothing to object. I was mistaken; he had something to object. He thought that not a fair way (turning round to the Attorney-General). There were witnesses enough present; and I should surely be ashamed to misrepresent what eight or nine people were present at. He thought that not a fair way. He thought and proposed as the fairest way, that two should be taken out of every leaf. That I objected to. I called that picking, and no striking, the jury. To what end or purpose does the law permit the parties to attend, if two are to be taken by the Master of the Crown-Office out of every leaf? Why then need I attend? Two may as well be picked in my presence as in my absence. I objected to that method. The Master of the Crown-Office did not seem to think that I had proposed any thing unreasonable. He began to take the names; but objected that he could not take the first forty-eight that came, because they were not all special jurymen; and that the names of common and special jurymen were mixed together, and that it would be a hard case that the party should pay the expence of a special jury and not have one; that they were expected to be persons of a superior rank to common jurymen. I could have no objection to that, provided they were indifferently taken. I said, Take then the first forty-eight special jurymen that come. He seemed to me that he meant to do it. He began; but as I looked over the book, I desired him to inform me how I should know whether he did take the first forty-eight special jurymen that came, or not; and what mark or description or qualification there was in the book, to distinguish a special from a common juryman? He told me, to my great surprize (and he said he supposed I should wonder at it) that there was no rule by which he took them. Why then how can I judge? You must go by some method. What is your method? At last the method was this: that when he came to a man a woollen-draper, silversmith, a merchant (if merchant was opposite to his name) of course he was a special juryman) but a woollen-draper, a silver-smith, &c. he said that there were persons who were working-men of those trades, and there were others in a situation of life fit to be taken. How then did he distinguish? No otherwise than this: if he personally knew them to be men in reputable circumstances, be said, he took them; if he did not know them, he passed them by. Now, gentlemen, what follows from this?

But this is not all. The sheriff's officer stands by, the Solicitor of the Treasury, his clerk, and so forth; and whilst the names are taken, if a name (for they know their distinction) if a name which they do not like occurs and turns up, the sheriff's officer says, "O, Sir, he is dead." The defendant, who does not know all the world, and cannot know all the names in that book, does not desire a dead man for his juryman. "Sir, that man has retired." "That man does not live any longer where he did." "Sir, that man is too old." "Sir, this man has failed, and become a bankrupt." "Sir, this man will not attend." "O," (it is said very reasonably) "let us have men that will attend, otherwise the purpose of a special jury is defeated." It seemed very extraordinary to me, I wrote down the names, and two of them which the officer objected to I saved. "I begged him not to kill men thus

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trol of the judges as visitors. A Mandamus will not lie to compel the Masters of the Bench of an Inn of Court to call a candidate to the bar. From the first traces of the existence of the Inns of Court, no example can be found of an interposition by the courts of Westminster-hall proceeding according to the general law of the land; but the judges have acted as in a domestic forum." If a person conceive himself to be aggrieved by the Benchers of an Inn of Court in refusing to call him to the bar, or in disbarring him, it seems that the proper application for redress is a petition of appeal to the twelve judges. For other matter connected with this subject, see the reports of the proceedings in the House of Commons on the petition of Mr. Farquharson, presented on Feb. 23d, 1810, Parl. Deb. vol. 15, pp. 552 *et seq.*; vol. 16, pp. 27** *et seq.*; 45. See, also, the case of Cunningham *v.* Wegg *et al.* 2 Bro. Rep. in Chancery, 241, in which case a bill for renewal of leases of chambers having been filed against the benchers and other officers of Gray's-inn, the defendants pleaded that Gray's-inn was governed by benchers, who concerning the letting of chambers make rules, subject in cases of dispute to an appeal to the Lord Chancellor and the twelve Judges. And, by lord Thurlow, Chanc. "It is a good plea. There is no instance of a suit relative to the discipline, or the property of chambers, in an inn of court. The defendants say, as far as they have acted, they are liable to the jurisdiction of the judges. It is a claim among persons having privilege; therefore this is not the proper jurisdiction."

With respect to the influence of episcopal ordination by imposition of hands, and the distinctions concerning the operation of this influence in the different cases of bishops, priests, deacons, *et al.* see the Debates in Dom. Com. on the motion for a new writ for Old Sarum, May 4, 1801, and those which occurred in the two Houses of Parliament during the progress of the stat. 41 G. 3, c. 63, 'to remove doubts respecting the eligibility of persons in Holy Orders to sit in the House of Commons.' See, also, in this Collection, vol. 5, p. 754; vol. 16, p. 647; and Mr. Luders's report of the case of the borough of Newport 1785, and his Notes thereto. Reports of the proceedings in Committees of the House of Commons upon Controverted Elections, vol. 2, pp. 269. 308. edit. of 1789.

without remorse, as they have done in America, merely because he understood them to be friends to liberty; that it was very true, we shall see them alive again next week and happy; but let them be alive to this cause." The first name I took notice of was Mr. Sainsbury, a tobacconist on Ludgate-hill. The sheriff's officer said, he had been dead seven months. That struck me. I am a snuff-taker, and buy my snuff at his shop; therefore I knew Mr. Sainsbury was not so long dead. I asked him strictly if he was sure Mr. Sainsbury was dead, and how long he had been dead? "Six or seven months." "Why, I read his name to-day; he must then be dead within a day or two: for I saw in the news-papers that Mr. Sainsbury was appointed by the city of London one of the committee" (it happened to be the very same day) "to receive the toll of the Thames navigation:" and as the city of London does not often appoint dead men for these purposes, I concluded that the sheriff's officer was mistaken; and Mr. Sainsbury was permitted to be put down amongst you, gentlemen, appointed for this special jury.

Another gentleman was a Mr. Territ. The book said he lived, I think, in Puddle-dock. The sheriff's officer said, "that gentleman was retired; he was gone into the country; he did not live in town." It is true, he does (as I am told) frequently go into the country (for I enquired). His name was likewise admitted, with some struggle. Now what followed? This dead man and this retired man were both struck out by the Solicitor of the Treasury; the very men whom the sheriff's officer had killed and sent into the country were struck out, and not admitted to be of the jury. Now, gentlemen, what does that look like? There were many other names of men that were dead, and had retired, which were left out.

There is something more unfortunate in the case of a special jury. The special jurymen, if they fail to attend that trial for which they are appointed, are never censured, fined, nor punished by the judge. In the trial of one of the printers, only four of the special jury attended. This is kind in the Chief Justice, but it has a very unkind consequence to the defendant, especially in a trial of this nature; for I will tell you what the consequence is. The best men and the worst men are sure to attend upon a special jury where the crown is concerned; the best men, from a nice sense of their duty; the worst men, from a sense of their interest. The best men are known by the Solicitor of the Treasury: such an one cannot be in above one or two verdicts; he tries no more causes for the crown. There is a good sort of a man, who is indeed the most proper to try all this kind of causes; an impartial, moderate, prudent man, who meddles with no opinions. That man will not attend; for why should he get into a scrape? He need not attend; he is sure not to be censured; why should he attend? The consequence follows, that frequently only four or five men attend, and those such as particularly ought not to attend in a crown cause. I do not say that it happens now. Not that I care: I do not mean to coax you, gentlemen: I have nothing to fear. You have more to fear in the verdict than I have, because your consciences are at stake in the verdict. I will do my duty, not for the sake of the verdict. Now what follows this permission to special jurymen to attend or not, as they like best? Why, every man that is gaping for a contract, or who has one, is sure to shew his eagerness and zeal.

It happened so in the trial of the first cause for this advertisement. The printer shewed me the list. Amongst them, one of the first I observed, was sir James Esdaile, alderman of London, and a contractor for the army (there were several others; I do not mention the gentlemen's names). He would have struck him out. I said, No; there are so many bad that ought to be struck out, leave in sir James: it is impossible that a magistrate of London! with so much business! a contractor under the crown! if he has any modesty! he cannot, an alderman of London! go down to be a special juryman in Middlesex!—He was the foreman of the jury. He was sure to attend. And so they got the first verdict, in order to give them this influence upon men's minds.—"We have got a verdict. This question has been determined by a jury."

Well, gentlemen, having then got such a special jury as he usually does get (for it seldom happens that twelve gentlemen have sense enough of their duty to attend, as happens to be now my case)—the Attorney-General brings on the trial. He then claims, amongst other things, a right to reply, though no evidence is called for the defendant. You have heard what passed upon this subject with the judge. I will leave that matter now, though I think I have enough to say upon it; however, I will leave it unexamined now: I hope to live to argue that point for my client, and therefore will not now trouble you with that argument. You will yourselves judge whether any reason was given to me, or to you, or to any man, why the Attorney-General, prosecuting for the crown, having all the influence, power, and advantage that he can possibly have, why he should have that advantage of reply—which my equal or inferior shall not have!

But besides this, I told you before, that he claims a right of stopping it, when he pleases, by withdrawing a juror. I should be glad to hear that contradicted and given up.

But further, if he loses the verdict, he pays no costs: the crown pays no costs. The miserable man that is harassed, even though innocent, though gaining a verdict under all these disadvantages (if it is possible, and which seldom happens), yet still he must stand by his costs; and they may be, you see, whatever they please to make them.*

* "The secrecy, ease, and certainty of having a man under a heavy prosecution in the

Again, if the Attorney-General gains a verdict, he punishes whom he pleases, and when he pleases. I think there were eight convictions for this advertisement, yet but three have been called up to judgment. One, I think, was let off, because there was a little false-swearing in the case by an officer under the crown—(I allow it to have been certainly a mistake, because he is a gentleman of character)—and therefore it is accounted for how this one got off: but how the other printers escaped, whether from the benevolence of the Attorney-General, I do not know.

That is not all. He aggravates the punishment of the person against whom he gets a verdict, if he pleases. I was present in court when I heard the judge who now tries me (and who will perhaps give the same intelligence in my case) tell the Attorney-General of that time (who is now Chief Justice of the Common-Pleas) when he moved that the convict (who was the gentleman who now sits next to the judge) when the Attorney-General moved that Mr. Wilkes might be committed to the King's-bench prison, lord Mansfield instantly said to Mr. De Grey—"The king's Attorney-General may chuse his prison: all the prisons are the king's. The Attorney-General may, if he pleases, move to have him sent to Newgate." His lordship mentioned Newgate: I heard it. And observe, this was an instruction to the Attorney-General, who surely, of all men in the world, least needs instruction: and it was in a case where he was prosecutor; and in a criminal matter, and prosecutor too for the crown. And this instruction was not in order to obtain justice against the offender; that was past; he had been convicted many years before:—but it was merely in aggravation of punishment. I did not know nor believe that the Attorney-General had that right: I should not have known it, if I had not learned it from so great an authority.

Gentlemen, having rehearsed what these claims are, I intreat you to consider who it is that enjoys these powers; superior to the powers which any one judge in this country enjoys; superior to the powers which even the courts enjoy. It is the Attorney-General. Now, who is the Attorney-General? who is he? whose officer is he? what sort of officer is he? I will tell you what a Scotch author of merit—(this is not law, but it is very good reason and great truth)—I will tell you what he says of the office of the Attorney-General. What I say now, gentlemen, does not go against the person now intrusted with it; it goes against his office. I do not speak of this gentleman particularly; all Attorney-Generals, at least most of them (some of them indeed would not, but most of them will) use these unjust powers. Mallet says, in the preface to his life of lord chancellor Bacon—"The offices of Attorney and Solicitor-General have been rocks upon which many aspiring lawyers have made shipwreck of their virtue and human nature. Some of these gentlemen have acted at the bar, as if they thought themselves, by the duty of their places" (that is, *ex officio*) "absolved from all the obligations of truth, honour, and decency"—(but not absolved you find from talking of them)—"but their names" (he says) "are upon record, and will be transmitted to after ages with those characters of reproach and abhorrence that are due to"—(to whom? This man is as unfortunate in his style as myself) "the worst sort of murderers, those that murder under the sanction of justice."—He was never prosecuted for it. He charged the office of Attorney-General (which is something more respectable than the office of a common soldier) with being the worst sort of murderers.

But the Attorney-General, it is said, is chosen by the king: that is what is pretended. He is the king's officer; but he holds it by a very precarious tenure: his future hopes are greater than those of any man in this country; his fears therefore must be in proportion. Observe too,

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Crown Office, without any controul, by this mode of information, are what render it much more formidable than the common, regular information, which, by virtue of a statute passed soon after the Revolution," [It is the act 4 & 5 W. & M. c. 18, 'To prevent malicious In-'formations in the court of King's-bench, and 'for the more easy Reversal of Outlawries in 'the same Court'] "cannot now be filed, for any trespass or misdemeanor, without express order of the King's-bench, and the informers entering into a recognizance to pay costs to the defendant is acquitted upon the trial, or if such informer do not proceed within a year, or procure a Noli Prosequi. The Attorney-General, however, informing *ex officio*, never pays any costs: so that he may harass the peace of any man in the realm, and put him to a grievous expence, without ever trying the matter at all. Indeed, the costs of the Crown Office are so enormous, that any man of middling circumstances, will be undone by two or three plunges there. Most booksellers and printers know this very well, and hence so few of them can be got to publish a stricture upon any administration." ——"It is still more wonderful that, since this prerogative is endured, there has been no act passed to subject the Attorney-General, provided he did not pursue his information, or upon trial was nonsuited, or had a verdict against him, to the payment of full costs to the party abused." Letter concerning Libels, Warrants, the Seizure of Papers, and Sureties for the Peace or Behaviour; with a view to some late Proceedings, and the Defence of them by the Majority, 7th edition of 1771.

The merits of the Attorney-General's *ex officio* Information were discussed in the House of Lords on the 17th of July, 1812, in a debate upon the question for the second reading of a bill which had been introduced by lord Holland. See the Parliamentary Debates of that period, vol. 23, p. 1069. See, also, p. 995, 998. 1111, of the same Volume.

he enjoys these powers on the behalf of the king, against whom, particularly, all those precautions were taken; for these precautions are not taken between subjects who are upon a footing; but all these precautions and advantages for innocence (that it may not be oppressed) they are all taken, not against the king, but against the crown; against that power which is more often abused than any other power; more liable to be abused, because greatest. But, gentlemen, the matter is a great deal worse than this. He is not the king's officer. He knows better where his obligations lie. He is not so ungrateful. He would not, at a table with his friends, say that he is the king's officer: he knows a great deal better than that. He is in truth the officer of the minister: and if the minister goes out to-morrow, out goes the Attorney-General. We cannot possibly have a stronger instance, and a happier for me, of this very thing. There sits here in court a gentleman* who should now have been Attorney-General (he lost not the place, I suppose, for want of abilities) who refused a brief in this very cause; because he thought it scandalous at the distance of two years and a quarter. I suppose he might have still stronger reasons. If I knew them, I would use them. If I knew his reasons why he thought this prosecution scandalous, you would hear a very different defence from any which I can give you. Put in then another minister, and the Attorney-General thinks me a very honest man: but if there comes a different minister and a different Attorney-General,—"O, put him out of the world; he is not fit for human society; shut him up like a mad dog."—You see it is not the king's officer, it is the minister's officer. Gentlemen, it is very well known that the Attorney and Solicitor-General make a considerable part of every administration. They sit there in the House of Commons on each side of the minister; the two brazen pillars, the Jachin and Boaz of the minister in the House of Commons. However, gentlemen, though this situation of theirs may make us smile, it is a very serious thing, especially when their honour and conscience are to go to you for proof, and instead of argument.

Now let us see, how have those powers been exercised? I have shewn you what they are; I have shewn you who enjoys them: now let us see how they have used them; I mean the present Attorney-General. I will not go back to tell you that the bishops were reckoned guilty of a libel, not because they opposed the introduction of the Popish religion, but because they would not lend their own hands to the introduction of it. But how has it been used by the present Attorney-General? I am driven to this inquiry. He has talked much of his conscience, and that if he had not imagined that he was executing his duty, he never should have thought of the prosecution: he did not know me; it was merely a matter of duty. Now I did not apprehend that it was a matter of his stirring, and that his motive was duty; but as he takes it upon himself, upon himself it must lie. Now, therefore, how has he exercised this power which he enjoys in right of being the king's officer? I say, that he has then equally betrayed his own conscience, and the dignity and prerogative of the crown (if injustice must pass by these names)—I say that he has betrayed them all: for he has acted, not as the Attorney-General of the king, but as the Attorney-General of the House of Commons. Never before this gentleman's time did any House of Commons, I believe, I am sure, never did they direct any Attorney-General to file an information. Who enjoys the power then? The House of Commons files informations! Worse still; the Attorney-General files informations, not from his own mere motion, not from the direction of the crown, but by the direction of the most corrupt assembly of men that ever existed upon the face of the earth. It may be called indecent to call them so; but, gentlemen, I know, that if every man was to speak but one word expressive of his opinion concerning what I say, there are those, perhaps within hearing, whose hearts would sink within them. There is no man doubts it, and I shall not be afraid to say it. But, gentlemen, now observe; this officer, the Attorney-General, was never permitted to have a seat in the House of Commons till the time of sir Francis Bacon. He is no officer of the House of Commons; he never was permitted to sit there till that time; and out of the extreme veneration which they paid to the greatest of mankind (for he was so), they permitted him, for the first time, to have a seat as a private member in the House. Now where have we got? He has no longer a seat in the House as a private member; he is the officer of the House of Commons: that power which is pretended to be exercised for the crown, is exercised for the minister. The House of Commons is the minister's; for he would not be minister, if he had not a majority. The Attorney-General is brought in by him; the House directs the prosecution: whereas the method formerly was, that the House of Commons used to address the crown, to desire the crown to order the Attorney-General to file an information, or to prosecute. Never till this time did the House think of directing the king's officer to file an information. The consequence happened to be, what at the very time it was natural to foresee would happen. The Attorney-General prosecuted men whom he thought innocent. I happened by stealth (I am not often permitted to be there)—I happened by stealth to hear the gentleman in the House of Commons speak a language which no man could mistake. What is still more, on one of the prosecutions brought, the vote for it was either rescinded, or some healing vote was afterwards put into the Journals of the House of Commons, for having caused a

* Mr. Dunning.

prosecution to be brought against a person who was found to be innocent. Here is a dangerous power indeed! Who may not, if this is permitted, file an information against the subject? What a power is this in the hands of a minister to ruin! for if I am not ruined, it is the gentleman's mercy. I thank him for that mercy; for he might every term file an information, if he pleases.

Now, gentlemen, consider in what sort of a charge does he enjoy these extraordinary powers. You will find, that as he is the last man in the world (I speak not of the man, but the office) that ought to be trusted with these powers, so he enjoys them in that kind of charge in which he should least of all enjoy them. For, gentlemen, libel as well as Attorney-General depends very much upon the minister. Why, don't we all know very well, that they who were pilloried* for libel in the last reign are pensioned in this? What then, is this the kind of charge in which this open door to oppression should be left to the Attorney-General and to the minister? It is not for crimes against the state that this power interferes, but for partial political opinions; and the man who is pilloried or imprisoned to-day, may, for the same act, be pensioned to-morrow, just as the hands change. If this party goes down, it is libel; if it comes up, it is merit. Is it in this kind of charge that an Attorney-General should enjoy all these unjust powers? I need not bid you consider and recollect what sort of things have been charged as libels: there is nothing that has not been so charged. Sermons,—petitions,—books against plays,†—saying that money will corrupt men, nothing but barely mentioning the effects of money,—all have been prosecuted, and punished, and ears cut off, and those things, for libels. In short, gentlemen, you will always find (your memories will go back enough to find it without reading) that whatever is contrary to the inclinations, interests, or even the vices of a minister, has always been, and ever will be, charged as libel. Even at this time, if the Attorney-General's friend, Mr. Rigby, had been Attorney-General, or to direct the Attorney-General to file informations for libels, the present Speaker of the House of Commons would have been accused of a libel, for recommending economy to the crown. We know that he would; and there is nothing extraordinary that a Speaker of the House of Commons should have an information *ex officio* filed against him for a libel. The Speaker, Williams, had one filed against him for publishing the Journals of the House.* They are now wiser. Indeed that case has been scouted.

If then, gentlemen, these considerations should make you careful and attentive in a trial upon a prosecution of this kind; the frequency of prosecutions for libels, I suppose, should add to your care and attention. For, gentlemen, when is it that libels are most frequent? When is it that prosecutions for libels have been most frequent? Have they been under the best governments, under the best administrations (for government is a word abused: I mean under the ministers)? Have they been most frequent under the best, or always under the worst? It is only bad men that will accuse the good: good men don't accuse good things: notwithstanding which, you will find that under the best administrations there are few libels, and much fewer prosecutions; and under the worst administrations you will always find them swarm. Whether it happens that under the worst administrations (for there is always folly with wickedness) the minister is so foolish, as that, not attending to the principles of the person recommended to him, he, by mistake, chuses a good Attorney-General, who has skill to discover and honesty to pursue those crimes which are detrimental to society; or whether it happens, that a good minister chuses a bad Attorney-General, who has no honour or understanding to care for or to discover their evil tendency, and therefore does not prosecute at all;—but so it happens, that under a good minister there are no prosecutions for libel, under a bad minister you meet with little else.

Gentlemen, if the general nature of this kind of prosecution calls for your particular attention, the particular unfairness of this prosecution more strongly demands it. Gentlemen, you will be pleased to remember, that the advertisement which is now brought before you was published on the 9th of June 1775. Observe, too, what is the charge. Not any harm that it has done; no, but only a tendency. The charge of the libel is a tendency to excite sedition; a tendency to alienate the minds of his majesty's subjects; a tendency to do a great many other bad things: I do not recollect them, nor care about them. What! come two years and a quarter afterwards to prosecute for a tendency (not actual mischief, but a tendency to mischief.) It was so dangerous a thing, that it was suffered to rage and have its full influence without any check or controul; and then two years after (when its tendency must long since have ceased) comes the prosecution to check the tendency! I believe no grand jury would have found a bill for this prosecution at this distance of time: nay, I believe that all the judges of the King's-bench would not have done it. The Attorney-General was well aware of this objection upon the trial of

* This alludes to Dr. Shebbeare. In the report of Mr. Grenville's Speech on February 3d, 1769, against the motion for expelling Mr. Wilkes, it is noticed that Dr. Shebbeare was taken up under the authority of a general warrant from a secretary of state, dated January 19th, 1758, drawn up in the same terms with those of the warrant against Mr. Wilkes.

† See the Cases of Sacheverel, vol. 15, p. 1; of the Seven Bishops, vol. 12, p. 183, and of Prynn, vol. 3, p. 561.

* See the Case in vol. 13, p. 1369.

the first printer. "Why not?" said the Attorney-General—"Will folly say, that that which was a crime in 1775 is no crime in 1777? Will folly say?"—Why, what will not folly say? Folly will say any thing: and what wonder? when even a man of his natural good understanding, if placed in his peculiar situation, is often obliged to say what a moderate folly would blush at. "Was it a crime," says he, "two years ago, and is it no crime now?" That is not the question: but, whether it should be prosecuted now, after two years delay? That was the question which he should have spoken to. And would that be thought so ridiculous a position to be heard in a court of common law? You all know very well, that a simple contract debt cannot be recovered after six years is suffered to elapse. Now, will folly say of that money, and the benefits of it which a man has enjoyed for six years, was it a debt six years ago and is it no debt now? No; no man will pretend that the debt is not accumulated. But what then? If you have suffered that time to pass by, you shall not sue for it now. So the unjust possession of an estate for forty or sixty years (according to the rules which the Courts have laid down) the unjust possession of an estate quiets the possession. What then, does it become just? Have I robbed another family for so many years; retained the principal and the income; and does it now become just? No, but you shall not recover it; the door is shut against your suit. Appeals for felony, for rape, and for murder, they must be brought within a year and a day. If you let slip that year, you shall not prosecute. What! Does it cease to be felony? Does it cease to be rape? Does it cease to be murder? No; there never was any such folly that said that; no folly ever said it: but the law says, You shall not prosecute: you have lost your time. But there is still a stronger circumstance concerning this doctrine, which I love best, because it came from the gentleman himself. The estate of a man, the most obnoxious for the blackest treason, by an act of parliament, was proposed to be restored to the son. I rejoice that he has it: but the argument of this very gentleman was, that—"oblivion ought to pass over it: it was treason, to be sure; but it was twenty years ago." Good God! if twenty years shall prescribe against treason, or silence, or put oblivion upon it; if forty years possession, for a large landed estate; if six years, for a simple contract debt; if one year, for appeal in cases of rape, felony, or murder; what shall not the mere tendency—(not actual mischief)—but the mere tendency of an insignificant libel in a news-paper (if it was a libel; but it is not) what, shall not that be permitted a two years prescription? I shall have others besides folly, I believe, think with me in this question.

But, gentlemen, whether it shall be prosecuted or not, the hardship is equal to me. I do not say, that it is absolute law that it should not be prosecuted; for this has never been adjudged: indeed the case has never happened before. The Attorney-General has produced no precedent of such a prosecution as this; he can produce none to you. But I desire the Attorney-General to remember what I now say to you and to the Court. I say, that this abuse of his power and prerogative, and of his unjust claims, will cause some method of quieting men in respect of libels, as men have been quieted in respect of possessions against the crown. It will be necessary: for it will be considered that the nature and the effects of the charge of libel have been very considerably changed in the present time. The charge of libel now affects both Houses of Parliament. Privilege is gone; expulsion may be the consequence; incapacitation follows! To what are they exposed! I cast my eyes by accident towards one—I beg the gentleman's pardon—there sits near the judge one of the most distinguished members of the House of Commons;* he is as liable to an information for a libel as I am at this minute. In his book, in his book the charge of murder is as completely made as in my advertisement: it is lately published in his Letter to the Freemen of Bristol: he stands as liable to be expelled, to be punished, to be shut up from society as a mad dog as I do, and with the same pretence. Gentlemen, there are now great officers of state whom I know to be more liable to a prosecution for libel than I am; who have written what has much more the aspect of a libel, than any thing to be found in my advertisement; and which may be proved against them by the same man that has proved my publication. It is true, those, who are not concerned in the Gazette, may at present have left off the practice: but what signifies that? The Attorney-General will tell them, that the number of years signifies nothing: it is folly only that will say that; even though it was written ten or twenty years ago, (for he has drawn no line) it is only folly that will say, it is not a crime now, if it was a crime then. Gentlemen, I must beg you particularly for your own direction to observe the strong reasons against this practice of bringing a prosecution for a libel, long after the cause of the charge was given. Consider the changes which are made both in the persons charged, and the appearance of change which there may be in the thing charged. A man hereafter to be charged with an offence so uncertain as a libel, may, thinking himself in perfect security, change his situation; which he would not have done, if he had known that there was a prosecution for libel hanging over his head: and perhaps the Attorney-General would not have brought that prosecution, if he had not changed his situation, and thereby made himself vulnerable, who was not so before. Why, a man might have had a wife and children since the publication of this libel; and it is known that to have them is called—"giving hostages to fortune."—A man might have given hostages

* The celebrated Mr. Burke.

to fortune, and then comes a vindictive Attorney-General and drags him away from his peaceful family and fire-side, drags him away for a libel written ten years ago: for he has drawn no line! Is this to be borne? is this to be suffered? I thank God, that is not my situation. There is, however, a change in my situation; but of that I shall say nothing; though I firmly believe, that that change in my situation caused this prosecution: and you yourselves shall consider. It is now two years and a month ago, or thereabouts, upwards of two years ago, that this advertisement was published. They were very sore at it; it was considered as an affront by those who were glad that the men were killed. However, of them I know nothing; I have not accused them. A prosecution was soon after commenced against the printer who has here been evidence against me; and it stopped: he heard no more of it; it went fast to sleep, and was taken up again. When?—Immediately after it was known somewhere, that I had (after an interval of twenty years) entered again into commons at the Temple, in order to do that for others which I am now brought here to do for myself.* Then re-commenced the prosecution; then am I become a libeller: but it sleeps till then; it was brought again fresh into life by that act.

But besides this, gentlemen, there is a great change not only in the person charged, but there is a great change also in the appearance of the thing which is charged to that person, by length of time. This advertisement was written in a time of profound peace. A civil war has since taken place: much blood has been shed: much mischief of all sorts has been suffered; and I wish I could say, that there was not much more in prospect. You cannot yourselves therefore easily put back your minds to that situation in which they would have been, had the prosecution followed close upon that publication. You cannot recollect the dates when certain proclamations issued; you cannot recollect the dates when certain injuries took place: unless one made it his particular study, there is not one of you can tell, whether this act passed at this time, or this proclamation at that time. If there is one of you who can recollect, you will find, that all those measures which take place against rebels, have all been since that advertisement. General Gage, whom I subpœnaed, and who would not attend you, who says, that he is gone away to Germany, he should have proved to you, that he published a proclamation in which he gives notice to the Americans themselves, long after this affair at Lexington and Concord. He gives them notice to come in, and warns them not to do so and so, otherwise they should be considered as rebels: it was not therefore known that they were considered, in America, as rebels till that proclamation came. That proclamation was to work some effect: it must either be intended to make them rebels who were otherwise not; or to make them known to be so, who were so. If they did not in America know that they were rebels, till that proclamation came, how should I here in England know it long before that proclamation did come? There is a great change in the appearance of this advertisement brought forward for prosecution now, from what it would have had to your minds at that time. This you are bound to consider. Indeed it was said from the bench, on the trials of the printers, that this advertisement blamed, and censured, and libelled "all the measures of government"—(relative to America, I suppose).—All the measures of government! Not the measures that happened since the publication of it, surely! and if they can find in that advertisement, that it censures all the measures before, I will be content to lose a verdict. You will not, gentlemen, for you must not, take it upon what that gentleman says, what I meant and what I thought. If you can make out that meaning from the advertisement, then do it; but you will find no word hinting at or censuring any man or any measure but that one measure of the Americans being put to death by the troops. If you can find in that advertisement any name hinted at or allnded to, or any thing of that kind, the Attorney-General will be much obliged to you; for he cannot. If he could, he would have shewn you in which part it was. He would have said, Here this measure is alluded to; there that great minister of state is alluded to. He has not, nor can do that: he has a reply coming forward, and, if he can do it, he will do it then. Therefore, gentlemen, you see that that might be a libel, if it was written now, which was not a libel at the time when it was written. Gentlemen, I don't mean that my advertisement would be a libel, if it was written now. I know the contrary well; and so well, that, if it is become a doubt in this country, that it is a seditious libel against the king and the government to charge the troops with murder, I will write it again and again. If it is not a question, then I am satisfied; but if it is made a question in this country, that no man shall charge a soldier with murder without being guilty of a seditious libel against the king and the government, then I will go into prison for life: for I will regularly charge the king's troops with murder (if they put men to death unauthorized by the law) regularly and constantly: and so I would do, if they made the punishment death. Gentlemen, if the advertisement had the aspect of a libel, it should have been prosecuted as soon as it was published, that so the mischievous tendency of it might have been prevented, and that fair play might have been done to me, and that you might not come to try an advertisement, forgetting that the advertisement preceded, and did not follow the rebellion. But if the Attorney-General has passed his time, I ought then, gentlemen, as in all other cases by law I should have, to have the benefit of the fault of my ad-

* See the Note in p. 688.

versary. I ought not by his neglect and fault to be put into a worse situation than I should have been, if he had done his duty. But the Attorney-General said at first, in excuse for that, that it was owing to an accident. If true, so much the more fortunate for the defendant. But how appears it? How does it appear that it happened by an accident? Is that to be so slightly taken up, upon the Attorney-General's just hinting it? What was the accident? Has he proved it? has he named it? He cannot name it. Let him account for it. I heard the late Attorney-General (the present Chief Justice of the Common-Pleas*) declare, that it was his duty to account for his conduct in bringing that prosecution against the letter of Junius; which was brought quick too, not in this manner. He said, it was his duty to account why he took one printer before another; because he looked upon himself in filing informations to be exercising a judicial, official power, and not merely an advocate at the bar; he thought himself bound to justify his conduct. Let the Attorney-General tell us the accident. I know something more of the re-commencement of the prosecution than he thinks I do; and a very strange circumstance it was that brought it to my knowledge: however, I don't think I want that. But that is not all. An accident, he says, prevented the prosecution at the time when, he must acknowledge, it ought to have been prosecuted. Aye, but there is another accident. What is the accident which has happened, that makes it be prosecuted now? There are two accidents. He has only just hinted one of them (he has not told you what that is); but he is totally silent about the other. What is the accident that makes it to be prosecuted now, at the distance of two years? You see there is one accident which caused it not to be prosecuted at first, in a proper time; there is another accident that causes it to be prosecuted at an improper time. He is bound to justify himself (not only to you, but to every man): he is bound to tell you both accidents. I believe he will explain neither. Gentlemen, I am sorry to take up so much of your time. I protest upon my honour, it is not to gain a verdict for myself: I have business to do that will take me up much more time than the judges dare to confine me on this charge. I am already a prisoner: I have been a prisoner in my own room much longer than they will chuse to imprison me. They will take care. The doctrines concerning libel have now risen to such a height, that they call for some remedy; and they will have it. The coming necessity of the times will produce it: and if we shall not have it from justice and honour, we shall have it from necessity.

Gentlemen, there are many other unfair practices in this case, besides this delay of prosecution. Observe how it comes on. The Attorney-General takes the printers first. Why not take the author first? He has said indeed, that though it was signed (and he makes that a great piece of impudence) he has said, that though it is signed with my name, it was—"as inscrutable and impossible for him to follow it, as if the name had not been put there." These are the very words: "as inscrutable and impossible, as if my name had not been put there."—Now, what said the evidence that he brought to you? He told you that he had never refused; that he had never been asked; that they had never made the slightest enquiry after the author. Now I appeal to your own consciences: is there a man in this court that doubts whether the Attorney-General doubted or not that I wrote that advertisement? Is there a man in this court thinks so basely and so meanly of me, that, having signed my name to an act of that kind, and paid (as I will prove to you) the money to the banker; is there a man in this court that doubts that the Attorney General would have found a difficulty to come at me? There is none of you that can believe what he says in that respect: judge then of the rest. Gentlemen, he took the printers first. I will tell you why he did that: it was to gain the influence of a verdict. He meant to take me; he did not think it inscrutable or impossible. After he had gained the influence of a verdict on the printers, then he comes to the author. The question now comes with a prejudice before you. A jury has determined upon it, has declared it to be a crime. My God! where is his honour and his conscience? But he says, that he did not know the author. He did know it; he was in possession of the proof before he tried one single printer; and therefore the printer, who is now the evidence, was not brought on to trial.* The information was filed against him, and he withdrew his plea, upon an agreement with the Attorney-General; thinking perhaps (you may suppose) that I should play him some cunning trick, and sink the evidence. I mention this, because it has been thrown out, as if I had escaped from the power of the House of Commons for want of evidence. The gentlemen (looking at the Attorney and Solicitor-General) know the case better; they know better. I know the gentlemen and their understandings.—They know how I escaped, and I will tell you presently.

But, gentlemen, he takes the printers first; and which printer?—He who printed it last of all the others. Now, why did he take him first? I will not tell you myself, but the printer shall tell you. He was a stranger to me, and he writes to me this letter—"The printer of the Whitehall Evening-Post presents his most respectful compliments to Mr. Horne, and takes the liberty of sending Mr. Horne a copy

* Sir William De Grey.

* "The fashion, now (A. D. 1764) introducing (for the first time since the Revolution) of proceeding against printers after the author is known, breathes a spirit of persecution (I may say cruelty) hardly to be endured." Letter concerning Libels, Warrants, Seizure of Papers, &c.

of the information filed against him for publishing the advertisement signed by Mr. Horne, on behalf of the Constitutional Society; and as the printer has great reason to believe, from his living in Middlesex, that administration will make their first attack upon him, as they generally deem themselves sure of a jury in that county," &c.—Gentlemen, that was the reason why they took the printers first, and that printer first: and (which is a very singular thing) though they convicted that printer, they have never brought him up to judgment. But Mr. Attorney-General said (and I had like to have forgot to mention it) that he did not know that I was the author. I have proved to you that he did know it before the trial of the printers. Common sense shews to you that he did know it, and had evidence against me. But then, I suppose, he will say, he did not stop the trial of the printers, because that would have caused a delay.—It would have caused a delay! What, after staying two years unreasonably and unjustly?—It would have caused the delay of a term to take the author first, and give him fair play. Will he by-and-by say, that he did not stop the printers' trials, and bring me on first, merely to avoid delay? The printers would have been much obliged to him for the delay; they wished and desired it. They offered him evidence. I told this honest man (whose face I never saw before) when he came to me—(for the printers were not defended in the manner I wished them to be *defended*; the little advice I gave was not followed)—amongst the rest I told this printer of the Whitehall Evening-Post, that I did not believe he could escape being tried first; but I told him he should send his attorney to the Attorney-General, and make excuses, and beg and pray that he might not then be brought on to trial, but stay till after the London juries had tried the cause; and I advised—(we had a meeting; I forgot to ask the witness the question)—and I then advised that printer who was the evidence, that the London printers should endeavour to press on their trials; and urge that suspence was worse to them than any thing that could follow a conviction; and that the Middlesex printer should beg for delay.—Not that the Attorney-General might be imposed upon:—no, it would have been nothing but just and reasonable:—but because I would either cover a man with shame, if he refused it, or at least (and so far kindly) prevent him, if possible, from exposing himself, by pretending that all this is the natural course of accident; that it was done to avoid delay; that it was integrity, honour, purity, and conscience.—However, I could not prevail: so great is the influence of that gentleman's office, and those connections which it causes. Though the printer was eager for it, his attorney said, "No; I can't be concerned in the cause; I would not for 500*l*. I can't speak to the Attorney-General; for God's sake, get another attorney."—"No, Sir, I don't mean that you should lose a client; I mentioned it, thinking you could have no objection to go to the Attorney-General and pray delay, till after the other printers had been tried; your client's wife is near being brought to-bed."—So the Middlesex printer was tried first, and a verdict gained. I did not wonder at it: I expected it. Gentlemen, though this was an accident, I must beg you to observe it is an accident which has always occurred. For in the case of that letter of Junius which was prosecuted, the first person prosecuted was Almon (who was not the publisher, but had sold it at his shop) who lived in Westminster. Here too was the same accident; and it had the same consequence; except, indeed, that in that case the London juries recollected themselves; and though they had a verdict of a Middlesex jury, the London juries cast it out. There was however, a struggle in their verdicts: there was something—but I will not enter into that now: they would not, however, suffer their minds to be entirely influenced and affected by the prior verdict so obtained. A gentleman who was a juryman upon that occasion in Middlesex, is now a baronet,* and of great consequence at the India-house. Gentlemen, if you make yourselves useful, there is a better track open to you than the honourable and just gains of your profession. You will observe then that the same accidents always return, and they are never explained.

Gentlemen, there is one part of the treatment of me in this prosecution that I think I have a right to complain of as man to man. I gave them no trouble; I made no objections; I requested when the jury was struck, from the Solicitor of the Treasury (before witness) I told him I lived in the country, that I was always at home—I desired he would save me unnecessary trouble, and that he would do, as men say to the executioner, Do your office like a gentleman. He seemed to be well disposed towards it, and treated me with great civility and complaisance. I desired him to present my compliments to the Attorney-General (and that if he would not do that office for me, I would do it myself) and desire he would let me know on what day he would chuse to have the trial. The solicitor promised me he would. He kept me upwards of a fortnight, never letting me know that it would or would not be tried. He kept me till seven o'clock at night the day before the last day of the sittings, uncertain whether I was to come here or not the next morning. What was the consequence? I had told him the consequence. I had a witness to send for one hundred and fifty miles. I sent for him, and I have again brought him (I am ashamed of the trouble I gave the gentleman, a stranger to me, I never saw him till now) I gave him the trouble to come and to go back two hundred and eighty miles. The person—(and it is not a common person, a porter, or messenger that can be sent with a subpœna, when you do not know whether the witness will come or not)—

* Sir Herbert Mackworth.

I was forced to send him the same way. The Solicitor for the Treasury knew it; yet he never would let me know till last Tuesday night (last Tuesday afternoon I suppose my solicitor knew it) when the trial would come on. My witness was forced to go back and come again. Now, what is your verdict, (suppose it pleased the Attorney-General to go on so two or three sittings more) what is the effect of your verdict compared with that expence? Your verdict is the gentlest part of the prosecution. When I say your verdict, it is because then follows the judge's sentence.

Gentlemen, if you don't know, it is proper that I should inform you how the London verdicts were obtained. I was present in the court. One jury, I think, brought it in (at first) guilty of printing and publishing [See the case of Woodfall, A. D. 1770.] a most stupid verdict! I am sorry that honest men should be so imposed upon. Guilty of printing and publishing! I heard a gentleman once say, who has some skill in the law, that there was but one possible guilt that there could be in printing and publishing; and that was, if it was printed upon gilt paper. The pun is poor enough; but not too stupid for the doctrine, not a bit. There happened upon the trial of another of the printers to be some difference of opinion in the jury. They came into court; they desired to be heard, A juryman desired to know "whether or not they were to find their verdict according to the information:" that was his question (I don't know his name) which he desired to know. It was plain enough what that honest man meant. It is true, he did not express himself in the technical legal terms of the law, perhaps; but I did then say aloud (and I firmly believe that his lordship heard me; there are gentlemen in court that stood by and heard me) I did say (a little heated) "his lordship dares not answer that question." I said it out loud (I might well be supposed to feel a little) "he dares not answer that question; for he dares not deny it; it is too gross: he dares not own it; for then he loses the verdict." His lordship did not answer it; his lordship did not. Are you to find according to the information?—Why you are to find the information according to the evidence. You are to find the thing, with which I am charged, proved. The juryman said—according to the information—Why, he was to find according; for according means agreeing, and means nothing else. The evidence agreeing with the information! Why yes, to be sure, what is he to find else? He must find that or nothing, for that is the only thing before him. However, that question was not answered. Then a little conversation, of a strange nature, took place—(his lordship loves conversations with the jury)—a little conversation took place about intention. I hope, gentlemen, I shall at least have this benefit by my trial, that the doctrine of intention will come out fairly and unequivocally to you; whether the jury have a right, whether it is their duty (it is the very gist of the whole matter) to determine what was the intention. The laws have confined the jury to one single word (so careful have they been.) That word is guilt; that guilt which is charged. Guilt there can be none without intention. If guilt can be found without intention, so be it; but I hope that you, gentlemen of the jury, nor this court, will not be permitted to go away from hence with these equivocal sayings which hitherto have been. Let it come out fairly, and let us know, in the name of God, what the doctrine is.

Gentlemen, I did object, if you remember it—(I don't now intend to go into it, for I shall still be longer than I wish; but I think I ought to mention it, and I hope you will excuse the loss of your time)—gentlemen, we talked something about the right of the Attorney-General to reply—If there comes, said his lordship, fresh matter.—There can come no fresh matter, unless there comes fresh evidence. The evidence is the matter; the pleading is a different thing. The prosecutor is bound to foresee all that can be urged in defence by the person accused; and to answer it before it comes: that is, he is to make good his charge. If it is not so, see the other case; see, on the other hand, what I am to do. I am then to foresee what he has to urge against me; and if I do not, what follows? Why, all that he urges in his reply (as he calls it) is a new part of the accusation, which I shall have no opportunity of answering. The fact of publishing the advertisement is not disputed; I never disputed it; the whole matter that we have to do together is, for him to prove it a crime by law or argument: therefore whatever argument he uses in his reply, if it has any effect upon your minds, I may be convicted (if convicted upon such argument) without ever having offered the least defence; that is the blessed consequence of his right to reply: so that he is not to foresee what may be answered to his arguments; but the man charged is to foresee what arguments may be urged against him.

Gentlemen, there lives this day a very great man in this country, whose doctrine and whose practices were diametrically opposite. He enjoyed the office of Attorney-General. He has been a chief justice. He, as I am informed, never prosecuted but one libel, and that was Dr. Shebbeare, who is now pensioned by those who made this gentleman Attorney-General. What was his conduct? If ever there was an infamous libel against government, surely it was that (it is a great many years ago, but I read it). What was lord Camden's conduct? He left the whole to the jury; intention and all; the whole: he cut you off from nothing of your right. He did not hold the threatening language—"you may, if you will, take it upon you."—Why that threatening? You may commit crimes, if you will: you may be as indecent as I may be supposed to be for repeating this: but, upon such an occasion as this, I reckon it not indecent. But—"you may if you will."—

Why you not only may, but you are bound to do it; nor do you discharge your consciences nor your oaths, if you do it not: but I hope you will have it clearly said, whether you are bound or not. Lord Camden's remarkable words, when he finished his charge against the defendant, were, that he did not wish the conviction of him, if any man whatsoever doubted of his guilt.

Gentlemen, another thing was said, which I must warn you against; it was said that this advertisement (I believe I mentioned it) arraigned all the measures of government (at least, I think, you need not search into the advertisement itself to be assured that it did not arraign the measures of government which have followed the publication.) The printers who have been brought to judgment, have been sentenced a hundred pounds; and they suffered what they were not sentenced to, a week's imprisonment. Their fine, it was represented, was mitigated, for that they might have been or were imposed upon by the author, the libel coming in the shape and form of an advertisement, which disarmed their caution; and therefore the fine was no more. Formerly our laws punished men for being knaves; now I perceive they shall be punished for being fools. If a printer, for the sake of two shillings or half-a-crown, is imposed upon by a wicked incendiary, who, under the shape of an advertisement, disarms their caution and slips it into their paper; the jury have, you know, nothing to do with their intention; therefore there must be a verdict against them of course: the judges find the printers have been imposed upon, and therefore only imprison them a week, and fine them one hundred pounds. It was a dear half-crown they gained! If the printers were imposed upon, they should have been acquitted. But by the evidence given now, you find they were not imposed upon by me: there was no imposition by me. What was my conduct towards the printer? This advertisement I am now giving you will offend certain ministers in this country: it is perfectly harmless and safe, and free from the cognizance of the law: the matter of it is just; it is true; but the law affords no guard or protection now from the power of the ministry in the House of Commons, who vote men guilty! and vote things crimes! They have given out, owing to my forbearance (I did not wish to expose the nature of that defence which caused me to go safe from the House of Commons), being silent they have propagated a report, as if (like an artful tricking attorney or solicitor that is not used to honourable practice) I had made a charge upon them, and sneaked out for want of evidence against me. I was determined, for the sake of the laws of this land, that they should, either by forbearing to take notice of this advertisement, or by taking notice of it, let it appear that they have no power to punish a man but by the laws: and therefore I furnished full evidence, in order to shew that even with the fullest evidence the House of Commons have no power to try or to punish the subject. I knew I was safe from the courts of law, at least that I must there be tried by a jury; and they may do their duty, if they please.—Gentlemen, for every minute of imprisonment that those printers suffered, I do freely and frankly confess that I deserve at least a year, comparatively. If they deserved a minute, for every minute I certainly deserve a year; and for every farthing of that hundred pounds which they were fined, proportion only our guilt (if there is any guilt in the case,) a million of money will not be sufficient for my crime. If they can justify their sentence on the printers, I will justify the court for the most ample punishment they can inflict on me. If I am guilty, no man upon earth so guilty. It was the most deliberate act of my life; it was thought of long before I did it. I made the motion; I called the meeting; I subscribed a great part of the money; I procured the rest from my particular intimate friends: but I shall come to that by-and-by.

Gentlemen, I have shewn you the method of proceeding by information *ex officio*: I must now desire you to observe the method of punishment, when it comes to the court. Observe how that passes. The man is convicted this sittings: he is called up for judgment next term: Go to prison, says the judge, and then we will think of your sentence. They sentence him a hundred pounds; but for what was the week's imprisonment? It is put into the sentence indeed "and imprisoned until he pays his fine.' Well, but could the man pay his fine till he knew what it was? Observe the distinctions which are made! A general officer who is now in America, general Burgoyne, was prosecuted. He comes into court to receive sentence for hiring ruffians to destroy the electors coming to poll; what is his punishment? He is fined 1,000*l.*; but he is not sent to prison whilst his sentence is deliberated upon; he is released instantly. Now what says our law? Our law says, that "a corporal punishment, however small, is greater than a pecuniary punishment, however great." 'Quælibet 'pœna corporalis, quamvis minima, major est 'quâlibet pœnâ pecuniariâ, quamvis maximâ' or something of that kind. [See vol. 3, p. 129]. Well then, the greatest offenders, you see, have not the greatest punishment. The miserable printer who is imposed upon by an incendiary—to prison with him; we have not time to tell you now what we will do with him: and yet it does not seem to be a very difficult case: but in a very uncommon case, that of an officer of the king's troops hiring ruffians to destroy the electors coming to poll, and thereby gaining a seat in parliament; in this case no deliberation is necessary: or it is taken properly, before he is brought into court, that he might not suffer a moment's imprisonment. You see the difference. The delinquent was wished good morning; the judge from the bench, when the general paid down his fine in court, wished him good morrow. Another man was lately

prosecuted, who would have taken away the estate of his neighbour, that neighbour not consenting illegally to lose it. He sends him a challenge. He is prosecuted and convicted. No deliberation for sentence; not a moment's imprisonment. He is fined a hundred pounds; and application is even made by the Court to know if any body ever knew a precedent for a smaller punishment. Nobody indeed ever did: and yet this challenger was an elderly member of parliament, and a justice of peace for the county where he lived.* He was still better off than with a good morrow: he was told—'Idem alii fecêre, et multi, et boni!'—"Other men have done the same thing, Sir, as you; and many other men and good men!"—If he was a good man, why was he punished? He stood not, at that time, a good man in the court; he did not appear there for his goodness.

Gentlemen, I some time ago hinted something to you of the motives for this prosecution. I will now go no farther than only to shew you clearly what could not be the motives; and I will leave your minds to determine what is the motive: only so far I will say, that if the change in my situation, if I was allured to it by the lucrative emoluments of the profession, and wished to share in the legal plunder of the people, this prosecution might then be very serious; but I laugh at it. I am out of the reach of the intended consequences of this prosecution; I say, intended consequences: for rely upon it, I am better known to those who have caused this prosecution, than for them to have only in view the consequences of imprisonment and fine. No, they know better: they know that no men act as I have always done who mean to be stopped by imprisonment and fine. But, gentlemen, I will shew you what is not the motive of this prosecution. The motive of this prosecution is not to prevent the evil tendency of this wicked libel; of this horrid charge against the king's troops of murder; against soldiers who never commit it, who are not likely to commit it. I am sorry to read to you any paper: (I did indeed intend to have read many, but the time I see will be too long) I will only read one or two to you, just to satisfy you of some things which you perhaps are not aware of. Here is the Public Advertiser of May 30th, 1775. You will find in it a very serious, very particular, very sharp accusation against the king's troops of murder; the whole circumstances at length; and murder, murder, murder in every line; but it is so long that I will not read it to you now, because you can all remember to look at it hereafter. The papers are May 30 and May 31. The government then, I mean the minister (I make an improper use of the word government) the minister desires the public, upon this charge of murder against the troops, to suspend their belief. What follows? This paper which I have proved—"As a doubt of the authenticity of the account from Salem, touching an engagement between the king's troops and the provincials in Massachuset's Bay, &c. I desire to inform all those who wish to see the original affidavits which confirm that account, that they are deposited at the Mansion-House with the right hon. the lord-mayor for their inspection. ARTHUR LEE."

Then come the copies of the affidavits; all the particulars at length: murder is not spared at all. Then, amongst the rest, comes an affidavit, which I shall prove to you presently more authentically than this; though it is enough for me that it was published. But you know, gentlemen, I am not the original author of the charge. The gentleman has been talking of the original author of the charge: he thinks he may tell you so now, two years afterwards; but if he had told you so at the time of this advertisement, every man in the court would have laughed at it. Here is the original charge, signed by the agent of the province where the murders were committed, and the original affidavits confirming it are here said to be lodged with the lord-mayor for inspection. It is very lucky for Mr. Lee that his receiving them, and causing them to be advertised, has caused no prosecution against him. We shall know presently whether this affidavit be a forgery or not: the gentleman for whose it is given attends here by my subpœna to prove or to disprove it.

"I Edward Thoroton Gould, of his majesty's own regiment of foot, being of lawful age, do testify and declare, that on the evening of the 18th instant, under the orders of general Gage, I embarked with the light infantry and grenadiers of the line, commanded by colonel Smith, and landed on the marshes of Cambridge, from whence we proceeded to Lexington. On our arrival at the place we saw a body of provincial troops armed, to the number of about sixty or seventy men. On our approach they dispersed, and soon after firing began; but which party fired first I cannot exactly say, as our troops rushed on shouting and huzzaing previous to the firing, which was continued by our troops so long as any of the provincials were to be seen. From thence we marched to Concord. On a hill near the entrance of the town we saw another body of the provincials assembled. The light infantry companies were ordered up the hill to disperse them. On our approach they retreated towards Concord. The grenadiers continued the road under the hill towards the town. Six companies of light infantry were ordered down to take possession of the bridge, which the provincials retreated over: the company I commanded was one. Three companies of the above detachment went forward about two miles. In the mean time the provincial troops returned, to the number of about three or four hundred. We drew up on the Concord side of the bridge. The provincials came down upon us; upon which we engaged and gave

* Mr. De Grey, I believe, elder brother to the Chief Justice of C. B.

the first fire. This was the first engagement after the one at Lexington. A continued firing from both parties lasted through the whole day. I myself was wounded at the attack of the bridge, and am now treated with the greatest humanity, and taken all possible care of by the provincials at Medford.

Signed, "EDWARD THOROTON GOULD."

When first I heard of this prosecution, and not before, I began to consider with myself whether I had indeed made use of any such expression or word as distinguished what I had said from the case of many other persons. Not a day passed but I found some news-paper with the same charge, containing the same word 'murder.' I need not read any of them to you; you can all recollect. Go to the papers that are published to-day, to those published before this charge was brought against me and since, and see if you don't constantly find in them this charge of murder against the king's troops. I took extracts from them till I was tired; and not only from the news-papers, but several other publications; from that honourable gentleman's publication and others, which are of more consequence than fugitive pieces in a news-paper. These all prove the Attorney General's nice sense of honour and integrity, and regard to the public good, who prosecutes this advertisement. Now, that men may not be misled by it, after suffering them to run wild for two years, and be misled without any controul! But, gentlemen, so far from that being the motive of this prosecution, the papers are all full of the same charge, and will continue full, I have no doubt. I protest upon my honour, they are none of them made by me: I have been dumb ever since. I meant to do good by it when I made the charge, and I have been dumb ever since, because I could not see that any good was to be produced. If then you see what is not the motive for this prosecution of me, at this distant time, that will lead your minds to conclude what is the motive.

Gentlemen, the language of the Attorney-General forces me to say a few words upon a subject which is the most disagreeable for a man to speak of; unless indeed it is when he appears as I do, a defendant. I thought when the Attorney-General opened his charge upon this prosecution, that he would have taken a different line from that which he repeatedly pursued in the trials of the printers. He knew that I had heard him talk against "indecency, a flood of obscenity, and scandalous publications." I had already heard him charge that advertisement to be full of "ribaldry, Billingsgate, scurrility, balderdash, and impudence." I have not used a word that he did not use. All these I knew he had charged upon that poor advertisement. I thought that upon this prosecution he would not give me such an advantage as to say the same things, or take the same line that he took before. It is true, he gained a verdict by that line before, and therefore perhaps thought he might this time. I own I did think that he would have paid me the compliment of something a little new; but he says he never knew so much of my talents and learning as at this time. The gentleman's memory is short: I would have forgot it, if he had not. He represents me to you in the light of a scurrilous, ribald, balderdash, Billingsgate, impudent fellow. That boldness with which I defend the right of the subject, will not, with any man who has a regard for the right of the subject, pass for impudence: those who know any thing of me must judge whether I am impudent upon other occasions.

Gentlemen, he has followed in this description of me which he has given, and in that character with which he has been pleased to clothe me—he has followed the old practice of some ingenious tyrants, who used to dress up men in the skins of beasts in order to encourage the dogs to worry them. Just so this gentleman dresses up his victims in the characters of beasts, in order to expose them to your indignation. He had no pretence whatever for representing me in that light. I do the more wonder at this language from him, because he knew better. He has said indeed, that he did not know the gentleman. The word 'know' has many different meanings. He did not know me as a friend, or as an acquaintance; I never had that honour: but that he did know me so far as to know much more of the talents and learning (if there were any in the case) than what he can possibly have picked out from this day's hearing, is a notorious fact. However, gentlemen, if I am that Billingsgate fellow, unfortunate is it for the Attorney-General that a fit of Billingsgate then once took him: and whilst the fit was on him, he applied to a gentleman to introduce him to my company, absolute stranger to him as I was. I did not request it; the Attorney-General requested it. Perhaps the gentleman who introduced him is in court. The fit was not a short one: my conduct and my character was not, in his declared opinion, such as he now represents it. I believe we sat in a public coffee-house together, though in a private party, I suppose from eight or half after eight in the evening till past midnight considerably. I don't mention it to plume myself upon his distinction; I claim no honour from it: the gentleman might be desirous of seeing me as you go to see a rare-shew, or as you would any strange creature; it might be from some curiosity. I never was vain enough, gentlemen, to impute it to myself as a merit; I did not see any reason to grow proud upon it; but I mention it particularly for this reason, that not only it ought to have saved me from such a representation of character, but it ought to have saved the Attorney-General from pinning such motives upon me as he mentioned in another trial; such as the gaining of half-a-crown, or the flying in the face of government. When he was in possession of my motive, he knew it perhaps better than most men in England; and though I

don't think I have a right to repeat what passed from that gentleman (though there was nothing in it dishonourable to him), yet I may be permitted to say what came from myself to him. A question was asked me to account for a part which I played; and why I, who did not then seem to him to be a desperate man driven by necessity to it, or that ill-behaved man, or that fool (for great numbers of patriots and ministerial men go from folly on both sides), he seemed to think I might have some more honourable motives about me, and wished to know what they were. I told him my motives; and if is a strange circumstance that I should then tell him that motive which is the very motive of this action of mine which he now prosecutes. I told the gentleman, in the year 1768, that there was a certain sect of religion (which I named) which of all others was most abhorrent from my principles and way of thinking; but I added—"Persecute them to-morrow, and I will declare myself of that sect the next day." I appeal to himself; he will remember it; it is rather too remarkable. I will mention the sect, if it is necessary. Shall I repeat the name of the person, the introducer, and the place? If there is any doubt, and he desires it, I will mention the particulars; because I should be sorry to be laughed at as if advancing a falshood of this kind, and pluming myself for passing a few hours with the gentleman who happens now to be Attorney-General. This passed long before this wicked advertisement; long before I could foresee that the Americans were to be treated as they have been. I think it should have saved me from such a representation of character, and from such motives as have been imputed to me; from that gentleman at least, if he acts (as he pretends) without direction from others; for he has seen me steadily pursuing that same motive. Every action in which I have been known to be concerned, has steadily been upon one and the same principle. I have never had occasion to support a friend, or an acquaintance, to promote an election, or to vote, or to do any thing for my particular connections; they have always been absolute strangers to me, and men taken up upon the footing of oppression. Friends!——Yes, if friendship received from me could make them my friends. But friends! ——No, if any friendship received from them was necessary to make them so. My motive has been constantly the same: I know no American.

Gentlemen, I have been more concerned in my room than I have with the commerce of men in the world; and I read there, when I was very young, that when Solon was asked which was the best government, he answered—"where those who are not personally injured, resent and pursue the injury or violence done to another, as they would do if done to themselves."—That, he said, was the best kind of government; and he made a law impowering men to do so. Now, gentlemen, we are happier, we are under a better government; for our laws enjoin us to do what he only impowered men to do. By our laws the whole neighbourhood is answerable for the conduct of each: our laws make it each man's duty and interest to watch over the conduct of all. This principle and motive has been represented in me as malice. It is the only malice they will ever find about me. They have in no part of my life found me in any court of justice, upon any personal contest or motive whatever, either for interest, or profit, or injury.

I have kept you too long to say a tenth part of what I intended to say, and I believe it is not necessary: I shall therefore pass over many things that would give to some pleasure, and to some pain. But as they are of that nature that I shall give myself the liberty of using, upon other occasions, as I please (doing no wrong), I can the more readily forbear them here. But, gentlemen, in this matter of charging the king's troops with murder, there is a very striking circumstance; and that too, I suppose, the Attorney-General will have forgotten. It is well known that, amongst other oppressions and enormities which gave me pain, murders (without any contest and dispute) committed and pardoned gave me much. I caused the soldiers in St. George's-fields to be prosecuted—the king's troops—for murder. I took them up. It was called no libel by the then Attorney-General; no libel against the government. They were tried for murder. I did intend to have told you how they escaped; but it matters not. They were tried; they were charged with murder; and that not only in a court of justice; I advertised it, I signed it with my name: the same printer (I forgot to ask him as an evidence: indeed I had before asked him for a news-paper that contained the advertisement, but he could not send me one) he could have proved it; but it is notoriously known, I charged that murder upon the king's troops with my name. It was not thought a libel then. It was thought a very great affront: for those troops had been thanked, in the king's name, for their alacrity upon the occasion. What then, if the king's name had been abused to thank men for their alacrity, what then? (I did not mention that, but I mentioned the murder committed.) There was murder committed. I saw it with my eyes; I saw many barbarities committed. I might have been amongst the slain. And shall not I mention what I saw with my own eyes? Shall I have no tongue nor understanding, but in a court of justice? I certainly will. What followed? Soon after that [in 1768], Mr. Stanley, a considerable officer in the state, moved in the House of Commons for an act of parliament to take away from the subject the right of appeal in the case of murder; because I had caused appeals to be brought; that is, I assisted the parties who brought them. This motion was supported by Mr. Selwyn. Mr. Dyson, a lord of the Treasury, declared himself to be entirely of their opinion;—"because the right of appeal for murder was, he said, a shackle upon the

king's mercy: but he begged a delay till the next winter, when he promised it should have his assistance; that so the motion might not appear in the Journals of the House all the summer, to alarm and terrify the minds of the people before that bill could be passed into a law, for which at present, he said, there was not time."—To avoid its alarming the people before it could be passed into a law!—Well, it did not stop there: some notice was taken of this, but not much, as it was for that time dropped. But this motion was revived some time after [in 1774]. Mr. Rose Fuller (a better man to come forwards upon such an occasion) gave notice of a renewal of that motion in the House of Commons: he was supported by Mr. Attorney-General. I was alarmed at that (and I will prove it; I am not now asserting what I will not prove). I instantly published what they might have called a libel, if it had not been upon such tender ground. I sent it to the public papers, with the initials of my name: I inserted in it such matter as could not fail to make it be known to come from me. That did not content me. I requested an honourable member of that House, who is now in court, Mr. Alderman Oliver, to present my compliments to Mr. Rose Fuller and the Attorney-General, and to inform them that, upon that ground, I was ready to go even to death; that I would stick at nothing; that, on such an occasion, I feared no prosecution for libel. I intreated them to tell me when they would bring the motion on, that I might be present to hear what passed, which I would faithfully report and freely comment upon. The Attorney-General, in his support of that motion, had reviled the right of appeal in the subject for murder, as a Gothic custom. Gothic was the invidious charge he brought against it: it was a Gothic custom! Why, gentlemen, so are all the rights, and liberties, and valuable laws which we have; they are all Gothic. But this was to be plucked out from amongst the rest; and because it is Gothic that men should be punished for murder, because it is a shackle upon the king's mercy, murderers are not to be punished. Gentlemen, this attempt has a near affinity with this prosecution of me, for a libel against the government, for charging the king's troops with murder. Gentlemen, I beg your attention to this matter: for, you see, they have got farther now in their system and their doctrines; and the mere charging of the king's troops with murder is to be considered as a seditious libel against the king and the government! But what thought the House of Lords at the time of the Revolution upon this Gothic custom?—King James the second had cut off and murdered many of the peers, under a sham trial of a commission of peers whom he picked out. At the Revolution they took care to secure themselves from such trials in future; and therefore, on the 14th of January 1689, they entered this among their standing orders: "Whereas this day was appointed for taking into consideration the report made the 8th day of this instant January, from the lords' committees of privileges concerning the trials of peers: after due consideration had thereof, it is resolved by the Lords spiritual and temporal in parliament assembled, that it is the ancient right of the peers of England to be tried only in full parliament for any capital offences. And it is ordered that this resolution be added to the roll of standing orders of this House."—This was to secure themselves. But when they had done this, some noble spirits amongst them being alarmed and apprehensive, lest, under this pretence, in future times the subject might be deprived of his right to prosecute those who had committed murder, they (three days afterwards) on the 17th of January, entered the following declaration: "It is declared by the Lords spiritual and temporal in parliament assembled, that the order made the 14th day of this instant January, concerning the trials of peers in parliament, shall not be understood or construed to extend to any appeal of murder or other felony to be brought against any peer or peers: and it is ordered that this declaration be entered on the roll of standing orders of this House."—The peers at the Revolution (all Gothic as it was) took this right of the subject, and hugged it to their bosoms; and this too in their own case against themselves. They would not themselves be exempted from a possibility of being prosecuted to judgment, that justice might be done for the lives of the king's subjects, even if slain by themselves. However, gentlemen, this Gothic right of appeal is not as yet taken from us: and I do firmly believe, that by the resolution which I shewed, and by the message which I sent, and by the libel which I published (if such things be libels), I do believe I have the merit of putting off (at least for that time) so infamous an attempt. Infamous four-fold, if you consider the doctrine now brought forwards.—The king's troops shall not even be charged with murder! Observe then what follows: the king perhaps will not pursue; the subject shall lose his right of appeal; and you shall not even dare to say that the king's troops have committed murder.

I have already taken up much of your time; but I hope that the importance of the doctrine brought forward in this case, as it is the first (there is no precedent of such a one)—I hope that will be my justification.

Gentlemen, I will now come to the advertisement itself. The Attorney-General says it is a scandalous publication; and he has repeated all those terms which I have before mentioned to you.

Now, gentlemen, pray consider with yourselves, to what purpose has he done this? Look at the information (you have a right to carry it out of court with you); see if you can find any such charge in the information; see if you can find any thing tantamount to ribaldry, or scurrility, or Billingsgate, or balderdash. These make no part of the information at all. He has done it merely to mislead and inflame,

But he complains of scandalous publications! Who has most cause to complain of scandalous publications (taking the nation as divided in opinion between the Tory and the Whig doctrines)? who has most reason to complain of scandalous publications? Read Dr. Shebbeare and the archbishop of York![*] a pensioner of the crown, and an archbishop just created so by the crown! See how they have treated the Presbyterians! And yet, I presume, they are as respectable a part of the king's subjects as the king's soldiers! I think that to alienate the minds of the Presbyterians, or of others from them, is doing no great service to this country! Why not prosecute for that? No; pensions and mitres shall reward them! But, not to talk of these general matters, the Attorney-General, in a prosecution of me for a particular advertisement, thinks it his place to talk of scandalous publications. Pray, take the two individuals, the Attorney-General and myself; which of us two has most cause to complain of scandalous publications? Judge fairly between us. He is a gentleman in great office; a gentleman necessarily exposed to the difference of opinions about his conduct: myself an obscure man, who never did enjoy any office of trust or of consequence; who never was a candidate either for honour or for profit; who have no claim to the notice of the public. Compare this with the situation of that gentleman; then compare the ribaldry and the scandal that has been published about us both; and judge which ought most to have talked of scandal in this prosecution! Gentlemen, I have had the honour to be burnt in effigy, and I saw myself committed to the flames. I have been sung about the streets in ballads, and I saw a little pert parson cocked up upon a stick in the singer's hands. The news-papers for some years were even sick of my name. Even my clothes afforded an entertainment for the wit of the theatre. As for caricatures, I have myself bought enough of them to furnish a room:—my rooms are but small, as you may easily suppose. My life has been written, with my name at length, and the atheist and macaroni parson printed at the bottom of a print in the frontispiece. Atheist! and with my name at length! Scandalous publications, to be sure, should be urged by that gentleman against me! Gentlemen, I have never complained of those imputations. I protest (except with very ignorant, very poor creatures, and it does not signify what they think) I don't think those imputations ever hurt my character; and if they have, I will take the chance of time to refute them. There was indeed one imputation that I believe did get some ground; and I thank the Attorney-General for now relieving me from it: it was the worst of all the other—a corrupt pensioner of the crown. That was an imputation which I believe did stick by me; but there is no wonder at that at all. I did not even for that so much as accuse the publications and the writers: it is the practice of the times, and the corruption of the minister, that libelled me! Every man may, without being absurd, suspect his neighbour of corruption, without any specific charge brought against him. Good God! in a nation of lepers like this, who can expect to be thought clean! However, I agree with the Attorney-General in all that he has said generally against scandalous publications: they ought to be, and the laws (without straining them) are now sufficient to cause them to be suppressed. But, gentlemen, I shall never be found in the list of those dealers in scandal. Well, but in the advertisement he tells you, there is scurrility, Billingsgate, ribaldry, and balderdash. The gentlemen of the law love to go by precedents. The Attorney-General found a precedent for it; and therefore (without considering whether it would apply or not in this case) he made use of it to eke out the time. Mr. Noy, the Attorney-General in the Star-Chamber, prosecuted a man for speaking disrespectfully of stage plays; and he said, that "it may be fit enough and lawful to write against plays, by men that have a mission: and they must do their errand in mannerly terms, and in the same terms as other men expect to bear with them. Mr. Prynne had no mission to meddle with those things, to see whether men should not return to gentilism. The terms which he useth are such as he finds among the oyster-women at Billingsgate, or at the common conduit."* Mr. Prynne had no mission, it seems, to prevent men from turning heathens; and therefore he ought not to endeavour to prevent them from turning heathens! But however, gentlemen, if I have used Billingsgate, and those bad terms with which he charges me, I shall not be angry with the Attorney-General, but very much obliged to him, if he will help me to correct my language. I am sorry, however, to find that he does not intend I shall have much benefit by the example of his own. He has charged the advertisement with impudence too: and it seems, gentlemen, by what I heard from him in the other trials, and in this, to be a very lucky impudence for me: for he did say, that "wicked is a term too high for this advertisement." These are the very words; I took them down: "wicked is a term too high for this advertisement." Upon what, then, does he expect to gain a verdict? He said, too, that "its impudence disarmed its wickedness." I believe that is a new figure, not to be found in poetry or painting! Impudence disarming wickedness! Why, gentlemen, that was in plain words telling the jury (if they had at all adverted to what he said) that they had nothing to do with that advertisement: for if it is not high enough to be wicked, it is too low for the verdict of a jury. You have nothing to do but with legal wickedness: a man cannot be prosecuted for scurrility and impudence. But where, in which words

[*] Dr. Markham.

* See vol. 3, p. 568.

of that advertisement, is this scurrility and Billingsgate? In which sentence is the unmeaning ribaldry and balderdash? Balderdash, I believe, is a term taken from the drunkard's table. Balderdash (if it means any thing) means a rude mixture, a confused discourse.* Does he prosecute a rude mixture and a confused discourse? If its aim and its object are difficult to be found out, is that an object of prosecution? In that case, it might as well have been written in Hebrew. But, gentlemen, all this was merely to inflame and mislead you; and therefore I shall not dwell upon it. But, gentlemen, whilst he has been misspending the time of the Court in that which makes no part of the information, he has not said one single word about that which does make a part of the information; I mean its falshood. Falshood is a part of the charge, and it is a criminal and an odious part of the charge; and if you do not find it in the advertisement, you cannot give a complete verdict. Falshood is a part of the monster which he has exhibited: and if one limb of it is wanting, you cannot give him a verdict. Gentlemen, I shall prove the assertions of the advertisement to be true by my evidence; and I will not now delay you with them. And, gentlemen, I shall prove to you a thing which may now perhaps be a little useful to my character (if it suffers under that stigma of Billingsgate and balderdash, and incendiary intentions, with which I am charged); for I shall not only prove that the motion was made, the money collected, and paid, but I shall prove to you, that the advertisement of the first sum did produce the second. The Attorney-General says, it was only a fetch to fly in the face of the law. It was a fetch. It fetched 50*l.* more: and I will prove to you that it did so. I will tell you the person who sent it, and the person who conveyed it to me; because the purpose for which the money was given, the gentleman who subscribed it, and the gentleman who conveyed it, are all worthy of each other. The money came from sir Stephen Theodore Janssen, who is now out of the reach of envy; it was conveyed to me by Mr. Alderman Oliver, who, though living, is equally out of the reach of censure; and it was paid for the purpose for which it is declared. And, gentlemen, I am the rather inclined to prove these circumstances to you, because his lordship in his charge to the jury on one of the late trials, finding that no evidence had been brought of the truth of the assertions in the advertisement, was pleased to forget a doctrine I have sometimes heard about truth, and threw in, as a make-weight into the scale, an insinuation of the possible falshood of the advertisement. His lordship said, he "did not believe such a proposal had ever been made, or such money contributed, or paid, or even such a society as was named existed. He hoped there were no persons capable of such an act: he hoped, and therefore he believed!" It is a tolerable insinuation to a jury! He hopes there are no men capable of such an act! What dismal act must this be? It must surely be some act that excludes a man ever after, from being admitted to sit cheek by cheek, and laugh and joke together with his lordship. It must surely be an act of that kind that a man must be held in abhorrence for it. No honest man could keep one company after it. "He hoped there were no men capable of such an act, and therefore he believed it." After this the Attorney-General, from his lordship, took the same cue: and therefore, in a succeeding trial, he too insinuated, that the subscription was a mere pretence (a fetch he called it) to colour the advertisement. I own when his lordship hoped, and therefore believed, I was in some pain for my own existence: and though I stood close at his elbow, I did not know but he might believe next, that there was no such person as myself existing in the world. And yet I have heard his lordship say, on other trials (and if I misrepresent him, he will do justice to himself), I have heard him say--"What! shall not a judge and a jury know and believe what every one else knows and believes?"—(and it was upon a trial for a libel)—"Shall they alone be supposed ignorant of those known and notorious facts which no one else in the court doubts?" As I do not therefore know which of those two doctrines his lordship may adopt on this occasion, and cannot tell what he may believe (because I do not know upon all subjects what he may hope), I shall therefore prove the truth of my advertisement. And when I have done that, perhaps, gentlemen, you will be told (as I have heard it said) that 'false' in the information stands for nothing, and is not a part of the charge! though observe, if I omit proving the truth, they will not fail to aggravate the charge, by insinuating the falshood.

Now then, gentlemen, I come to the very great offence of all; to that which does indeed make a part of the information, but has made no part (except in assertion) of the Attorney-General's harangue: I mean, charging the king's troops with murder. I am told, that it is not for any of those assertions about subscription, and payment, and collection, that I am prosecuted; but it is for charging the king's troops with murder. There the Attorney-General said, he "put his finger."—I have not charged the king's troops with murder: there is not any such assertion in the advertisement. There can be no charge, no truth or falshood, but in an assertion. Gentlemen, I have no more asserted, that there were any persons murdered, than I have asserted that they have left behind them widows, orphans, or aged parents. Perhaps no persons were murdered, perhaps no persons were even killed at Lexington and Concord on the 19th of April 1775. Perhaps, if there were any killed, they were such as have left behind them neither widows, orphans, nor aged parents. The advertisement

* Johnson's definition is "any thing jumbled together without judgment; rude mixture; a confused discourse."

does not assert any of those things. There is indeed a description in the advertisement of certain persons for whose use the collection was made: if there are no such persons, the intended charity will not take place. I indeed suppose the charge to be true: others had charged the king's troops with this murder nine days and more before my advertisement. I have shewn you where; in the same newspaper of May the 30th and 31st, 1775, signed by the agent of the province. I supposed that charge true; but I did not make it. I took it as I found it. The charge was in all the newspapers of May 30th and 31st, 1775. Why not prosecute those that brought the charge? The charge was authenticated in the most formal manner: original affidavits, taken on the spot, were lodged with the lord-mayor of London. The charge was not nonymous; it was signed by the agent of the province where the murders were committed; it was signed by Mr. Arthur Lee: He publicly avowed it every where. He sat daily in this court, with the chief justice and the Attorney-General, publicly as an advocate: he was retained on one of the trials: he stood up to avow it: his lordship knew what he was going to say, and would not permit him to speak: it was in the first trial at Westminster. You see then (nay, you know it from a thousand publications) that this was not a wanton suggestion of my own; nor yet lightly taken up upon a slight rumour: but it was so given to the public, that no man could reasonably doubt of it. The Gazette, published by authority, desired every man to suspend his belief; in declared answer to which these affidavits came. It has never since been contradicted, even by that very authority that desired us to suspend our belief. But, gentlemen, though I did not make the charge in this advertisement, to save trouble I am willing to have it understood, that I did make the charge in the advertisement: I do again make it now. I did not word that part of my advertisement in the descriptive manner in which it stands, through cautiion, and as a subterfuge to insinuate a charge which I was afraid to make: so far from it, that I do tell you again I allow the charge. I believe, gentlemen, these murders will never be forgotten as long as the history of this country shall remain: for the murders of that day, the 19th of April, have been productive of all that slaughter which has happened since, and of all that which is still to come. Suppose then, gentlemen, if you please, that I had charged the king's troops with murder. Well! what then? How follows the libel against the king and the government? for you must take notice that the accusation in the information is not that I have charged the king's troops with murder. That would not have supported an information: an information could not be supported upon that charge. The charge against me is, that I have charged the king and the government with murder. And to-day the gentleman has spoken a little more plainly than he did before. To-day he says, that "I have charged the persons employed by government with being guilty of murder; and consequently those who employed them are involved in the same guilt." This is the charge against me. But how does he draw the consequence? Is that to be found in the advertisement? Does every man that says a soldier has committed murder, involve the king and the government in the commission of that murder?

Gentlemen, I have not, in my advertisement, even charged the ministers. But if I had, I hope the ministers or the troops are no part of that government which you acknowledge: at least I am sure the troops do not make a part of that government under which I was born; they do not make a part of that government to which I have repeatedly sworn, and always held the most faithful and firm allegiance: and I will say more, they do not make a part of that government under which I will ever silently live. Indeed, gentlemen, Mr. Attorney-General seems to think the troops something more sacred even than the government: for he said, in aggravation of the charge, that it was "not only a libel against government, but even against the soldiers in our service." If he should happen to forget this also, the counsel who answered him at the time, and took notice of it, I hope will remember it—"Not only a libel against the government, but even against the soldiers in our service:" so that the troops are something more than the government! I believe they are intended to be made so; for ours is a government of laws, not a government at will, either by troops, commanders in chief, ministers, or king. Consider, gentlemen, that the king's troops are only tolerated in this country for the purpose of foreign defence. They have been but of late years tolerated in time of peace. They have only an annual existence; which existence expires yearly, unless regenerated by a yearly vote. Now, gentlemen, consider! Hanoverians, Hessians, Brunswickers, Waldeckers, the very Indian savages (for of these are the king's troops now composed) all these, by Mr. Attorney's doctrine, make a part of the blessed government of this country! and to charge any of those king's troops with murder is to be guilty of a seditious libel against the king and against the government! Gentlemen, reflect. Have not the king's troops often been charged with murder? Does there pass a year when some of them are not convicted for murder? and, in the last good old king's reign, were they not executed too for murder, when they were convicted? It is too notorious.—A libel to charge the king's troops with murder! I believe nobody ever dreamt that it was a libel against the government, or even against the ministry, to say that some of the king's troops have committed murder. If such a charge is false and malicious (and a false and malicious charge may be made against the troops, as well as against any other person) it may be a libel against them, just as it would be against any other of the king's subjects; and they

must seek the same remedy. They are not nearer, nor, I hope, dearer than we are; than any other of the king's subjects. How long have the troops been these privileged characters? What is there peculiar in their character, that to charge them with a murder shall be a libel against the king and the government? Suppose I had said (as I believe I might truly), and as I know it has often been said, that many murders have been committed by the king's patents, does any man think that the Attorney-General would have prosecuted that as a seditious libel against the king and the government? And yet the king's patents are just such as he pleases to make them: they are of his own begetting, and much more as he pleases to make them than even his children. But the troops? what are they? what are they, whose origin we know? what are those who are of our own country?—Many of them, felons taken from gaols, and rescued from the gallows. Of these are the king's troops composed. And is it wonderful to charge the king's troops with murder? But it is too ridiculous. I am sure the Attorney-General does not, he will not, pretend to say, that every particular charge against some soldier or soldiers for murder is a seditious libel against the king and the government! He will not say so! Suppose, gentlemen, some of the king's peace-officers had been charged with murder. It has often happened. Constables and peace-officers may exercise their authority in an illegal manner: they may kill men instead of arresting them. They have done it; they have been sometimes tried for it. Are not they as much the king's officers as the troops? Something more so, I suppose; for they are the officers of the real government of the country; the officers of the laws. And yet was ever any man prosecuted, or would any man now be prosecuted, if he charged a pack of constables with having committed murder? Would that be a libel against the king and the government? It could not be. Gentlemen, suppose some of the soldiers as brutal as Kirk's lambs (soldiers, for their cruelty, known by that name) should renew again the horrid barbarities which they committed in the West; would it then be a seditious libel to say that they had committed murder? I do not say, nor know, that the king has at present among his troops any lambs of Kirk's breed; but I am sure he had in 1768; because I then saw them not only commit murders, but other barbarities which not a savage hardly would commit. I saw one of the king's troops run his fixed bayonet under the shoulder-blade of a poor man, because he could not get under a rail time enough out of his way: I saw a woman with child wounded: a ginger-bread woman murdered as she sat at near a quarter of a mile distance. Were not they murdered? Were not those murders committed by the king's troops? by as numerous a body of the king's troops as those who committed the murders at Lexington? Gentlemen, there was a person present; I don't know that I have a right to mention his name; but he said he had served as a surgeon under Braddock in America, and he told the justices of the peace, that, even in that country, he had never seen murder so wickedly, so wantonly committed. But perhaps the Attorney-General does mean still to prosecute me for calling them murderers. Why should he not? It is but nine years ago! I don't know but that, as soon as this prosecution is over (if you should establish this doctrine), he may follow it with another prosecution for that libel too. The same printer can prove it; and I shall not deny it. But the Attorney-General will, I know, from necessity, be obliged to say, that this is a very different case from charging some individual soldiers with murder. The king's troops here, he will say, acted in that capacity, as the king's troops, in a body, under their officers, and in a military manner, as part of the king's army. Well, it may be so; but, however, that is more than he has proved to you. If you believe that, you must take his word for it, or you must have it from the evidence which I shall produce. But if Mr. Attorney-General makes or attempts to make this distinction to you, gentlemen, between individual soldiers and those acting as part of an army, I must then intreat him to draw the line. None has yet been drawn; but he must do it before you can give him a verdict. If he will give up, as I am sure he will, that to charge any individual soldier with a murder is not a seditious libel against the king and his government; but shall insist, that to charge a body of the king's soldiers, acting under their officers, is a libel against the king and the government; he must then draw some line. He will tell you, I suppose, whether it is a regiment, or a company, or a serjeant's guard, or a corporal's guard; what number, and how commanded is it; that draws the line; that makes it an offence against the king and the government, and makes it a seditious libel to charge them with murder. Look after him—see if he draws you that line. He must likewise, gentlemen, when he has drawn it, shew you his law for it; and then he must prove that the troops I have charged fall within that line: and if he does all this, if he draws that line, and establishes it by law, and proves that the troops I have charged are within that line which he establishes by law, then you are bound to give a verdict against me. And if he would do that, I would at once save him the trouble of a trial. If he can draw that line, I will not keep the court a moment.

Gentlemen, I will be bold to say, that the whole army together, foreigners and natives, with all their officers, and the commander in chief,—aye, and the king himself at their head,—is no part of the government of this country; nor can they lawfully put any man to death. I said, gentlemen, some time ago, that there never had before been brought a prosecution upon such a charge as this. Now, it is true, that a part indeed of the charge against honest John Lilburne, upon one of his

trials, was, that he had accused the soldiery of having committed murder; and his words were (besides the word 'murder,' which he expressed at length) that they had committed murder by "shedding the blood of war, in the time of peace:" and he had likewise called their general, by name, a 'murderer.'* But, gentlemen, it must be remembered, that this prosecution was brought when the army were indeed, *de facto*, the government; when there was neither king nor parliament, but the army governed alone. Then indeed it was natural enough to call the troops the government, and to reckon it a seditious libel against the government to charge them with murder. Since that time, the Attorney-General will find no such prosecution. However, gentlemen, even then a London jury, faithful to their duty, in spite of the Judges and the Attorney-General (who then held the very same language which the Attorney-General holds now), in spite of all their arts, at that perilous time, a London jury in this very court, sitting in those very places where you now sit, did justice to their own consciences, and they acquitted him, as you must me, unless you chuse to exchange the laws of the land, and have military execution take place in this country. A standing army, in the time of peace, is a monster to the free constitution of this country: it has but very lately been suffered; and one of the great arguments that has been urged by those who have from age to age opposed a standing army, was, that they would be thenceforwards used as they now are. The pensioners of the crown and the friends of arbitrary government ridiculed such a supposition. They said, it was impossible that such a time could ever arrive. I have read their arguments; I am sure the gentleman who now prosecutes me has read their arguments. They were then afraid of this use of troops; and therefore those who opposed the establishment of the army gave it as their reason. Gentlemen, the courtiers ridiculed the thought that such a time could ever arrive, or that the soldiers in this country could ever be so employed. Now, what would our fathers have said, if any chief justice or attorney-general had at that time hinted that the soldiers should not only be so employed, instead of the civil officers of justice, to inforce the law upon the subject; but that they should also have a privilege, when they were employed, which the officers of justice never pretended to? Any man who had broached such a doctrine (before the crown had got a firm possession of a perpetual standing army) such a man would have been hooted at by both parties: by the court (not that they would have disliked the doctrine, but) because the secret would have been let out too soon. But now this same doctrine has made the chief justice an earl, and will make the attorney-general a chief justice.

Gentlemen, I must entreat you to recal to your memory in what light military execution has always hitherto been considered in this country; and I shall give you (for it is worth the while) the circumstances of the military execution at Glenco.* I published the pamphlet, that all the world might see it. I mention it, because it happened about the time of the first establishment of a standing army (in its present form) in this land. It is but about eighty years since. It happened immediately after the Revolution. Now, gentlemen, who were the Glenco men? "It is certain and acknowledged by all, that they had been in the rebellions under Dundee,† and under Buchan."

* Vol. 4, p. 1320. 1367.

* See the Proceedings respecting the Massacre at Glenco, vol. 13, p. 879, of this Collection.

† See the Proceedings against him, vol. 13, p. 817. See, also, vol. 11, as there referred to.

Mr. Laing, in relating the 'last splendid exploits' of Dundee, has eloquently celebrated the illustrious parts of his character: but a limited commendation of the hero would not satisfy the zealous prejudices of the writer of his 'Memoirs.' By the blind or dishonest partiality of this biographer, high praise is claimed for the 'mercy and tenderness' 'the unexpected and undeserved clemency' of Claverhouse, as minister of 'all the paternal care' of Charles and James for the presbyterians of Scotland. Of James's paternal care, which permitted the execution of wretched ignorant enthusiasts, whose blood he said would be upon the nation, the author has given an instance in the following curious story:

"His grace the duke of York, who was concerned to hear of the commotions and troubles in the west, ordered that some prisoners should be brought to Edinburgh to be examined. Accordingly there were three sent, who were found so ignorant and simple on their examinations, that his grace gave orders to set them at liberty, upon condition that they should say 'God save the King;' which they positively denied; then his highness asked if there was a Bedlam in the country to put them in, and declared, that if they were hanged, it was his opinion, their blood was on the nation: notwithstanding, according to their sentence of condemnation, they were brought to the place of execution, and his grace being uneasy, sent the lord Roscommon, with a pardon to them; who came close to the scaffold, and (one of them being hanged) made a handsome speech to the other two, offering them their pardon, if they would say 'God save the King.' The next to be hanged was John Potter, who seemed to be in a doubt, and it was believed would have accepted of the pardon, but his wife took him by the arm, and almost pushed him over the ladder, and said, 'Go, die for the good old 'cause, my dear; see such a man' (meaning the hanged man) 'will sup this night with Christ Jesus;' so in fine, the other two were hanged: but what was the woman's design

The slaughter took place in very troublesome unquiet times, at the moment of the Revolution: it was after repeated proclamations of indemnity and pardon. The last proclamation allowed them five months (from August to January) to come in and take the benefit of that proclamation. About six weeks after the expiration of that term, the slaughter happened; and about 25 or 30 of them were killed. Now, gentlemen, let us look for the reasons which were given for that slaughter. The secretary of state, Stair, gives these reasons for that slaughter: these are his words: "Since the government cannot oblige them, it is obliged to ruin some of them, to weaken and frighten the rest." He goes much farther:—"It is a great work of charity to be exact in rooting out that damnable sect." They were not only obliged to do it, but it was charitable. He goes farther:—"for a just example of vengeance, I entreat the thieving tribe of Glenco may be rooted out to purpose."—He says it was "a great advantage to the nation, that that thieving tribe were rooted out and cut off." —"When you do your duty in a thing so necessary," (there was a necessity, you see)—"to rid the country of thieving, you need not trouble yourself to take the pains to vindicate yourself by shewing all your orders."—"When you do right, you need not fear any body." He adds farther, gentlemen,—"Here is a fair occasion for you to shew that your garrison serves for some use."—These are his instructions; the secretary of state's instructions to the troops: it was a fair occasion to shew that their garrison served for some use.—"The king's justice in this, will be as conspicuous and useful as his clemency to others."—Can any murder be dressed up in fairer terms? I defy the Attorney General, with all his abilities and force of language, to say any thing in behalf of this murder at Lexington, in more specious terms than secretary Stair has done. "It was charity to be exact—for a just example of vengeance—I entreat the thieving tribe of Glenco may be rooted out to purpose. It is a great advantage to the nation that the thieving tribe were rooted out, and cut off. When you do your duty, in a thing so necessary, you need not trouble yourself to take the pains to vindicate yourself by shewing all your orders. When you do right, you need not fear any body.—Here is a fair opportunity for you to shew that your garrison serves for some use." And after it was done, he says, "All that I regret is, that any of the sort got away, and there is a necessity to prosecute them to the utmost."—These are the specious reasons given for this slaughter at Glenco by the then secretary of state. But, notwithstanding all these fine reasons of the secretary (who would have been very glad to have had it considered as a seditious libel against government, for any man to say that that murder which he had authorized was a murder: he would have been very glad of this doctrine; it would have saved him) he himself acknowledges in a letter, that there was "much talk at London, that the Glenco men were murdered." There was much, observe; not a little; there was much talk at London that the Glenco men were murdered. And the parliament of Scotland, who took up the matter, said, it had made "much noise both in Scotland and the rest of the king's dominions." And, gentlemen, it was a very useful talk and noise. You will find what it produced. Now, what did the king? reluctantly indeed; but it produced good. What did the secretary of state? What did the Attorney-General? File an information for charging the king's troops with murder? (words and writing have the same effect; rash words, indeed, shall have an excuse where a deliberate writing shall not.) No! there was no information for a libel; but the king granted a commission for an enquiry by what pretended authority that slaughter was committed. The officers of state at that time knew what they were about, as well as they do at this time. There was a defect in the commission. Gentlemen, in this first commission which was granted, the officers who had the drawing it up, no doubt, took care that there should be a defect. A defect there was, and the enquiry did not take place. But the much noise and the much talk continued; and two years afterwards the king was forced to grant another commission of enquiry; and then care was taken that there should be no defect. And that commission of enquiry was put in force. It was a commission of enquiry to some of the noblest and the greatest in that country, Scotland, where the murders were committed. Gentlemen, what did those lords commissioners? They reported, that the slaughter of the men at Glenco was—"a barbarous murder;" the very Billingsgate language complained of in me. These noble Scotchmen voted and used that very expression, that very ribaldry. The Attorney-General has taken hold of a whole nation by calling it Billingsgate and ribaldry. Here is that very word, "murder, barbarous murder," applied to the king's troops, which offends that gentleman so much in my advertisement. He may now see, that I too had a

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in having her husband hanged, surprised many."

Mr. Walter Scott, in his 'Lady of the Lake,' and 'Vision of Don Roderick,' has added illustrious renown to "the various achievements of the warlike family of Græme or Grahame."

'Dignum laude virum musa vetat mori.'

The following is the passage in Dalrymple, to which Mr. Laing, as cited in vol. 13, p. 817, alludes: "Dundee had inflamed his mind from his earliest growth by the perusal of ancient poets, historians, and orators, with the love of the great actions they praise and describe. He is reported to have inflamed it still more by listening to the antient songs of the highland bards."

precedent for it. After the commissioners had discharged their duty, and made their report, that it was a barbarous murder; the parliament of Scotland took it up, and they voted the same Billingsgate—they voted that it was a "barbarous murder." And they addressed the king; and in that address they called it a "barbarous murder." But that is not all. They justify the king. They find upon their enquiry, that the king's instructions had been contradicted: for his instructions were, that the Glenco men should be prosecuted "in the way of public justice, and no other way:" that is what they find for the king. And yet they were no friends of those men who were murdered. They did not justify them, nor arraign all the measures which had been taken against them, by finding it a barbarous murder. But they justify the king; and they acknowledge themselves so well persuaded of their guilt, that they say, if the king had proceeded against them according to law, and had taken their lives, "they would have met with no more than they deserved." However, gentlemen, I suppose that in that declaration they were rather hasty: for there were women and children, and old men of 80, killed: and I do suppose, that if they had been proceeded against according to law, the infants at least would have been spared, if the old men and the women had not escaped. They go farther. They accuse the secretary of state, Stair, as "the only warrant and cause" of the slaughter by his orders. They find that he "did, in place of prescribing a vindication of public justice, order them to be cut off and rooted out in earnest, and to purpose; and that suddenly, and secretly, and quietly, and all on a sudden." It keeps pace very much with the murders at Lexington and Concord. That expedition was secretly, quietly, and all on a sudden; an expedition at the dead of night. They find that he directed the soldiers, that they "should not trouble the government with prisoners." Now the government cannot be troubled with prisoners; the ministers might: government is not troubled with offenders. He promises them, that "their power should be full enough:" and he orders them, that they should "begin with Glenco:" and his words are, that they should "spare nothing which belonged to him." Military execution differs a little from the laws of the land! They accused the king's troops with murder, for executing the orders which they had received: they addressed the king "to order his advocate to prosecute them:" and they desire him, that he would send the troops home to be prosecuted: "there remaining—" (these are their very words) "send them home to be prosecuted: there remaining nothing else to be done for the full vindication of his majesty's government from so foul and scandalous an aspersion." There remaining nothing else to be done! Not an information for a libel, but an enquiry into the matter, and a prosecution of the offenders! Now, gentlemen, then I must entreat you to observe what the troops are capable of doing: and I did intend to have read to you the cruel particulars of that narrative; but it is well enough, you will read it another time at your leisure; and it is your conviction, more than your verdict, I seek. You will know where to find it. You will see in how barbarous, how wanton, how treacherous, and how cruel a manner they slaughtered men, women, and children. And this they were told was their duty; and this they thought a proper way (as Stair, the secretary of state, who was a military man; they thought it, as he told them) a proper way to shew that they served for some use. Gentlemen, you find then, by this report and vote, that murder may be committed by the king's troops without and even against the king's orders and instructions; therefore I conclude, that it is not necessarily a libel against the king and the government to accuse his troops with murder. Indeed I go farther, I say, the king cannot give orders for such a murder. It is an impossibility: nor, if it were possible, would such orders justify the act. It exceeds the king's power; and would still, by whomsoever authorized and committed, continue to be a murder. Gentlemen, you find too, that a secretary of state may be guilty of exceeding the king's instructions (as in this case of Glenco he was upon enquiry found to have done). And as a secretary of state may exceed the king's instructions, so may all those other persons through whose hands the orders pass from the secretary of state to the soldiers who execute them; consequently, it is no charge against the king or the government to charge the troops with murder. But, whether the troops have orders or not, you see, that the king's troops who commit the fact are nevertheless guilty of murder, as it has been here voted, though acting under orders. Now then, gentlemen, I must beg you to compare that doctrine concerning Glenco (which has never been arraigned) compare it with this doctrine of the Attorney-General concerning the soldiers at Lexington. In the trials of the printers he said, and he says now, that the advertisement is a seditious libel against the government, because it arraigned the employment of the king's troops, and called the victory they had obtained a murder. There, he said, he put his finger; "for this," says he, "arraigns all the measures of government; quelling rebels armed, to call that murder." Now I beg of you to consider what a number of things are left out in this manner of reasoning, and what a number of things are taken for granted. In the first place, it does not appear, nor has he offered to prove any such thing, that the slaughter at Lexington and Concord was a measure of government. Arraigning all the measures of government! and yet it does not appear that this was a measure of government; I mean, even according to the abused use of the word government; I mean, not a measure even of the secretary of state. But if it had been, how does it follow that, by abusing the measures of

the ministers of state, I condemn all the measures of government? Suppose I condemn one measure of government, how does it follow that I condemn all? May not a man condemn that measure, and yet approve all the foregoing? I do not mean to be understood that I approve the foregoing measures: I abhor them. But there is nothing in the advertisement before you which condemns the measures of government directly or indirectly: it relates to no other measure but merely to that one; and you are not to trouble yourselves with what I may like, or what I may not like, but what I have expressed in that advertisement which is before you. For in this case of Glenco, it is evident that the noble commissioners who voted it a barbarous murder, did not condemn all the measures of government: for they said, "If the king had prosecuted them by law, and taken their lives, he had done no more than justice:" it is plain therefore they did not condemn all the other measures of government, but only the slaughter by the troops; for they supported the other measures of government, and that at the risk of their lives and fortunes. And, gentlemen, I know of my own knowledge, and I dare say you do, many persons who have not disapproved of all those preceding measures relative to America, who yet did disapprove of that rash and wanton transaction. Then, gentlemen, as for the 'victory,' I think it will not appear to be quite so complete a victory as that at Glenco! and therefore you still see, that such a victory as that may be called a murder. Gentlemen, for my own part, I do not hesitate to declare, that I abhor such victories; victories by subject upon subject! And as for such a victory as this, I do declare I think that the brows of such conquerors instead of laurel should be crowned with wreaths of hemlock. And as for his "quelling of armed rebels!" every word is falshood. They were not rebels, nor armed, nor quelled. They had committed no act of hostility; they had made no attack; they were sleeping quietly in their beds, unapprehensive of any attack upon themselves, at the time that this expedition took place: and that I shall prove, gentlemen. What reason have you to believe that they were in rebellion, unless the Attorney-General's saying so proves them to be in rebellion? for he has offered no proof to you of it. It is now—(and pray consider this matter about rebels; though I think it does not matter; for a rebel may be murdered) but consider, it is now two years and a quarter since this slaughter was committed; and yet, to this day, no person whatever has been prosecuted as a rebel. No legal proceedings of any kind have taken place. It is two years and a quarter since that execution upon the rebels, as they are called, and yet no proof of rebellion: and yet you are to believe, that they are rebels! The Attorney-General, if they are rebels, should do his duty: he should prosecute.

Now, gentlemen, observe only another contradiction in the doctrines which are brought before you. You will be told, that if they were murdered, the murderers should be prosecuted. You have been told so. Men are not to be charged with crimes; they are to be prosecuted by law. So then we are not to know, we are not to judge of murder when it is committed, till the law helps our judgment. And yet, observe, we are to judge of rebellion; which is a crime surely more difficult to be ascertained, and about which there have been more doubts and disputes than about murder. If a man, out of the court, exercises his judgment about a murder, he shall be punished; but he is at the same time bound at his peril to exercise his judgment about rebellion; to know what is rebellion, and who have committed it. And yet, gentlemen, I must beg you to observe, that if these very men, executed by military force at Lexington, had been rebels; had been taken in rebellion; had been prosecuted, convicted, sentenced, and had been leading to the gallows by the sheriff; if these same king's troops had come and shot them, or run their bayonets into them, they would have committed murder. It is not their being rebels; it is not their being sentenced—when they are even leading to execution, a man may commit a murder upon the convicts: and these troops would have committed murder, had they executed the men even in that condition.

Gentlemen, the same way of thinking of military execution has prevailed ever since that time. I shall not trouble you to repeat the particulars of the affair of captain Porteous,* at Edinburgh. These gentlemen are so little pleased with military execution upon themselves, that Porteous was charged by them with murder. He was prosecuted, convicted, and when he was reprieved after sentence, the people of the town executed that man themselves, so little did they approve of military execution. Now, gentlemen, there are at this moment people of reputation, living in credit, making fortunes under the crown, who were concerned in that very fact, who were concerned in the execution of Porteous. I do not speak it to censure them; for, however irregular the act, my mind approves it. I beg you likewise, gentlemen, to recollect that most wanton and most wicked rebellion of the year 1745. In what a manner was the victory over them spoken of in Smollet's "Mourn, hapless Caledonia!"—It is known, I suppose, to every body who ever reads poetry. He calls it murder:

"The naked and forlorn must feel
"Devouring flames and murdering steel," &c.

I condemn his act; I do not justify it; but he was not prosecuted for it in that mild reign.

Gentlemen, it has always been judged a meritorious jealousy in our civil officers; it was in Janssen; it was in some other sheriffs, who are still living, when they refused the assistance of the military to execute criminals. So little proper are the military, with or without orders,

* See his Case, vol. 17, p. 923.

for civil purposes, that it has always been thought a praise-worthy jealousy in them to refuse to suffer the military to assist at the execution of criminals: how much less then are they proper to execute them themselves. In that prosecution of the king's troops for committing murders in St. George's-fields, I was particularly fortunate for this occasion; and I should have reason to rejoice for myself (if I alone was concerned), that I did by that prosecution bring out a doctrine (which I know to be false, and which if not discountenanced will be fatal)—but I did draw out a doctrine from the bench which must prevent your verdict against me now. To justify the executions committed in St. George's-fields, or to save the delinquents from punishment, the judge declared from the bench that they were to be considered as any other men in the country; that it was a matter of no consequence whether they wore a white coat or a red one; that they were on the same footing, and might be employed like any other subject. I know that to be false: they are distinguished from other men, not so as to make them more qualified for execution, but less. However, this doctrine answered the purpose at that time: but this doctrine, if I am to be convicted, must now be laid aside. The king's troops must no longer be considered as on a level and on the same footing with the king's other subjects. They must now, by the "king's troops," mean some persons more sacred, dearer, and nearer to his majesty than any other of his subjects; and to arraign any action of theirs is to be guilty of a seditious libel against the government. Now, gentlemen, observe how rapid is their progression; from toleration to equality, and from equality to domination; and from thence you may learn how dangerous is this doctrine. Observe, that first, and for many years, they beg hard to have troops tolerated, merely to prevent surprize, and to be ready against foreign enemies: that is the pretence. The judges next connive at their employment against the subject at home, under pretence of equality, and as being merely on the same footing with the king's other subjects, and with no other difference but the colour of their coats. From this last doctrine (though it includes a contradiction to what follows) the transition has been very short indeed. They are now to be taken out of that equality with other subjects; and it is made a crime against the king and the government to condemn any slaughter which they may commit: and this too without any enquiry, without any proof concerning the nature of the execution or the manner of the slaughter; or whether it was directed, or was not directed; or by whom directed. And yet, gentlemen, I have learned from sir Robert Atkins (still going to my only source of law, a State Trial) I have learned from him, that "some judges are of an opinion that before a trial, or presentment, or acquittal, 'modo legitimo,' no action upon the case for slander will lie; it not being, he says, ripe for it till an acquittal. By the same reason, he says, it is not ready for an information, which is but the king's suit, the reason being the same in both." So that, gentlemen, if that be true, this prosecution is too soon as well as too late: too soon, because it precedes the enquiry into the fact, whether murder or not; and too late, for the reasons I have already given. And I have no doubt, gentlemen, but that you yourselves will think that the first step to be taken to remove (if there be any) aspersion on government, is to set on foot an enquiry into the murder; and then, if it shall be found a groundless charge, prosecute and punish those who charged them. They say, why do I not prosecute them? or at least that I should have prosecuted the murderers, or not charged them with the murder. It is well known, I have always done so when I could; and I would do so now if I could. I would prosecute those troops guilty of those murders. But how is that to be done? An act of parliament was made just before the commission of these murders, to exempt the murderers from trial in America; and you will please to remember, that it is not long since an act of parliament was made in England for the more speedy execution of murderers here. An act was made a few years ago for the more speedy execution of murderers in England; and that because it was thought a means of deterring men more effectually from murder. Now then what are you to conclude? What are you to conclude even from the circumstance of delay alone?—but either that what deters men from committing murder here, will not deter them from committing murder there; or else, that it was not intended to deter men from committing murder in America. Now what would any dispassionate American think even of this single difference between us? This act was made at a time too when checks for their security were more necessary than at any other time; for it was when troops were pouring in upon them. Observe, when Englishmen are murdered, as small delay as possible shall be suffered between the fact and the punishment; in America, every delay and every possible difficulty! What was this likely to produce but mutual slaughter on both sides? The soldiery were encouraged to murder by a prospect of impunity; and the Americans, by that impunity of their murderers, were taught to defend and revenge themselves. I beg you to recollect what happened in London only three or four years ago. A foreigner stabbed a coachman in Palace-yard, Westminster. The poor man in the agonies of death called out for a knife, that he might do himself justice (the fact is notorious; I believe it came out upon the trial) that he might do himself justice; as, he said, he knew that his murderer would be pardoned! Gentlemen, he was mistaken; his murderer was hanged: but it was a very natural thought for him, after the pardons for murder which had then been recently granted. For take away from men a reliance in the protection of the law, and they will wisely, and

justly, and properly, do justice for themselves. The justice of this principle is acknowledged every where; in all countries. There is a signal instance of it. Even a French despot found it; and when the king of France pardoned one of his own blood for a murder which he had committed, he publicly bade him observe, that he would likewise pardon any one that should murder him. Now, gentlemen, picture to yourselves the Americans of Lexington and Concord sleeping quietly in their beds, their wives and their infants by their sides, roused at the dead of night, with an alarm that a numerous body of the king's troops (their numbers, perhaps, augmented by fear and report) were marching towards them by surprise in an hostile manner—these troops who were not to be brought to justice by them for any murders which they might commit! What shall they do? Shall they attempt to fly, and leave the helpless part of their family behind them? Shall they stay, and submit themselves and their families to the licentiousness of these ruffians? I suppose there might be amongst them (as amongst us) some of both these sorts: but however, for the honour of human nature, there were also some of another temper. They hastily armed themselves as well as they could; they collected together as they might, and they staid waiting the event, determined not to attack, but to defend themselves from lawless insult, or to sell their lives as dearly as they could. There is nothing surely in this that will justify the slaughter of them which ensued. And you will please to observe the time when this happened; for it is a very striking fact. As soon as the act of parliament exempting them from trial for murder in America—as soon as that act got to America, and the weather would permit them, the troops did instantly and without delay commit those murders with which I now charge them. That act of parliament was proposed by the confidential friend of my judge; it was proposed by lord George Germaine; and though the Attorney and Solicitor General, according to custom, were instructed to bring in the Bill, he proposed it in the committee. He mentioned the word soldiers—troops:—but the Attorney and Solicitor General, or the other gentlemen who are in office (for I believe their names are mentioned for form, I do not mean to accuse them) those who drew up the Bill, knew what was the secret intention of the proposer, (not the intention of the government), and therefore no soldier is to be found in the Bill; but it is left at large—those assisting in the execution of the orders of the officers of justice; and the general of the army was at that time the civil governor of the town. Lord George Germaine, whom I have subpœnaed to appear, and who I understand does not mean to attend, was not then, it is true, in office; but he was very shortly after made secretary of state for the American department. You see then that secretary Germaine was more subtle and cautious than secretary Stair. Now, if we would prosecute those murderers, how is it to be done? How shall we find the surviving witnesses? Having found them, how shall we get them to England? How shall we find the individual murderers? and if found, how shall we bring them hither?

Gentlemen, do you not plainly see? The act passes that they shall not be tried for murder in America.—The murders immediately follow.—They cannot be tried by the Americans;—and (if the doctrine now attempted by this prosecution is established by you) our miserable fellow-subjects in America shall not have even the poor consolation of being even pitied here. The murderers shall not be tried there: they shall not be charged here. But, gentlemen, I shall be told (as I have been) that the Americans were rebels. I answer, that it has not been proved. Times of discontent and suspicion are not times of rebellion: suspicion may be groundless, as well as discontent.

But, gentlemen, you will be told that it was no murder, because there was a necessity for it.—Lord Stair said the same for Glenco.*—Well, gentlemen, if upon the trial of the murderers it should so appear, that would save them from a verdict of murder. But till that necessity appears, and is proved, every man is justified in calling it a murder. Necessity shall save the accused from a sentence of death; but it shall not turn the accusation into a libel, because it had a reasonable foundation. Men were killed without the sanction of the law. However, I have never yet heard any necessity, any real necessity shewn for this slaughter; and I take it that my evidence will be sufficient to make it appear that it was a voluntary act, not unexpected or waited for, but sought for by the troops. Indeed, the Attorney-General has excluded any such notion; for he has called it a victory! —Necessary self-defence (and no further than that reaches is any man justified in putting men to death) necessary self-defence has, I believe, never yet been called a victory. The utmost which that could ever be called, would be a lucky or a happy escape. But necessity did never yet excuse him who attacks; it will only excuse in self-defence. The law tells you, you must go back to the wall. If you go and attack, and so invite what follows, necessity will not afterwards acquit you. But, gentlemen, let it be necessity. If it is necessity, I am sure, I am still justified in calling it murder by the greatest and (upon this occasion) the best authority for me in this country. For if, when at a critical moment, to save this nation from an universal famine, it was necessary for the ministers of state to act contrary to law—if all men with one consenting voice approved this salutary measure to save the lives of men, and both houses of parliament returned his majesty their thanks for concurring with it—I say, if, not withstanding this, it was necessary, in order to heal the wound which the constitu-

* See vol. 13, pp. 883, *et seq.*

tion was supposed to have received (by the subjects lives being thus saved contrary to law) if it was necessary to have an act of parliament to indemnify those innocently guilty ministers of state, those meritorious offenders; what, shall it not be equally necessary to have an act of parliament to indemnify those who have put our fellow-subjects to death contrary to law? I know indeed there was a very severe judge once, who did go so far in the insolence of his delegated authority, as to affirm that,

——————— "'Twere all as good,
To pardon him that hath from nature stol'n
A man already made, as to remit
Their saucy lewdness that do coin heaven's image
In stamps that are forbid.—'Tis all as just
Falsely to take away a life true made,
As to put mettle to restrained means
To make a false one."

But the doctrine now held out to us goes as much farther; as revenge and tyranny are more odious, more pernicious, and more detestable than lust. Lust, for its purpose, argued only that it was an equal crime to give life contrary to law, as to take away life contrary to law. But revenge and despotism only make it a crime to preserve lives (which is a better kind of giving life than generation) contrary to law;—and deny it to be any crime to take away lives contrary to law, unless it be also at the same time contrary to the inclination of the tyrant.—Admit then, gentlemen, if you please, admit the motive for killing those our fellow-subjects at Lexington and Concord to be as necessary as you please: go farther, admit it to be useful, admit it to be highly meritorious:—yet I hope the warmest admirer of such kind of executions, the most thirsty after American blood and confiscation, I hope he will not insult our understandings by contending that it could be more meritorious, that it could be more useful, that it could be more necessary to kill men in support of the measures of some particular ministers, than to save this whole country from famine. Our law, gentlemen, has not called such an action as that illegal embargo on corn by any specific name, as it has called the illegal putting of men to death by the name of murder. Suppose then (what indeed was freely done) that any one, for want of a specific name, had called that necessary embargo on corn, an illegal action: as when we say murder, we mean illegal slaying. Now then, I ask (and I hope the Attorney General will tell us,) would it have been a seditious libel against the king and the government to have called that measure illegal (for want of a specific name) which the real government itself, the legislature, by the indemnifying act declared to be illegal? Whether the Attorney General may pretend this or not, I cannot tell: but I am sure my judge must direct you otherwise.—He cannot for shame pretend, because he forced an act of indemnity upon these men, who themselves thought the act a sufficient justification of itself; he forced them to be pardoned, to be indemnified by an act of parliament; and therefore I am sure that he cannot pretend that utility and necessity shall justify the deaths of men, when he would not permit utility and necessity to be sufficient, without an act of indemnity, to justify those who had illegally saved this whole country from famine.

But, gentlemen, I am ashamed to have said so much upon a point so clear. It is not because I am tired; or because I am failing in many more arguments equally strong. But I disdain to take up more of your time, or to say a word more upon this subject. I will leave it just where it is. I leave it to the reply of the Attorney General, and the direction of the judge.

Mr. Horne having concluded, the Attorney General began to address the jury by way of reply; upon which Mr. Horne rose, and spoke to lord Mansfield as follows:

Mr. *Horne.* My lord, I don't mean to interrupt the Attorney General: but, my lord, my haste, and the shame I feel for having made any defence to such a kind of charge, made me forget to examine my witnesses. The Attorney General has not proceeded far in his reply, and I hope I shall be at liberty to call them now.

Att. Gen. You will not examine witnesses to justify a libel?—My lord, I object to his calling witnesses, except he had opened to what points he meant to call them.

Lord *Mansfield.* You had better not object, Mr. Attorney General; you had better hear his witnesses.

Mr. *Horne.* My lord, if Mr. Attorney General make an objection, I will endeavour to obviate his objection.

Lord *Mansfield.* Call your witnesses.

Mr. *Horne.* I call the Attorney General.

Lord *Mansfield.* Oh! you can't examine the Attorney General.

Mr. *Horne.* Does your lordship deliver that as the law?—My lord, I call the Attorney General, and desire that the book may be given to him.

Lord *Mansfield.* You must state then what questions you mean to ask him; for he has a right to demur to the questions, and take the opinion of the Court.

Mr. *Horne.* If I do that, it will be more than he was directed by your lordship to do with any of the witnesses he examined.

Lord *Mansfield.* They were called of common course; the Attorney General may demur to it.

Mr. *Horne.* If I ask him an improper question, he may then object to it, if he can.

Lord *Mansfield.* If you call the Attorney General in any cause, if you don't state the question, he may demur.

Mr. *Horne.* Can he before he is sworn?

Lord *Mansfield.* He may demur to being examined at all.

Mr. *Horne.* Yes, and I dare say he will.

Lord *Mansfield.* You might as well call a

common attorney or an advocate employed against you in a cause.

Mr. *Horne.* But this, my lord, differs widely. In what I shall call Mr. Attorney General to, he acts neither as attorney nor as advocate.

Lord *Mansfield.* State the question.

Mr. *Horne.* My lord, I have many questions to ask him. He has paraded upon his honour, his conscience, and his duty. He is not acting as an attorney or an advocate in the cause. When he files an information, he is then acting as a judge or a jury; and if he has not acted in it with that integrity with which he would have done upon oath, so much the worse for him. One chief reason why I desire to examine him is, to obtain this: that I may point out a means by which an accusation in future shall not be brought against a man without an oath, at least from somebody. My lord, one question I mean to ask him is concerning that accusation which he has now brought: how it came to be brought? how it came to be dropped? and some other circumstances attending it. He has talked so much of the fairness, and the conscience, and the integrity of his motives in doing it, that I am sure it will look very comical if he refuses to swear to those declarations. If he will not swear to these motives, without his oath I cannot believe it: and if, contrary to my expectations, he does swear to it, after his oath I shall be left to exercise my own judgment.

Att. Gen. To any matter so impertinent as that! If that gentlemen had had any question of fact to have asked me relative to his defence, I would not have objected to have sworn to it; although I stand in the place of prosecutor in this cause, where in point of form I might: but I put myself upon this, that I will not be examined to questions so impertinent as those that have been now proposed.

Mr. *Horne.* My lord, the gentlemen of the jury will please to observe then, that here is an accusation without an accuser. Your lordship smiles! Upon my word, my lord, I do not think it a thing to be laughed at. If I had the honour to be talking with your lordship over a table, I should speak of it with the same seriousness, and not as a quibble. I hope the gentleman will upon oath justify that information, for the integrity of which he has been haranguing.——He will not!—Well, then, I must do without the evidence of the Attorney General.

Lord *Mansfield.* I cannot force him to be examined.

Mr. *Horne.* No, my lord, nor do I believe any body else could.——Please to call lord George Germaine.

[Lord George Germaine was called by the Crier, but did not appear.]

Mr. *Horne.* He is gone to Germany too,* I suppose, with general Gage.

* See his trial before a Court Martial, A. D. 1760.

Mr. Alderman *Oliver* sworn.

Examined by Mr. *Horne.*

Mr. *Horne.* My lord, I call this witness to prove the truth of the assertions contained in the advertisement.

Sir, I must desire you first to speak to the particulars of a meeting called, during an adjournment of the Constitutional Society, in the year 1775. Was there a meeting called by you in June 1775?—I believe there was; upon your application.

Are you sure of it?—I am.

Did you know the purpose for which it was called before it met?—Yes; I did.

Did you approve of that purpose?—I did.

Was a proposal made to subscribe any money, and for the purposes mentioned?—Yes, it was; and by you.

A sum of money was subscribed?—There was.

Did you contribute part of it?—I did.

Was such a direction, as in the advertisement, given to me?—There was.

There is another advertisement of 50*l.* I believe I need not read it; it is well understood. Did I receive that 50*l.* from you in the name of an unknown contributor?—Through me.

Was that 50*l.* given for the purposes mentioned?—It was.

By whom?—Sir Stephen Theodore Janssen. I was also a subscriber to the same purpose.

I mentioned in the course of my defence what may otherwise perhaps be represented as not true. Did I send by you, upon a relation from you of a motion made for an act of parliament to take away the right of appeal from the subjects in cases of murder, did I, or not, send that message which you heard me represent in my defence?—You sent a message by me; and I dare say, from your accuracy of memory and your truth, you did deliver a message for the Attorney-General. Whether I thought that it would be of the same effect,—I did mention to Mr. Rose Fuller the determination of Mr. Horne to go all lengths in opposition to that act which was to destroy the right of appeal in cases of murder; and I do believe in my conscience his application prevented any further steps being taken upon it.

The fact, as I represented it, the witness says is true.—Certainly so.

William Lacey sworn.

Examined by Mr. *Horne.*

[A receipt for 100*l.* shewn to the witness.]

Is that your hand-writing?—It is.

Do you recollect that 100*l.* for which that is your receipt, being paid in at your house?—I do.

In the name of Dr. Franklin?—On his account.

Do you know by whom that was paid?—I have it in my book in the name of Mr. Horne.

Do you recollect me to have paid it myself?—I do not: but it was paid.

Do you know of any other sum paid?—No: I have got a copy as it stands in my book here.

Is there any thing besides the 100*l.* put in?—No.

No 50*l.*?—No.

Where is Mr. Chetham?—He is in Ireland.

He is a clerk in your house?—He was.

And used to receive money occasionally?—Yes.

Do you know his hand-writing?—I believe I should.

Look at that receipt.

[A receipt for 50*l.* was shewn to the witness.]

Lacy. I believe that to be his writing.

Mr. *Horne.* Call Mr. Gould.

Mr. *Edward Thoroton Gould* sworn.

Examined by Mr. *Horne.*

Did you in the year 1775 serve in a regiment of foot belonging to his majesty?—I did.

Were you present at Lexington and Concord on the 19th of April 1775?—I was.

How came you to be there?—As a subaltern officer, ordered there.

Ordered by whom?—General Gage.

At what time did you receive those orders?—I don't recollect immediately the time.

Was it on the 19th, 18th, or 17th of April?—I believe it was on the 18th in the evening.

Did you receive them personally from general Gage?—No such thing.

Whom then?—From the adjutant of the regiment.

When did you set out from Boston for Lexington?—I cannot exactly say the time in the morning, but it was very early, two or three o'clock.

That is in the night in April, was it dark?—It was.

Did you march with drums beating?—No, we did not.

Did you march as silently as you could?—There were not any particular orders given for silence.

Was it observed?—Nor it was not observed, not particularly by me.

Were you taken prisoner at Lexington or Concord, or either of them?—At the place called Monottama, in my return from Lexington.

I shall ask you no questions that you dislike; give me a hint if there is any one you wish to decline—Did you make any affidavit?—Yes, I did.

Will you please to read that? [Giving the witness the Public Advertiser, May 31, 1775.] I believe that to be the exact substance of the affidavit that I made.

Lord *Mansfield.* It cannot be read without the Attorney-General consents to it.

Attorney General. I don't consent.

Lord *Mansfield.* If he consents to it, I have no objection.

Mr. *Horne.* May I give it to the jury?

Lord *Mansfield.* No; I suppose they have all read it years ago.

Mr. *Horne.* My lord, that is my misfortune that it is so long ago.

[Mr. *Horne* begins to read it.]

Lord *Mansfield.* You must not read it.

Mr. *Horne.* I have proved the publication by the printer.

Lord *Mansfield.* It will have a different consequence, if you only mean to prove that there was such an affidavit published. If you mean to make that use of it, then you may produce the affidavit, or have it read.—If you mean to prove the contents of it, they must come from the witness, and then you will have a right to have it read.

Mr. *Horne.* I mean both to prove the contents true, and the publication of the affidavit: that indeed, I have already proved.

Lord *Mansfield.* Then you may read the affidavit, if you make use of the publication of it.

Mr. *Horne.* I make use of both; that it was so published, and charged, and that it is true.

'The Public Advertiser, Wednesday, May 31st, 1775.'

[The affidavit read.]

Are the contents of that affidavit true?—They are; it was made at the time I was wounded and taken prisoner.

Pray, do you know that the Americans upon that occasion scalped any of our troops?—I heard they did; but I did not see them.

You saw none?—I did not.

From whom did you hear it?—From a captain that advanced up the country.

Were you, at the time when the orders were given to you to go to Lexington and Concord, apprehensive of any attack by those Americans against whom you went?—We were as soon as we saw them; we found them armed.

Before you went from Boston?—That day we did.

How many miles is Lexington or Concord from Boston?—The farther is about 25 miles, the nearer is about 12.

Did you know, had you any intelligence that the Americans of Lexington and Concord were, at that time, marching, or intending to march to attack you at Boston?—We supposed that they were marching to attack us, from a continued firing of alarm guns, cannon, or they appeared to be such from the report.

Lord *Mansfield.* Did you say cannon?—Cannon.

Lord *Mansfield.* When was that?—As soon as we began the march, very early in the morning.

Mr. *Horne.* But did you hear those alarm guns before your orders for the march were given, or before your march began?—No.

But after you had begun your march?—

Yes; after we began our march the alarm guns began firing.

Did you suppose those alarm guns to be in consequence of your having begun the march?—I cannot say.

I will not desire you to suppose (though the gentleman has supposed that they were coming to attack him) but do you know of any intelligence whether the persons who fired the alarm guns, whether those were the persons who were killed at Lexington and Concord?—No; I do not.

Mr. *Horne.* How those orders came you cannot tell, therefore I do not mean to examine to it.

One of Jury. Pray who did the alarm guns belong to; to the Americans or our corps?—From the provincials.

Mr. *Horne.* What do you mean by an alarm gun? Alarm may be misunderstood.—*Gould.* That is, what they term in the country an alarm gun; it is a notice given to assemble the country.

After you had begun your march, you heard these alarm guns?—Yes.

Mr. *Horne.* My lord Percy, I thank your lordship for your attendance. I will not trouble your lordship with any questions. I shall not ask your lordship those questions I intended, since general Gage has not thought proper to attend: he is gone to Germany I understand, and will not be back, I suppose—these three or four days!

Lord *Mansfield.* Then you have done?

Mr. *Horne.* Yes.

REPLY.

Attorney General. May it please your lordship, and gentlemen of the jury;

The gentleman has chosen to take the conduct of his defence himself; and in the course of the conduct of it, he has proceeded in as singular a way as I believe ever any cause was conducted that was ever tried in any court of justice. He certainly has done more than the wisdom, than the propriety, than the decency of any counsel would have permitted him to do on a similar occasion; and if I conjecture his aim aright, from the manner in which he has attempted the defence, he has more cast about to be stopped in a great variety of parts, for the sake of making it a topic of complaint, than seriously stated them, as hoping they could be deemed by any by-stander (and more particularly by you that are to judge of them) at all pertinent to his defence. I did not recollect on the outset that I had so totally passed over the terms of this charge, much less that I had so profusely enlarged upon subjects foreign and impertinent to that charge, as to lay me open to any reflections upon that account. It is not to my purpose, and therefore I will trouble you with no reflections upon those various stories (histories of various adventures in many parts of the world) with which he has thought proper to interlard the speech he has made to you upon this subject; which before I sit down, I hope I shall be perfectly justified in having stated to you as one of the plainest, and clearest, and shortest propositions that ever was laid before a jury. Gentlemen, it is certainly true, the charge in the information consists in this, that he did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel. I was afraid, when my speech was loaded with the imputation of having thrown out invectives in the terms of the information, that the information had not been sufficiently explicit upon the true nature and quality of the libel which it offered to bring before you. I admit that the information is explicit, that it is direct, and that it perfectly and justly qualifies the nature of the charge that is brought before you of scandalous and seditious. It is likewise inferred that this is concerning his majesty's government, and the employment of his troops; the information has therefore undertaken to say, that the scurrilous matter which follows was delivered in writing, concerning the king's government, and concerning the employment of the troops. If it was delivered concerning either, it is sufficient: that it was delivered concerning both, I take now (by this time at least) to be perfectly clear.

Then the matter of the libel is this: that at the Constitutional Society it was proposed a subscription should be immediately entered into for raising the sum of a hundred pounds, to be applied in the manner in which it proceeds to specify afterwards. And the gentleman has been at the trouble to prove, that that was not merely a conceit and device of his, in order to introduce the charge that follows; but that the charge which follows was (in point of fact) introduced upon the previous act; which, according to my poor conception of the thing, does not deserve softer epithets than that which followed. It is no alleviation at least of the libel that he has published upon the government, that it took such a commencement as it did, and proceeded in such conduct as has been imputed. I thought it a candour, an article of fairness to names mentioned or even alluded to in the most distant way, to suppose that it had not been exactly in the way he thought fit to state it. But whether it were or were not, in what view has he even said to you, that that circumstance, true or false, goes an inch towards qualifying the virulence and indecency of the libel that immediately follows it? The next words that he puts in are—"to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the king's troops at or near Lexington and Concord, in the province of the Massachusets." Let us a little see, what is the nature of the observations he makes upon it. In the first place, that I left it exceedingly short. And the objection to my having left it short was simply this: that I had stated no more to you but this, that of imputing to the conduct of the king's

troops the crime of murder. Now I stated it, as imputing it to the troops ordered, as they were, upon the public service. And imputing to that service the crime and the qualification of murder, was an expression scandalous and seditious in itself; reflecting highly upon those troops; reflecting highly upon the conduct of them; and reflecting upon them to all the purposes and conclusions which this information states But, it seems, I did not argue it sufficiently! I confess very fairly, that to argue such propositions as those (according to that gentleman's notion of arguing them sufficiently) is far beyond all the compass of all the talents and abilities that I have in the world. I cannot speak four hours in order to demonstrate to you, that taxing people with the crime of murder, and taxing the conduct of people with that imputation, is a scandal upon the parties so reflected on. If there be a man of more diffusive talents, of better talents at speaking, who can expend four or five hours by enlarging upon that proposition in that manner, I do not envy him his talents; for my lungs would not be sufficient, if my talents were. I trusted that I had sufficiently demonstrated that position.

Now, on the other side, what is the kind of answer that is made to this? In the first place, he is to prove that it was murder! Asserting that it was murder over and over again in the speech, is the palliation, and is the defence of this! But he is to prove that it was murder! I confess very fairly, that this is the first hour in which it ever entered into my imagination, that that species of proof could be allowed to a defendant! I am not at all sorry that it has been allowed; for the consequence has been to refute more than half the speech, and more than half the application of it; therefore I am not sorry that it has been allowed. But I will never, so long as I live, accede to this as a proposition of law, that a man shall be at liberty in a libel to charge you with the crime of murder, and when he is indicted for that libel (or otherwise brought into judgment for it by information,) that it should be competent for him to put you to try, whether you have been guilty of murder or no. I did say, what common sense dictates, what the law of every civilised state under heaven prescribes (and there is not a maxim of law to be fetched from any country or age that contradicts that,) that the man that calumniates, and does not accuse, deserves to be punished with exemplary severity. He told you a long story of murders supposed to have been committed in St. George's Fields, where he took to himself the merit of having prosecuted that murder. As far as that part of the story goes, I don't quarrel with him. If he, seeing a transaction which he took to be murder, thought himself bound to prosecute that transaction, honestly, candidly, and with humanity and fairness to the prisoner, as well as to the friends of the deceased; if he did that, I do not quarrel with him: but whoever, in the shape of prosecuting that murder, published in the newspaper (either by advertisement or otherwise) matter that was likely to cause an impression upon the minds of the people at large, or upon the minds of the jury, before they heard that prosecution tried, did a most abandoned and a most wicked thing. Is that the way that people are to be tried for their lives? Are they to be brought before a jury in a regular course of trial, to be heard for themselves upon the evidence then laid before them? and is the integrity of a libeller to interpose, by writing down their reputation; and by endeavouring to instil into people, where they cannot be heard, where they have no opportunity to contradict, and where witnesses cannot be examined either on one side or the other, an impression that they are guilty, without the form, without the essence of trial? If therefore there was such an advertisement as that published, that advertisement I hold to be a most wicked one. Prosecuting men that are thought to be guilty, is a fair and an honest action. In this case, what is the excuse here? That they cannot be prosecuted. Supposing the accident of the distance from that side of the water and other accidents should so far intervene as to prevent the possibility of trying those men, even if they had been guilty of murder, would it follow as a conclusion upon that, that they shall be libelled? and that it shall be in the power of any man alive to raise impressions behind their backs, by publishing in the newspaper imputations to their disadvantage, which they cannot contradict or refute? calumniating them, accusing them of murder? The time would undoubtedly come in which they would be to be tried for it, if guilty: and to be tried for it under that sort of impression! I am amazed that any man of common sense could (even in his own case) imagine, that it would be tolerable doctrine in the ears of people that have lived for years in a civilized country, that that was the true way of prosecuting upon the subject of murder! He told you a story of Glenco, which, if I understand him right, went directly the reverse. They were to be tried. Unless he means to compare the authority of the Morning or London Evening Post to the councils of the whole nation! if he means to make that comparison (which he did not make, and which is too absurd for me to do for him;) making that, a degree of idle analogy would seem to arise; but without that, absolutely none.

Now with respect to the rest, he has offered by evidence also to establish, that this must necessarily be a murder; and the fate of these people, it seems, is to be tried by the effect of that evidence! And what does that evidence amount to? Why, that the king's troops, under the command of general Gage, were in an hostile country; and that it was impossible for them to go upon any service (ordered by that general and conducted by his officers) without an attack: that the moment they went out of Boston alarm guns were discharged, in order to raise the power that possessed the country on

the other side upon them, and to make the attack upon them. And this is the medium by which it is to be proved, that the soldiers who were ordered by their commander to advance from their post at Boston into that country, were guilty of murder; because they were surrounded upon the 18th and 19th of April, in consequence of those alarm guns, with an armed force on the other side, in order to withstand and oppose their operations, they being at that time in an hostile country! Why, if I had meant, if I had thought it consistent with law or with reason, to enter into a discussion of that question with him, whether he is a libeller or not, for having charged them with murder by a printed paper, instead of charging them in a more direct way; if I had thought it necessary to establish the case against him in the strongest and most precise manner, it would have been by calling just such a witness as that, in order to prove that the troops were themselves attacked; and that, upon the moment of their going out of the place, they were surrounded with hostile attack. But necessity, it seems, necessity, according to the notion of law, is that which self-defence prescribes, that a man must go to the wall who is attacked. He must fly first; and if he can escape by flight, then he shall not justify himself by turning and repelling the attack! What sort of understandings does he imagine the audience to be composed of, when he represents an expedition and attack of this sort in that manner? That the king's troops, when they heard the alarm guns and were attacked, were to fly, to get to the wall, and drop their arms! this is the notion of military disposition in an hostile country! and this is the law that the learned gentleman has learned from the State Trials, the source of his reading! and which he has set forth with a dexterity, and a species of understanding, and a sort of eloquence, which is peculiar to him. And I must say now, it is more than I ever heard before. If I had the honour of a conversation with him nine years ago, I had forgot it. I did not take notice of the conversation perhaps enough to retain it. I had still less an idea that his abilities were so conspicuous. But this species of eloquence I take to be peculiar to himself; as it could not have been delivered by a counsel; it would have been absolutely impossible by a counsel used to practice; it would have been impossible to a counsel, used to feel the weight of his arguments, used to feel the ridicule of applying such kind of arguments as these, and deterred by that means from doing it. No counsel would have thought himself warranted to do this. He would not have had conceit enough to think his own understanding so superior to all that heard him, as to suppose he could pass such a proposition upon his auditory, that the conduct of an army, in an hostile country, was to be like the case of a man indicted for murder to fly to the wall, for fear they should do some mischief! This is the sort of defence he has thought fit to make upon this subject; and it gives me a ground for saying, that, if I was short in applying the charges of the information as I should have done, it is now completely applied.

All that part of the defence which went perfectly wide and foreign to all practical application to the case, I will now entirely drop. At the same time I cannot do it without making this observation; that, whatever be the degree of veracity claimed by and due to that gentleman, in the particular words that he thinks proper to impute to the various people whose words he has thought fit to quote; as far as my memory goes of the transactions which I do remember; as far as conjecture goes with regard to those I have not a perfect memory of; I believe, that this failing at least belongs to his representation of them: that taking, as he has done, particular passages, for the sake of remembering them to the disadvantage of the speaker, he has stripped them of their context. He has therefore made it impossible to recollect the whole, in order to see whether they would, or not, turn out such nonsense as he has imputed to those several speakers. It may be true, for aught I can tell; though if any body had asked me, whether I ever spoke upon that subject he mentions in the House of Commons, I should have said no, directly; for I believe I did not. I believe Mr. Oliver will not say, that he brought any such idle message as that to me. I should have treated it with ridicule. I have no objection to converse with Mr. Oliver upon any subject he thinks proper. He does me honour by it. But if he had brought me such a message from a person in Mr. Horne's situation, respecting my conduct in parliament, a little laughing at the message he must have excused. But he does not say he brought me such a message. I don't know that I bore any part in that debate. But he says, he took down some words; and that I said, it was a Gothic custom. If I got up to make a speech upon a proposition of law of that magnitude and extent, of such a variety of reading that that proposition was open to, and contented myself with sitting down, and saying, it was a Gothic custom; I should not have had any pretensions to the ear of that House. If I made any discourse about it; which I suppose I did, as he says I did; I suppose it is as idle, as foolish a kind of speech as it is possible for any man to make. I should not wonder if I was refused all audience there in all times to come, provided my speeches were just those which I have had the —(not misfortune, for I think it very natural) as I have heard to-day. Other people have shared exactly the same fate. Is it a fair thing, with respect to any judge, with respect to any court of justice? Is it a fair thing to state one fiftieth part of a cause depending before them with an observation which the other forty-nine parts would never have justified upon it? Is it the part of a good citizen, of a man that reverences the laws of his country, of a man that wishes any thing but anarchy to rise in a coun-

try? Is it the part of a good citizen to treat courts of justice in that manner, with respect to cases cited from their decision in the way in which those were cited? I mention them only in the way of observing that: for, to be sure, it was perfectly impertinent to any question depending before you; and unless it had been equally so with respect to the cases themselves, I should not have given you the trouble of a single word upon that. There was one thing which fell, which gave me some little astonishment to hear, and which I remember well. I don't take notes, but I have a pretty general remembrance of things delivered by me. I take myself to have stated to you in the outset the very same doctrine of intention. Why, who doubts but that the intention constitutes the criminality of every charge of every denomination and kind? But the extreme ridicule of the thing is, the talking of that doctrine upon an occasion like this! See what it is. The words are, that the American subjects for meritorious considerations upon their part, and for those considerations only, were inhumanly murdered at Lexington and Concord, in the province of Massachusets Bay. Nobody can doubt in the world, but that imputing inhuman murder to the conduct of those troops, is abuse! I suppose he did not mean it as flattery, to extol them, to deliver them down to posterity (if such paragraphs as these had any chance of reaching down to posterity) to deliver them down to posterity in terms of heroism! He meant to abuse them: the words themselves are abuse. Then, I say, where words of direct, unqualified, indubitable abuse are printed concerning any man alive; that the very circumstance of printing calumny concerning a man, carries along with it an intention to abuse him. Why it is nonsense to doubt it. One may spin words till one loses the meaning of a sentence, and the first words that are used in that sentence; but it is nonsense to deny when you use direct abuse; when you revile them in the very attempt to justify the charge; and again use terms of abuse; that those terms of abuse don't prove intention of abuse: *primâ facie*, at least, they will. If a man is called a rascal, has he any doubt whether the man that called him so means to abuse him or not? Why that is playing with words in a most ridiculous manner. And these are the kind of words that are now called in question; and a jury are told, that where a libeller calumniates another with the imputation of a capital crime, that calumny carries along with it a proof of his intention to calumniate. That is the dreadful proposition which is to prove an intention to overturn all the liberties of this country! I wish those who talk about their liberties, would be pleased a little to have a small regard for the liberties of others. The man that robs upon the highway, while he is unapprehended, is the freest of all human creatures: but the men whom he attacks, whom he plunders, whom he terrifies, these are not free as long as they are under his dominion and power. The man that dashes libels about him upon every one he is pleased to call his enemy, is the freest of all agents; but those that he inflicts deep injury upon, are they free? And is it talking with common sense to say it means the liberty of doing wrong? of attacking personal property, reputation, or what I please, without being controuled? Is that what you call freedom? It is a definition of freedom that I never expected to hear; and which can, I am sure, do no good to any cause upon the side of which it is advanced, before any one gentleman of common sense! That I call no freedom.

With regard to the rest, what can one argue it more? Why, yes, it seems one may; because if you will scan the construction of these words well, they will not amount to a libel. Not amount to a libel! it seemed to me a very hardy proposition when it was first of all stated, that calling a number of men murderers was not a libel. No, says he, It is not a libel. Observe, I called it under-writ, it is writ beyond common sense, instead of below it, which was the first apprehension I had of the thing. For, he says, *non constat* that there were any persons of that description! *non constat* that there were any widows, orphans, or parents!—*non constat* that there were any beloved American fellow-subjects—and I believe more about that last than any thing else; for I do not believe that our love to our American fellow-subjects was that ruling principle that governed this publication.—"Who, faithful to the character of Englishmen,"—(that may be true, for aught I know) "preferring death to slavery, were, for that reason only, inhumanly murdered by the king's troops." *Non constat* whether there were or were not any king's troops! It happens unluckily in the last part of the sentence, it is asserted that there were: for the sentence runs—"who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the king's troops:" so that if assertion was necessary, there is an assertion for you. But, however, how can any body trifle so much with his own understanding, or with the understandings of others, as to suppose that, if it had been without an assertion, suppose it had been a question,—why did the king's troops murder our American fellow-subjects?—why would not that convey a libel just as much? Are there any necessary forms of words that compose a libel? I think it fair to say, that that was given up. It was used more to shew the skill of the adversary than to the merits of the question.

But, it seems, that a soldier may commit murder: aye, to be sure, so may any other man alive. There is no question at all about that; but if any man is supposed to have commited murder, he ought to be tried. If any man is charged with having committed murder (otherwise than in a legal course) he is calumniated; he is libelled: and that is all that I have to contend before you. But it is a little doubted, whether this relates to the employment of the king's troops! I must admit that

that doubt was started a little before the explanation of one of the witnesses came: and I suppose, if that had been in the contemplation of the learned gentleman when he spoke, he would not have raised that as a matter of doubt; because, as it stands now, it seems a very plain proposition (both upon the evidence and the reason of the thing) that it was so applied, and meant to be so applied. Then he informs you, that I have used a number of words, and he gave you a list of them.—I wondered to find the words that I had used in a written speech, brought in so many volumes into the court to be used again here. But, it seems, this is a collection of all the words I ever used in my life; and he sits down in his chamber (the place he is most used to sit in) collecting all these words, and then comes here with a criticism upon them. Now I have not the least inclination to derogate from that learned gentleman's talents as a critic: and if the food of such poor language as mine will serve the gentleman to employ himself upon, he is quite at liberty to do it upon this or any other occasion, whenever he thinks proper to employ himself quite so innocently. The words, in substance, I will maintain. I really did not believe that the gentleman who had written that paragraph, would have undertaken to defend it just in the way in which he has done to-day. I thought that, instead of quibbling upon the force of it, that he would have advanced a great deal more boldly to it than he did; at least in the outset of the speech to-day: and, in the latter part of his speech, he so far justified what I foretold in my own mind upon the subject, that, I think, he has proved to a demonstration (if that were an essential part of the case) that his true reason for writing that, was to defy the laws of the country; for so I stated it. I stated it that there was no affectation of discussing any subject; that there was no pretence or colour even of reasoning upon any subject; under the mask of which many others have thought proper to cloak themselves, when they wish to write malignantly. But there was not even an affectation of that; but a blunt way of bolting out so much calumny, without qualifying it in any way in the world, or making it appear any thing more than that which I stated it to be; —an attempt to defy justice.—Either prosecute this, or never prosecute again as long as you live, is the true language of this advertisement.

What is the rest of his defence? It consists in abusing me; the judge; the jury; the Crown-office; the law as it now stands; the counsel that appeared for the printers who were convicted of the same crime before, because they did not do enough and act to his mind; and the solicitor of the Treasury! That is the nature of the defence made in this cause! I have chosen to separate it from the case, and yet I believe I shall be forgiven if I say a few words upon the rest of the subject. The learned gentleman thinks proper to state to you that this is a prosecution of two years old; because the offence was committed on the 9th of June 1775, and because you are now trying it in July 1777. Now if he could have made any thing of the observation, it would have been just as handsome to himself (it is nothing to me, for I despise all those things) it would have been as handsome to himself, if he had thought proper to state the facts precisely as they were. This information was filed in Michaelmas term 1776; and it was not my fault, but his fault, that it was not brought on to trial in the Hilary term following. But still there is between the 9th of June 1775 and Michaelmas 1776, some time, though not two years; a year and something more. Then he complains that I thought proper to file my information against the printers first, although I might have applied to those printers in order to have obtained evidence against him. In the first place, I have made it a rule to myself not to apply to any printers, in any other way than by charging them for their delinquency, and bringing them before a jury to be tried. That is the application that I make, and always will make to the printer of a libel. In the second place, if I had thought proper to apply, as he calls it, to the printer, I might have had a fictitious conversation put upon me, in order to prove that I had practised with them to get Mr. Horne delivered up. Now in the third place, it is a matter of perfect indifference to me whether I prosecute the printer or the author. And I will tell you why. My notion with regard to authors are, that most of them are generated by printers; at least more authors are produced by printers than printers by authors; and if the press was never to go till the good sense of some author set it to work, it would prevent a great deal of the groaning of the press upon publications and subjects much too frivolous to be regretted if they were lost; and I believe authors have grown more from the press, than the press has grown from authorship. If I stop the publication of libels, I think I do an essential good to the country. I know if they are printed and published ostensibly, where to apply to stop them: but I never did, nor ever will stop them by applying to the printers. He has explained, by examining the printers themselves, that no such application was made to them. I cannot state exactly upon memory the time when I commenced this prosecution. I suppose it must have been about the time when the others were tried. If so, the consequence is, that the Michaelmas term following, in consequence of that application, was the very first time that I could file an information at all. I was told when the printers were tried here, Why do not you resort to Mr. Horne?—You are afraid of Mr. Horne. To be sure, there was some reason. If I had known that I should have been obliged to hear so much eloquence! especially to have the trouble of replying to it; it would have been a prospect I should not have liked. But I believe, I should

have waded through all that prospect, if I had been ever so much apprized of it before. And when Mr. Horne was disclosed to be the author, I certainly should have prosecuted him. But before he made that disclosure, what I said is true; that he defied the laws of his country under the screen of the printers. And he has proved himself that he was not to be disclosed without a prosecution. He gave no authority to the printers to go to the solicitor of the Treasury, and make a disclosure of him: or, if he did, they made no such disclosure. And yet this manner of delaying the cause is one of the grounds upon which he has thought proper to treat me just in the manner in which he did. Now I would beg you a little to recollect how that part of the conversation arose, when the learned gentleman spoke without book; when he spoke at first, and had not his words so well measured as the well-timed labour of his closet enables him to measure his words upon paper: he certainly took the freedom of charging me of using all means, right or wrong, foul or fair, in order to get a conviction.

Well, what is the next article of his harangue? I am reproached for having boasted of the integrity of my character, because I denied the truth of a false and impertinent charge; because it is neither true nor pertinent, that ever I had employed myself in the way in which I am so represented to have employed myself. And what is the boast upon that? It is a very high one; for I called upon him to name his instances. That was my boast! and innocence, when it is able to call upon its reviler to name his instances, does make a proud and magnificent boast. So far I boasted. Well, when called upon, what are the instances? The first is, that I prosecute before a special jury. That in a prosecution which I (the servant of the public) think proper (for reasons of public weight and importance) to produce, I wish to have men of the first character, of the first situation, men of the highest and most approved honour, my judges! that is the first article in which the opprobrium is to be justified of my using all means, foul or fair, in order to obtain a conviction! In this he has all the advantage that an accuser can possibly have: I confess the whole charge. It is my desire to have all my actions so tried; it is my desire, and I will, whenever I can, obtain a tribunal of that sort; which (from the great dexterity and wisdom of eloquence) is looked upon to be the best topic (before them) to condemn me for resorting to! This is another matter he would have been totally deprived of, if he had submitted, as those poor printers did, to be defended by counsel. They would never have thought of abusing the Attorney General (before a special jury) only because he thought proper to lay his cause before that jury! It is a singular way to take those topics which go beyond the ability or practice of any counsel whatever!

Then the next attack is upon the poor master of the Crown-office, sir James Burrow. I do not believe that there exists in this world a man of more inflexible integrity than sir James Burrow. I never heard him charged in my life with any thing like opprobrium. I know perfectly well that if I were to apply to sir James Burrow, in order to get any particular manner of striking a jury, either in London or Middlesex, that he would set himself, for the whole evening after, to contrive how he could best cross the purpose of that application. I know he would, I know him very well, I am sure he is a very honest man; and I am sure I should fare exceedingly ill, if I was to attempt to make any such application. None such is suggested. But it is said, that the solicitor of the Treasury desired sir James to take this part; to take two special jurymen out of every leaf; giving this reason for it, because the books might be made up; and that if it was once known to be the practice of sir James to begin in the middle, or the end, or any part, they might be made up by the address of the officer, so as to get a particular set of men for a jury. I will take it as said by the gentleman: the solicitor proposed that there might be taken two out of every leaf, which would produce the fairest collection of the jury in the broadest manner, and out of the greatest number and variety of names and people. So far I think nothing unfair in the solicitor's application: and I do not know, I protest to God, at this very moment, what earthly reason sir James Burrow could have to refuse that, except the one which I strongly suspect him of, namely, that one—that it was desired by the solicitor for the crown:—for if he apprehended that it would give the slightest ground for suspicion by taking any one article of conduct whatever, he is very nice, I know, and very obstinate; and I am sure, nothing would bind him more surely to refuse to take a jury in that, which appears to me to be the most impartial way; stronger and quicker than an application on the part of the solicitor of the Treasury. That is not all; but the sheriffs of London are abused: the jurors are named merchants, who are not so! Why, do I make up that book? Is that one of my crimes? The sheriffs of London make it up. When it is returned to the Crown-office, the names are taken out of it, in the most impartial manner; and the whole state of that, instead of loading me or any one concerned with the slightest calumny, is the fullest acquittal that could be had! It does not therefore relate to any one concerned in this prosecution. Then I am wrong in another thing; for under all bad administrations, there is nothing so rife as prosecutions for libels! I should be glad to know in the abstract (without referring to those documents, so many of which the learned gentleman produced himself) in the eight years I have had the honour of being Attorney-General, how many prosecutions for libels have been brought? I wish that was stated, in order to shew the monstrous number of prosecutions for libels! They are not so many as I could wish; for if you compare the pro-

secutions with the daily publications, that man that looks at those publications, and sees how rife and rank the scandal is upon all orders and denominations of men, upon all branches of the government and the state, as well as private men; whoever sees that must look at them with a very peculiar eye, if he does not see that the increase of the scandal is a great deal more than the increase of the prosecution for that scandal! and yet this is one of the topics also for which I have been abused! It is said also that I am corrupt in another respect, because I condescend to consider myself as the servant of the whole public, and so liable to receive orders from every branch of the legislature. The arguments that one hears used upon these occasions, they are made only for the moment. I should not be astonished if from the same quarter I had heard it was one of the most monarchical sentiments in the world, to insist that there is any public officer who was not under the orders of either House of Parliament. I always took it to be the assuming of those that call themselves Whigs (for want of a better nickname) what I hold—that in a free state the representatives of the people assembled in parliament are a sovereign member of that state; and that every public officer, great or small, is amenable to them. But how amenable to them? I wish that had been a little more stated. Amenable to them to do wrong? No man ought to be amenable to the greatest and the proudest body of men whatever to do wrong. I have not been so amenable: for in those instances in which I have thought it would be wrong to prosecute, I have stated it to the House, and the House has forborne the prosecution upon my representation. That has been the conduct which I have held upon the occasion; and a conduct which, if I am questioned for it (in any place where it would be pertinent), I should be very glad to render an account of that conduct. But, says the gentleman (with a strain peculiar to himself), will you submit to be sworn in order to be examined by me?—To what? Yes, Sir; to any one fact which can be alleged in your defence, I will submit to be sworn to the truth of it. But will you submit to be sworn in order to undergo impertinent questions about the motives and steps of your conduct from time to time, such as I shall think proper to put to you?

Gentlemen, I put myself upon your good sense! I put myself (for the question was not meant for you) I put myself upon the candour and the good sense of the audience, that I was impertinently treated in the proposal; and that I should have been ridiculous to have submitted to that proposal! I spoke to some persons about it (whose authority I am not permitted to cite to you) who concurred in opinion with me: but I am sure, and I put it to the mind of every gentleman, whether I did not act right in that matter. To have refused him justice would have been a hard and improper measure; I did not refuse that. To refuse to answer impertinent questions, I did refuse it; and I appeal to the candour and good sense of this audience that I did right to refuse it; and it would have been ridiculous to have done otherwise.

These are the topics which, as far as I can recollect, have been produced against me. With regard to the rest, the gentleman informs you, that the law as it stands is full of a great variety of hardships. I don't know that system of law under heaven which may not be perverted to purposes of hardship. I don't know any thing so perfectly ridiculous as to argue from the possibility of the corruption of a good thing to its worthlessness. In order to make any thing of that, he should have gone the length not only of stating what might have been done, but what was done; otherwise you may sit and hear that glorious constitution (which I have known so many able and eloquent writers and speakers extol in the highest terms to the skies) you may sit and hear it reviled from one end to the other: not for the mischief that it actually does; not for the inequality in point of justice that it actually administers; but which it might! But let him prove that there is any thing in my conduct of this prosecution that deserves those epithets with which he charged it, and I must submit to be covered with them. But that will not make an iota of difference in your verdict. What does it signify to you (who sit to consider whether this be a true or a false charge) that it comes at this time or at any other? The gentleman taxes me with folly in saying, that if it were a crime in 1775, it must be so in 1777! I should hold it to be the utmost folly to say otherwise. If there were any improper practices with regard to the prosecution, it might be a reason of objection to those who prosecute; but with regard to the mere question to be put to the jury—is he guilty in manner and form?—it is absolutely nothing; it would be folly to assert it.

I have now stated to you the progress of this business, referring to his own witnesses for the truth of that progress; and I trust, that upon that representation, I shall not be found to have misconducted myself even in the course of this prosecution. I have gone very much out of my way, and very contrary to the turn of my temper, when I have embarked so far in a defence of myself at all; but when facts are stated, I thought it necessary to restate and explain these facts. Beyond that, let general and loose reflections take what place they please. I put myself upon my public conduct for my justification, without boasting of that conduct either one way or the other. If I am wrong in that conduct, let it condemn me: if I am right in that conduct, let it approve me. It is upon that only that I desire to rest it; without boasting or without disclaiming, either on one side or the other. I will say no more upon that subject, but refer it to you to determine what ought to be done upon a charge thus stated, and thus industriously proved upon the part of the defendant, if

any proof had been wanting to support it upon the part of the prosecutor.

Lord *Mansfield*. Gentlemen of the jury, if ever there was a question, the true merits of which lay in a very narrow compass, it is the present. This is an information against the defendant for writing and composing, and printing and publishing, or causing to be printed and published, that is, for being the author and publisher of a paper, which the information charges as a seditious libel. If it be a seditious libel in its own nature, there is no justification attempted: why then there are but two points for you to satisfy yourselves in, in order to the forming of your verdict.

Did he compose and publish; that is, was he the author and publisher of it? Upon this occasion, that is entirely out of the case; for it is admitted. As to the excuse of ignorance, or being imposed upon (which is a topic in the case of printers and others) it is out of this case, because it is avowed to be done deliberately; and it is now avowed, and the contents of it. Why then there remains nothing more but that which reading the paper must enable you to form a judgment upon, superior to all the arguments in the world; and that is,

Is the sense of this paper that arraignment of the government, and the employment of the troops, upon the occasion of Lexington mentioned in that paper? Read! You will form the conclusion yourselves. What is it? Why it is this: that our beloved American fellow-subjects—(therefore innocent men)—in rebellion against the state. They are our fellow-subjects; but not so absolutely beloved without exception! Beloved to many purposes: beloved to be reclaimed: beloved to be forgiven: beloved to have good done to them: but not beloved so as to be abetted in their rebellion!—and therefore that certainly conveys an idea that they are innocent. But farther it says, that they were inhumanly murdered at Lexington by the king's troops, merely on account of their acting like Englishmen, and preferring liberty to slavery! The information charges the libel to relate to the king's government and the employment of his troops. Read it, and see whether it does relate to them. If it does, what is the employment they are ordered upon? what is the employment that they execute? To murder, the paper says, innocent subjects; because they act like Englishmen, and prefer liberty to slavery! Why then, what are they who gave the orders? what are they who execute them? Draw the conclusion. It don't stand upon argument. If any man dares to give orders to murder a subject, or to execute those orders, or to make any subject a slave, he is as high a criminal as can exist in this state. Evidence has been examined, and (though unusual) I was very desirous every thing offered should be heard; and you have had Mr. Gould examined: and whatever doubt there might be with regard to the occasion of hostilities at Lexington; whatever weight the observations might have before; yet now, upon his evidence, you see how it stands! The unhappy resistance to the legislative authority of this kingdom by many of our fellow-subjects in America, is too calamitous an event not to be impressed upon all your minds; all the steps leading to it are of the most universal notoriety. The legislature of this kingdom have avowed that the Americans rebelled, because they wanted to shake off the sovereignty of this kingdom; they profess only to bring them back to be subjects, and to quell rebellion: troops are employed, money is expended upon this ground; that the case is here, between a just government and rebellious subjects; for a just and a good purpose, for the benefit of the whole. If I don't mistake, the first hostilities that are committed—(though many steps on both sides leading to them existed before)—but, if I do not mistake, the first hostilities are those committed upon the 19th of April, 1775. If some soldiers, without authority, had got in a drunken fray, and murder had ensued, and that this paper could relate to that, it would be quite a different thing from the charge in the information; because it is charged as a seditious libel, tending to disquiet the minds of the people. Now what evidence has Mr. Gould given? Why, he says, that he was sent with a part of the king's troops, by the orders of general Gage, the governor of the province, the commander of the king's troops; that when they began their march (which was about two or three in the morning) he heard (I think he says he heard) a continual firing of alarm cannon, which is a signal, at certain distances, used in America to raise the country; and that they heard as soon as they began their march; and from thence they concluded that the provincials were marching to attack them. When they came within sight of them, they found them armed, in bodies of troops armed. This was not a stated time of peace when the king's troops, under the authority of the governor, go from one part to another; to have bodies of men, in military array, armed, and signals fired! but this they found. And he says, he cannot tell himself; but to a question asked him, he says, he heard the provincials charged our troops. He says in his affidavit, which he has likewise sworn to, and which you may compare, that he saw, on their arrival, he saw a body of provincial troops armed, to the number of about 60 or 70 men; "on our arrival they dispersed, and soon after firing began; but which party fired first I cannot exactly say." And then, towards the latter part of the affidavit, he says, "the provincial troops returned, to the number of about three or four hundred. We drew up on the Concord side of the bridge. The provincials came down upon us; upon which we engaged, and gave them the first fire." And says he, "this was the first engagement after the one at Lexington. A continued firing from both parties lasted the whole day. I myself was wounded at the attack of the bridge, and am now treated with

great humanity as a prisoner." Now from this account you see, that they had erected in effect their standards; each had their troops in battle array; they were ready to fight. Who (from this evidence) fired first, he cannot tell; that is, originally the first. He heard that the provincials charged; but whether the one or the other fired first, he cannot tell; when the two bodies were in the field, each expecting the other to attack. This is the account given by the defendant's witness: that it was the king's troops, by order of the commander and the government, that were engaged in this fray, in which those lives were lost! Then if there is nothing particular, but it is a consequence of the general dispute, of the cause of this most lamentable and unhappy war, no good man but must lament it, and wish them reclaimed. If it is barely the consequence of that which has led to further hostilities since, you will read this paper, and judge for yourselves. You will judge whether it conveys a harmless, innocent proposition for the good and welfare of this kingdom, the support of the legislative government, and the king's authority according to law; or whether it is not denying the government and legislative authority of England, and justifying the Americans; averring that they are totally innocent; that they only desire not to be slaves; not disputing to be subjects, but they desire only not to be slaves; and that the use that is made of the king's troops upon this occasion (for you will carry your mind back to the time when this paper was wrote) was to reduce them to slavery. And if it was intended to convey that meaning, there can be little doubt whether that is an arraignment of the government and of the troops employed by them or not. But that is a matter for your judgment. You will judge of the meaning of it; you will judge of the subject to which it is applied, and connect them together; and if it is a criminal arraignment of these troops, acting under the orders of the officers employed by the government of this country, to charge them with murdering innocent subjects, because they would not be slaves, you will find your verdict one way: but if you are of opinion that the contest is to reduce innocent subjects to slavery, and that they were all murdered (like the cases of undoubted murders, of Glenco, and twenty other massacres that might be named) why then you may form a different conclusion, with regard to the meaning and application of this paper.

Without giving you any reason, you will easily guess why I pass over a great deal that has been said, that ought not to have been said: but there is one thing that is relative to the subject, and therefore it ought to be said: that was, a doubt (upon one of the former trials upon the printers) that occurred to the jury, in which they had a difference of opinion; and they agreed to come in and leave it to my decision. I had told them (as I told you) that the of the points to guide your verdict was, whether you understood the meaning of the writing to be as charged by the information. One of them understood, or doubted, whether (this was in the case, you see, of a printer, of a third person) whether actual proof of a seditious intention (distinct from the inference from the act itself) was necessary to be proved. The other thought that a seditious intent was by law to be inferred from the seditious act; and they came in and proposed their doubts. And I told them what I tell you (and what I believe never was doubted, and what was not questioned upon that occasion, though I desired they would move the court upon it, if they had any doubt) that it is not necessary to prove an actual intent, which is the private operation of a man's mind; but a jury were to exercise their judgment from the nature of the act, as to the intent with which it is done.* As, if a man writes and publishes a seditious libel, a libel that has a seditious tendency, that is a ground to a jury from whence to infer—(when it is without any justification, without any excuse)—that is a ground from whence to infer a seditious intent. Just as if a man murders another without any justification of that act, it is a sufficient ground for the jury to infer that he did it maliciously. That answer was given to the jury.

Gentlemen, here I conclude every thing I shall trouble you with, by way of charge, because you will exercise your judgment, as I have said before, upon the paper and the information, by reading them, which you may have to carry out with you. But merely for the sake of the audience, as something has been so much mentioned in the cause (for I don't give you any reason for taking no notice of any thing out of it) I think proper to state it in so particular a manner, that when you come to see it misrepresented, you may all of you remember what it is, and what it was, and upon what ground it passed; and that is, with regard to the Attorney General's Reply. You see, as the case is, it is entirely out of this cause: for the defendant has called witnesses; and I thought it right that he should know it early, that he might not abstain from calling witnesses to avoid the reply, and in that manner be surprised. Now I will tell you what I take to be the practice with regard to that matter. The nature of a reply is the plaintiff's answer to new matter advanced by the defendant. The plaintiff knows his own case; he knows his own witnesses; he opens it; he observes upon his witnesses; and he draws such conclusions from them as he thinks proper, to persuade a jury to encrease the damages. The defendant, if he only makes observations upon the same evidence, and only draws conclusions from the same evidence to the jury, to lessen the damages; why there, there is nothing new, there is no new matter at all: and by the practice,

* This seems to be somewhat inconsistent with what lord Mansfield laid down to be the law when delivering the judgment of the Court in Woodfall's Case.

e expedition of business in civil causes, prosecutions in the name of the king, common informers, the practice is, that lon't reply where that is the case. But, hstanding that, if the defendant was to a point of law, the other must be heard. was to throw out to the jury, to catch surprise them, allegations of fact which lled no witnesses to prove—you recollect nany millions of facts you have had urged , for which no witnesses were called—many extrinsic to the cause)—there the el for the plaintiff may set the jury right, and em out of the cause, and shew that they solutely irrelevant and immaterial. But, emn trials, in state prosecutions, where ttorney General attends, I never knew it l but that he had a right to reply.* I was years solicitor-general: I was attorney al: I have known it often, where nothing een said for the defendant that they ht called for a reply. I never knew it l to the attorney general, where he in- upon being heard in reply: and I be- the present Attorney General has replied al times. This is so much the law of the that (if my memory does not fail me) in nost solemn cases (and as I speak from ory only, if there should be any slip in it, e I shall be excused) and, to the best of emory in the trial of my lord Byron (if entleman can correct me, I shall be very o be corrected—I dare say there are some hat were of counsel in that cause) in the of lord Byron,† who called no witnesses, idence, the Attorney General replied. House of Commons, as the public prose- for the nation, insist upon it as an abso- ight, that they are to reply. It is a great ago; but, if my memory does not fail think I replied for the House of Com- upon the trial of lord Lovat,‡ though lled no evidence. I speak from memory, nany years back; and therefore if I am ken, I do it with that reserve and qualifi- to be set right.—This has nothing at all with the cause; but it at least explains, se who want to understand it, the light ich I see that matter, and the ground which I determined it.

So in Dr. Hensey's Case; although the ner had given no evidence at all, yet Yorke or general, on the part of the crown, was in reply to the matters which had been ed in defence of the prisoner. See vol. 1342.

in lord Wintoun's case; though the pri- called no witnesses, the managers for the nons replied. See vol. 15, pp. 864, *et*

See the report of it in this Collection, 9, p. 1178; by which it appears that lord n called no witnesses nor evidence, but over that the Attorney General did not

ee it in this Collection, vol. 18, p. 530.

[The Jury withdrew about five o'clock, and returned into court about half an hour after six; and gave in their verdict, that the defendant was Guilty.]

Further Proceedings on the Trial of John Horne, Esq. upon an Information filed Ex Officio by his Majesty's Attorney General, for a Libel, in the Court of King's-Bench, on Wednesday the 19th and Monday the 24th of November, 1777. [Published by the Defendant, from Mr. Gurney's Short-hand Notes.]

Wednesday, November 19, 1777.

The Attorney General moved for judgment against Mr. Horne.

Lord *Mansfield.* Is the defendant here?

Mr. *Daniel*, the defendant's attorney, answered, that he was.

The Information was read by order of the Court.

Mr. *Horne.* My lords, with great submission and respect to your lordships, and in full confidence and security of protection by the laws of my country, I presume to offer to your lordships that I am not, upon this information, a proper object for the judgment of this court. And, my lords, I cannot mention what I have to say in arrest of the judgment which Mr. Attorney-General has prayed against me, without first acknowledging the obligations which I have, and the thanks which I owe, to my prosecutor, and to my judge: for, my lords, it is to them, and to the arguments which they used in order to obtain a verdict from the jury, it is to them that I am indebted for that argument which must prevent the judgment. At the same time, my lords, it is but justice in me to declare, that whatever ill-founded doubts might, at the beginning of the trial, have harboured in my mind concerning any personal enmity, hostility, or prejudice towards me, before the close of the trial they were all entirely effaced: for enmity, my lords, is not a supine and careless, but an active and curious principle, prompting men to neglect nothing which may tend to produce the desired mischief. And your lordships, I am persuaded, will see reason to believe with me, that, so far from any uncommon diligence having been used against me, neither my prosecutor, nor my judge, nor my jury had ever so much as once cast an eye over the information brought against me; for your lordships will instantly perceive, by looking at the record, that I am not therein charged with any crime.

My lords, when first I saw the charge in the information, I thought of it the same which I now offer to your lordships; and therefore, fearing nothing but the inattention of the jury, the greater part of my defence consisted of motives pressed upon the jury for their attention: and when I hoped I had secured that point (the only favour, as I then declared to them, which I had to request) I then proceeded to shew that there was not any crime in that which was alleged against me; keeping my eyes always fixed upon that with which alone I had to do, namely, the charge in the information; and I desired the jury to take the information out of court with them.

But, my lords, when I heard the reply of Mr. Attorney-General, and the address of the judge to the jury, I was no longer at a loss to understand how it happened that I could not see in the charge against me that criminal matter which they imagined it to contain: for, my lords, I then heard, for the first time, that there was an insurrection or rebellion in the colony of Massachuset's-Bay; that certain persons—and those persons denominated king's troops—were employed by his majesty and by the government for the purpose of quelling that insurrection or rebellion; that in this their employment and service an engagement ensued between the said rebels or insurgents and the said king's troops so employed; that in this engagement certain of the said insurgents or rebels were slain by the said king's troops; and that my advertisement and the charge of murder, said to be contained in it, related to the said insurgents or rebels so slain by the said king's troops so employed.

And, my lords, the judge did very fairly, and very plainly and precisely, and in express words shew to the jury, that on these circumstances did depend the whole criminality of the charge against me.

Now, my lords, though the jury did, through want of attention, forget to consider that these circumstances were neither proved nor charged; your lordships, I am sure, who are to look to nothing but to the record itself; your lordships, I am sure, will not fail to consider, that no indictment or information can be cured or made good by any implication, argument, supposed notoriety, or intendment whatever. Nothing can be assumed or intended against me, but what is expressed in the record itself. If therefore in the whole range of possible occurrences there can any one be imagined in which it would not be criminal to say that the king's troops (no technical term, my lords, *troupeaux*,—flocks—companies—even deserters may be comprehended under that term)—if therefore any one possible occurrence can be imagined (and I suppose there are a great many, the judge who tried me helped me to some, above twenty)—if any one can be imagined, in which it would not be criminal to say that the king's troops have committed murder, then your lordships cannot, upon this information, proceed to judgment; because the information wants those necessary averments, which cannot by any means be intended. For your lordships will find, by looking at the record, that in each of the various counts which this information contains, it is simply averred, that I did write and print and publish, and cause and procure to be written and printed and published, to the tenor and effect following.

Your lordships will therefore be pleased to examine the record; and I have not the smallest doubt that your lordships will do me that justice which my jury, through want of attention, did not.

Attorney General. My lord, if I understand the effect of this motion, it is, that the matter of the information, as charged, does not state a crime. That indeed is the necessary form of the objection to be made in this stage of the business; for, in this stage of the business, every thing is to be taken to be solemnly true which that information has stated as essential to the constitution of the crime, and which the jury consequently have found. Now, my lord, it is said, that nothing is to be assumed but what appears upon the record; and that the information wants some averments. I was very attentive to collect, if I possibly could, what species of averment it was that the information was supposed to want. But I missed it, if it has been stated on the part of the defendant. What kind of averment inserted in this information would have supplied it, and have made it a perfect description of the crime? I shall take up the information itself to shew, in the course of the argument, that there is enough stated in it to make the crime. The information does not end, as is supposed on the part of the defendant, merely in these words,—that he had "written and published, and caused and procured to be written and published, according to the tenor and effect following." The information states expressly that he had—"written and published a certain false, wicked, malicious, scandalous, and seditious libel of and concerning his majesty's government and the employment of his troops, according to the tenor and effect following." So that the matter found by the jury, and upon which your lordship is either to pronounce judgment, or to say that, stated so upon the record, it amounts to no crime in estimation of law, is, that he did write that false, wicked, malicious, scandalous, and seditious libel of and concerning the king's government and the employment of his troops.

I own I expected that he would have gone farther, and that he would have endeavoured to prove that such words as are included under the tenor and effect following, delivered in writing to be printed and published concerning the king's government and concerning the employment of his troops, were, in themselves, so manifestly innocent, that it was necessary for a court of justice, upon this record, to say that, notwithstanding the jury has found a libel published according to the tenor and effect following, yet there is, in truth, no libel.

Your lordships will observe what it is that he had said concerning the king's government, and concerning the employment of his troops; that "our beloved American fellow-subjects, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the king's troops, at or near Lexington and Concord in the province of Massachuset's-Bay, in New England, on the 19th of last April." This therefore is what he has said concerning the government and concerning the employment of the troops; that they were to commit murder upon the king's subjects, only because they were, something better than innocent,—meritorious, in being faithful to the character of Englishmen, and in preferring death to slavery. If it be possible to state that these words (uttered and applied in the manner in which this record applies them, to the public government of the country, and the employment of the troops) are innocent words, then the argument might have taken some foundation. But to say that there is any want of averment in this—till I hear what averment could have made this charge more plain, more distinct, as a charge of murder upon the king's subjects, against the employment of the troops, against a national exertion of public force; it cannot, in my mind, by words be made more strict and plain than it now stands upon the record.

The effect of these words I industriously avoid to speak of now: the degree of favour that belongs to them will be the subject of farther discussion: the only question that is at present before the court, is simply this; whether the libel, as stated in the record, does or does not contain sufficient matter of slander.

REPLY.

Mr. Horne. I should be very happy, my lords, at all times to pay to Mr. Attorney-General all those compliments which are personally and officially due to him; and I would rather have risqued the chance of exposing myself, than not pay to him the compliment of a reply; if indeed I could have found in his answer any thing to which even the appearance of a reply could be given. However, I will do for him what I can.

Mr. Attorney-General has said, that he could not discover from any thing which I had advanced, what omitted averments were suggested by me to be necessary to the information. My lords, though Mr. Attorney-General may have missed them, your lordships, I am sure, did hear me very plainly and distinctly: and though I did not formally say, such and such averments are necessary to the information; yet when I told your lordships, that in the reply of the Attorney-General, and in the address of the judge to the jury, I then heard, for the first time, that there was a rebellion in Massachuset's-Bay, and that certain persons were employed to quell that rebellion; your lordships, I am sure, and the whole court very well understood that those were the averments which were necessary to the information. And, my lords, it was not out of any satirical inclination that I imputed the omission of those averments to carelessness; I had other reasons. For, indeed, I know very well (and upon reflection I dare say your lordships will know very well) why those averments were omitted. My lords, the truth is, that Mr. Attorney-General found himself between Scylla and Charybdis. If he inserted these averments, he split on one side, on the proof. My lords, the advantages are very numerous and great which I should have derived from those averments. The information would have been destroyed, for want of proving what was averred; therefore he did not chuse to aver them. By the nature of his answer to me, I am persuaded he was aware of it: and, from certain intelligence, I know that there was a consultation on the drawing up of the information against me. It was proposed to alter the information; but having obtained verdicts upon the other informations, it was, upon consultation, agreed by the learned gentlemen, the king's counsel, that the information against me should be literally the same. I know it from certain information, which I obtained without the least treachery in my informants; for the gentlemen who caused me to know it, had not, in what they said, the least notion that they were telling me any thing.

My lords, before I heard Mr. Attorney-General's answer, I was a little apprehensive that I might meet with some difficulties. I was sure I ran no hazard in the principle of my objection. I thought, indeed, that I might perhaps be puzzled in the application of it, by cases of law, or by precedents that I had never before heard of. Now, my lords, though Mr. Attorney General has not favoured me with any, and though I cannot myself give you an adjudged case; yet your lordships will forgive me, unused to these matters, if I read to you the opinion of a learned judge in a matter exactly similar to this. It is in the case of lord Russell. The opinion I mean is that of Sir Robert Atkins. His words are remarkably fortunate for me; and it being that kind of law obvious to persons who pretend to understand no more than what common sense will direct them to, I did happen to have read that book long ago. I beg leave to read some little of it, because it literally applies. He takes notice of that part of the indictment where it is averred against lord Russell, that he was at a consultation for the purpose of seizing the king's guards. He says, 'guards' [there is no difference between guards and troops,—except indeed that troops is a much wider word than guards. Troops! we say a troop of strolling players.]

"The guards—What guards? What, or whom does the law understand or allow to be the king's guards, for the preservation of his person? Whom shall the court that tried this noble lord, whom shall the judges of the law that were then present, and upon their oaths, whom shall they judge or legally understand

by these guards? They never read of them in all their law-books. There is not any statute law that makes the least mention of any guards. The law of England takes no notice of any such guards; and therefore the indictment is uncertain and void." He says, "the love of his subjects is, next under God, the best guard of kings." He says,—"The very judges that tried this noble lord were the king's guards, and the kingdom's guards, and this lord Russell's guard against all erroneous and imperfect indictments from all false evidence and proof"—(What immediately follows does not, indeed, apply in my case)—"from all strains of wit and oratory"—(there has been none here, my lords)—"misapplied and abused by counsel. It had been fit for the court that tried this noble lord on this indictment, to have satisfied themselves from the king's counsel, what was meant by these guards. But admit the seizing and destroying of those who are now called the king's life-guard, had been the guard intended within this *overt fait*," or open deed, (these, my lords, are the averments which are similar to those that I propose—these are the averments which Mr. Attorney-General enquired after) "yet (he says) the indictment should have set forth, that *de facto* the king had chosen a certain number of men to attend upon and guard his person, and set forth where they did attend, as at Whitehall, or the Mewse, or the Savoy, &c. and that these were the guards intended by the indictment to be seized and destroyed; that by this setting forth, the court might have taken notice judicially, what and who were meant: but to seize and destroy the king's guards, and not shew who and what is meant, makes the indictment very insufficient."* My lords, Mr. Attorney-General (I beg the court's pardon, I shall take up very little of their time) the Attorney General says, he expected I should have said that the matter contained in the information is no libel. I should perhaps have said so, if libel had been such a technical term that I could have known what it meant: and if it was such a definite and technical term, then perhaps my objection would not have all that weight with you which I now believe it will. The sending of a wooden gun† was adjudged by this court to be a libel. There are many other things that might be adjudged libels. It is impossible for me to say what libel means. It is not a technical term; and perhaps if it had been, the Attorney-General would not have had quite so much difficulty to make this information good: but not being a technical term, it makes those other averments the more necessary.

Mr. Attorney General has then tried to help the deficiency of the averments in the information by, of and concerning—"of and concerning his majesty's government and the employment of his troops."—I believe there is no crime comprehended in 'of and concerning;' for it may be of and concerning good, as well as bad. The word 'concerning' means, looking at together; and that is the only, and the single meaning of the word 'concerning.'*

Now, my lords, if Mr. Attorney General should succeed in this his prayer, he will be a very fortunate, though not a very reasonable gentleman.

My lords, a proof of all those matters which should have been averred (which I am founded in saying by the opinion of the judge, who pressed them upon the jury as motives for their verdict, and which I firmly believe he would not have done, if he had not believed that they were contained in the information) a proof, my lords, of all those circumstances was supplied for the Attorney General by the judge on the trial; for he produced no evidence of them himself: and he will be very fortunate, indeed, if he can now prevail upon the Court to supply likewise the deficiencies in the information.

Lord *Mansfield*. Whatever the degree of guilt may be, how strongly soever it may have been proved, or whatever observations may have arisen in this case; yet if the defendant has a legal advantage from a literal flaw, God forbid that he should not have the benefit of it. It is most certain, that at the trial the information was considered to be words spoke of and concerning the king's government and his employment of his troops; that is, the employment of the troops by government. Upon that ground the defendant called a witness, Mr. Gould. The Attorney General rose to object to him; but it was very clear that he was a proper witness; and he acquiesced immediately, because it was extremely material to shew what the subject-matter was to which the libel related—if it was the employment of the troops under proper authority that came within the charge in the information.—Had it been a lawless fray (which I believe I said at the trial,) had it been a lawless fray it would not. Though the saying so might have been a libel of the individual's, yet it would not have been this libel: it would not have been this libel of the king's troops employed by him. Now at first, and at present, it seems to me, that "of and concerning the king's government and the employment of his troops," pins it down. But I doubt a little upon it. There is some weight in the objection, whether in the form of drawing there should not have been innuendoes. In common reason and understanding, it is charged; but whether technically charged or not, I do not know; and therefore as to this point, without prejudice we will take some time to consider of it; to see whether precedents can be found which require this technical scrupu-

* See vol. 9. p. 730.

† Qu. by Thicknesse to lord Orwell.

* In maintenance of this argument, Mr. Horne published his 'Letter to Mr. Dunning on the English particle,' (as to which, see Boswell's Life of Dr. Johnson, vol. 3, p. 378, 8vo edition) the contents of which he afterwards incorporated into chapters 6, 7, and 8, of the Ἔπεα πτερόεντα.

losity over and above that certainty which is sufficient to every reader: and we will go on with the rest, *de bene esse,* as we could not pronounce judgment upon it now, and will consider of it till he comes up again, if we find sufficient to satisfy us to over-rule the objection.

[Lord Mansfield then read his notes of the evidence given upon the trial as follows.]

Lord *Mansfield.* This is an information filed by the Attorney General against John Horne; and it was for publishing the advertisements that have been read from the information.

Thomas Wilson proved the advertisements in question, the manuscripts, to be the hand of Horne; and Henry Sampson Woodfall, he published the advertisements. He swears that the defendant gave him a paper the 7th of June, to publish in his own and send to the other papers; and that the defendant paid the fees. Then he produced two advertisements to publish. The defendant cross-examined him, and he assented to the question of the cross-examination, by saying, "By your desire I inserted these advertisements, and published them as your act and deed. You never desired to be screened; but you desired to be given up. You said, they should not want full evidence." William Woodfall proved likewise a paper given him by the defendant to be inserted in The London Packet and Morning Chronicle; which were the advertisements in the record. Therefore, upon the fact of printing and publishing there is no doubt at all.

The defendant called a witness to prove, that really and in truth there was a subscription, and that the money was actually raised; and he likewise called William Lacey, who proved that 100*l.* was paid to him, and by him remitted to Dr. Franklin: that was 100*l.* and no more. And then the defendant called Thoroton Gould. And he said, that at Lexington, on the 19th of April 1775, he was a subaltern officer. He was ordered there by the adjutant of general Gage, the commander in chief of his majesty's troops, and governor of the province: and he, together with the other troops, set out; and between two and three in the morning he was taken prisoner: that he heard the provincials charged our troops.—"We found them armed. We supposed they were marching to attack us, from a continual firing of alarm cannon, early in the morning, as soon as we began to march. Notice or alarm guns are to raise the country." Upon this evidence the jury found him guilty.

Lord *Mansfield.* Mr. Attorney General, have you any thing to say?

Att. Gen. Mr. Horne, I suppose, will say what he can in extenuation.

Lord *Mansfield.* Mr. Attorney General, have you any thing to say?

Att. Gen. It belongs to the defendant, I apprehend, to state what he can to the Court in his extenuation.

Mr. *Horne.* I shall state nothing in extenuation till your lordship's decision has told me that there was a crime. I do not know where the crime lies at present. My objection goes, that there is no crime in the information. It is impossible for me to extenuate that which I do not acknowlege.

Lord *Mansfield.* Have you no affidavits of circumstances, or any thing?

Mr. *Horne.* None in the world.

Lord *Mansfield.* Let him be committed.

Mr. *Horne.* Will your lordship commit me before it appears whether I am even accused of any crime?

Lord *Mansfield.* No, then you may come up on Monday.—You came voluntarily now?

Mr. *Horne.* I did.

Lord *Mansfield.* Then come up voluntarily again.—If you should find any precedents on either side, I wish you would give them to us.

[This recommendation to bring precedents was repeated to the Attorney General and to the defendant, two or three times.

To which Mr. Horne replied, that he was not himself very likely to produce precedents.]

KING'S BENCH, *Monday, Nov.* 24, 1777.

Lord *Mansfield.* In reading my notes the other day in the case of The King and Horne, I overlooked the reference to a written piece of evidence that was given by him at the trial, and I am told I did not state it; and therefore I will state it now.

He produced to captain Gould the Public Advertiser of the 31st of May 1775, which purported to be the copy of an affidavit made by captain Gould, while he was a prisoner in the custody of the rebels at Medford, and printed in that paper: and he asked him whether the contents were truly printed. I told him, that if he meant to prove the facts to be true as above, it could not be proved by affidavit, the man being present; and even if he was absent, they could not be proved by affidavit: but that if he meant to shew that, at that time, there existed a public account of it in the paper; that might be of use to restrain or qualify the meaning of the paper that was in question by the information. He said, he desired it to be read in that light; and in that light it was read, and is as follows:

"I Edward Thoroton Gould, of his majesty's own regiment of foot, being of lawful age, do testify and declare, that on the evening of the 18th instant, under the orders of general Gage, I embarked with the light infantry and grenadiers of the line commanded by colonel Smith, and landed on the marshes of Cambridge, from whence we proceeded to Lexington. On our arrival at that place we saw a body of provincial troops armed, to the number of about 60 or 70 men. On our approach they dispersed, and soon after firing began; but which party fired first, I cannot exactly say, as our troops rushed on shouting and huzzaing previous to the firing, which was continued by our troops so

long as any of the provincials were to be seen. From thence we marched to Concord. On a hill near the entrance of the town we saw another body of the provincials assembled. The light infantry companies were ordered up the hill to disperse them. On our approach they retreated towards Concord. The grenadiers continued the road under the hill towards the town. Six companies of light infantry were ordered down to take possession of the bridge, which the provincials retreated over. The company I commanded was one. Three companies of the above detachment went forward about two miles. In the mean time the provincial troops returned, to the number of about 3 or 400. We drew up on the Concord side of the bridge. The provincials came down upon us; upon which we engaged and gave the first fire. This was the first engagement after the one at Lexington. A continued firing from both parties lasted through the whole day. I myself was wounded at the attack of the bridge, and am now treated with the greatest humanity, and taken all possible care of by the provincials at Medford.

"EDWARD THOROTON GOULD."

There was a motion made the other day in arrest of judgment, and many objections, I understood, that were taken to shew that the charge, as it stands upon this record, is insufficient in law to support any judgment: that there was no averment as to the state of the Massachuset's colony at that time; either that there were riots, insurrections, or rebellions: that there were no averments that the king had sent any troops; that there was no averment that there was any skirmish or engagement; or how it began; or the nature of it: how it began, or how it went on, or ended: and that it was not averred that the employment of the troops was by the king's authority. The only objection that had colour in it was, what I mentioned last—that the employment of the troops was not averred to be by the king's authority. I thought then, and said, that the averment of the words being written "of and concerning the king's government," was an answer; but no precedent was cited or alluded to on either side. I fancy the Attorney-General was surprised with the objection. But there was no precedent; and I could not say upon my memory whether precedents might not require some technical form of expression as to that medium through which words are averred to be written of the king's government. And if any flaw had happened formally, technically, or verbally, that were not at all founded in the sense or reason of the thing, I should in this case be of the same opinion that I was in the case of an outlawry—that the defendant ought to have the benefit of it: and therefore I desired that we might think of it for some time, that precedents might be searched, and the books looked into. We have fully considered of it, and the precedents have been looked into, and we have fully considered the information, and all the objections that were mentioned, and all the objections that we could think of; and we are all clearly of opinion, without any doubt, that the information is sufficient. An indictment or information must charge what in law constitutes the crime, with such certainty as must be proved; but that certainty may arise from necessary inference; in the manner settled in the case of The King and Lawley in Strange. Plain words, in a libel, speak for themselves. If they are doubtful, their meaning must be ascertained by an inuendo. Here the words are plain; they want no inuendo. They are averred to be written "of and concerning the king's government and the employment of his troops." The obvious meaning is, that the employment of the king's troops must be under his authority; and it necessarily isso, if the words also relate to and are written of and concerning the king's government. This must now be taken to be true; because the verdict finds it. Had the question arose upon a demurrer, it must equally have been taken to be true. The gist of every charge of every libel consists in the person or matter of and concerning whom or which the words are averred to be said or written. In the King against Alderton the information was held bad, because it was not laid in the information, it was not laid that the libel was of or concerning the justices of Suffolk. Where the words are averred to be written of the king's government where—(there are several precedents)—or of the government of the kingdom, or of the government, suppose, of the navy; as to any thing further as to which they are also written, through the medium of which they calumniate the king's government, there is no form of expression technically necessary. And it cannot be; because there may be cases where the king's government might be calumniated through an imputation upon the gross licentiousness of his troops. The question to be tried is, whether the words laid are written of the king's government. It may vary the degree of mischief, guilt, or malice; but it is totally immaterial as to the constitution of the crime upon the record, whether the words refer to something that has existed, or are an entire fiction. Had Lexington been left out; or had any other place been mentioned, where there had been no skirmishes, or engagement, instead of Lexington; it would without any inuendo have been equally a libel. It is the duty of the jury, to construe plain words and clear allusions to matters of universal notoriety, according to their obvious meaning, and as every body else who reads must understand them. But the defendant may give evidence to shew that, in the case in question, they were used in a different, or in a qualified sense. If no such evidence is given, the obvious meaning to every man's understanding must be decisive. Before this trial, five several juries had found those words, from their necessary meaning, to be of and concerning the king's government. Here, in this case, the defendant gave evidence:

and the evidence he gave demonstrated that the words related to troops acting under the king's authority; and consequently related to the king's government. And I am the more confirmed that upon this occasion there is little colour of doubt of any flaw in the information, that in those five trials that I allude to, in one or other of them, a great variety of counsel of learning, eminence, and ability, were employed. They were called upon to pry with all the sharpness that they had into the information, to pick a hole in it: there were three judgments given upon conviction upon them; and no counsel saw or imagined there was any flaw in it. Therefore we are all satisfied that the information is sufficient.

Att. Gen. The defendant has been convicted on the oaths of twelve of his countrymen with having written, printed, and published, and caused to be written, printed, and published, a certain false, wicked, malicious, scandalous, and seditious libel of and concerning the king's government and the employment of his troops; asserting, that the national force of this country has been employed in the murder of the king's subjects, for as meritorious an attribute as can be imputed to man: and he has specified the time and place at which that was done.

The charge, as contained in the information, rests within a narrow compass. I might have stated, perhaps, and proved a different crime to have arisen upon it; but I did state that which, according to my judgment, was a crime of such quality, was a crime of such heinousness, and of such a size, as fairly called for the highest resentment which any court of justice has thought proper to use with respect to crimes of this denomination. My lord, although the crime, upon the state of it in the information, rests within the compass which I have now mentioned; yet, as it now comes before the Court, the matter that now requires the consideration of justice does not lie within that narrow compass. The defendant himself has thought it important to the situation which he wishes to hold with a certain body of men in this country, not to leave it just in the place in which the information does: he has thought it essential to his views (which I don't enter into particularly what they are), but he has thought it essential to his views, to prove how much he meant by writing in that manner to the public; and also to prove how much he meant, and how directly, how pointedly, and how confidently, to insult the public justice of the country, by not only committing as high a crime as could be committed within the description of misdemeanor against the public authority and welfare, but by stating himself to have committed that crime with a view of insulting the public justice of the country. My lord, if it had been essential to us to prove that that crime, and that that case which is specified in the indictment, was the subject of a murder committed under public authority by the national forces of the country, he has himself thought proper to state and to prove by his witnesses, that he meant the attack made by the king's troops upon a body of rebels. Your lordship has taken notice of the addition of this affidavit that was introduced into the cause. The effect of that evidence was to prove that which was but too well known before, namely, that in the time there specified, the 19th of April, 1775, the rebels had arrayed themselves in arms; had formed magazines; had taken stations in the country in which they had placed themselves; were ready to surround the forces of the king, as far as their abilities could do it, upon any motion to be made by these forces; that upon the instant, very early in the morning, (and whether accidentally or otherwise let that be decided by the witnesses) the king's troops, marching in perfect silence—that, upon the instant of that happening, the first demonstrations that were made upon the part of the rebels was the firing alarm-guns; understood exceedingly well by the witness, and exceedingly well explained by him: it proved that he understood them perfectly, namely, by the rebel troops instantly surrounding them. I state that to have been industriously proved on the part of the defendant, in order to mark that he meant to fly at the very highest subject, and to offend in the most heinous manner in which it was possible for him to contrive to offend.

My lord, he did not think it enough to have proved that such was the intention of the paper with which he was at that time charged; but he also thought it incumbent upon him to produce witnesses to prove another part of the contents of that paper; namely, that he had attended a solemn meeting; at which meeting he, with certain other persons there assembled, had contributed money to the amount of about 100*l.* and that the purpose for which they contributed it, was the comfort and relief of those whose merits with them was stated to consist in no other particular than the circumstance of their relation to those rebels that stood in arms against the king's forces: he brought witnesses to prove the fact. That the money was actually paid, is not the thing that I pin upon: let it be doubted whether the 50*l.* came actually to the hands of the banker; or that the money was afterwards applied to any of the purposes that are there stated. To be sure, there was not proof alleged upon that subject. Whether it is to go to those people, or whether it is to go to any other purposes similar to those, in the intention of those who subscribed the money (that is, the insulting and affronting government and the king,) it is a matter of very little consequence to the point I am now speaking to. He was at the pains to prove that they went through that business that I am stating to your lordships in order to afford comfort and relief to those who stood in that species of relation to rebels; which, as far as it goes, is to excite that rebellion, by offering that degree of encouragement to those who shall happen to perish

in such a flagitious offence: as far as it goes, it amounts to that. The libel therefore that now stands before your lordship, which the occasions of the defendant of a different sort (which I shall have occasion to speak more particularly to presently) obliged him to aggravate, obliged him to go to the extent that I have now stated, is such a one that I believe it will be totally impossible for the imagination of any man, however shrewd, to state a libel more scandalous and base in the fact imputed, more malignant and hostile to the country in which the libeller was born, more dangerous in the example, if it were suffered to pass unpunished, than this which I have now stated to your lordship.

Your lordships have seen that the libel is such, that it is impossible by any epithets to aggravate it. I depend entirely upon the state which I refer to—which your lordship has delivered to the Court.—I depend upon that for the most emphatical description of every circumstance that tends to create criminality, which is possible to be alleged not only against this, but against any other libeller whatsoever.*

My lord, such was the nature of the libel. The next question that I meant to trouble your lordship upon, is the conduct of the present defendant in the article of publishing the libel; and, subsequently to that publication, in the article of avowing it, holding it up, maintaining it to the world, thrusting it in the face of justice, and proclaiming—— 'Sic honor et nomen divinis vatibus.' It is a language addressed to the lowest and most miserable mortals. There is no man of any value in point of understanding in this country, that does not know that the information contained in it is false, absurd, impossible, even below the worth of refutation; but it is addressed to the lowest of the mob and to the bulk of the people, who it is fit should be otherwise taught, who it is fit should be otherwise governed in this country. My lord, the occasions of this reverend gentleman to keep up the opinion of a particular part of the factions in this country, his private occasions obliged him to be very distinct, and very anxious to explain it. On the part of the prosecutor, it was enough to prove that he had published the libel. The evidence for the prosecutor went plainly and distinctly to that fact. We produced the original paper under his hand. We produced the man to whom it was delivered, Woodfall, in order to publish it in a paper which he printed himself, called The Public Advertiser. We proceeded to prove that the occasion of delivering it to him, and the office in which he was employed, was not merely to publish it in that paper, but to carry it round to all the other public papers, and to make the dispersion of it as universal as he possibly could. Here therefore we did establish upon him, by these plain facts, a publication of as universal a sort as it was possible for him to obtain.

One would have thought that these facts so stated had constituted crime enough. But it is not enough to be criminal, with this man; he must be criminal in a way that may shew himself able to defy justice; in a way to convey to the people, who believe in those foolish representations, that they actually do trample upon justice. I believe a great multitude of those gentlemen called authors, Mr. Woodfall's contractors, are men, in fact, who are just capable of writing in an impudent style. The single, simple merits of an impudent style is, I suppose, qualification enough to prevent any material distinction between his whole rabble of authors. If there is any distinction at all, it must arise from the superior confidence of those who can not only write in that style, but stand forth in the face of the justice of the country, and say—'punish me if you dare.'—These men lose their credit, these men lose their opportunities with their own faction, if, when called upon for their crimes, they don't preserve the same impudence. That made it necessary for the present defendant not to be satisfied with what the prosecutor had proved upon him, but to undertake a proof of his own; to put him upon still higher ground with his connections. By the examination of Woodfall, he has undertaken to prove that the method of his transactions with him had been at all times, that he should at all times, for his own sake, if called upon, give him up to justice. A good decent sort of contract, that long way back, between a divine of the church of England and his printer! that he should print for him upon the terms of the said divine being ready to be given up to justice, at all times when he should be called upon! My lord, the first instance of the execution of that contract was upon a polemical subject of divinity, between this gentleman and one of his parishioners, sir John Gibbons. Mr. Woodfall did not state to the Court which part was taken by which: I cannot possibly tell how the controversy ended: but in an extract upon the subject of religion, for the edification of the parish, it was necessary that there should this contract intervene, that the reverend author should be ready to stand forth, in case the printer was called upon. But with regard to the present publication, this was to be much more emphatical. He had been called upon in another place. He was afraid that he had not been thought by his friends to be confident enough in maintaining what he was charged with; and that, if

* In the 'Memoirs of John Horne Tooke, interspersed with original documents, by Alexander Stephens, esq. of the honourable society of the Middle Temple,' (vol. 2, pp. 461, 462. 8vo ed. 1813) it is said that "Thurlow, after he had run the race of ambition, courted his [Horne Tooke's] acquaintance in the peaceful shades of retirement." See, also, pp. 259, 260. 326, of the same volume, and in the New Parl. Hist., the debates in the House of Lords on the Bill 'to remove doubts respecting the eligibility of persons in holy orders to sit in the House of Commons,' stat. 41 Geo. 3, c. 63.

be escaped, it was upon some doubt, whether the guilt was proved upon him or not: upon which he called upon this Woodfall to depose, that in the manner of delivering him that paper, it was done with an industrious and affected solemnity. The words of it were, "—did I, or did I not, formally before the witness, when called in, deliver that paper as my act and deed; as if it had been a bond?"—And in the latter end of the evidence,—"if they now chuse to take notice of this advertisement"—it was to that purpose; for this reason, that "in the last transaction before the House of Commons it was pretended they let me off because they could not get full evidence. Do you remember I said, that if they now chose to take notice of this advertisement, they should not want full evidence?"—Now, my lord, to be sure what had passed between this author and this printer, (whether it was more or less in confidence) would have made it of no consequence whatever to the public. It would have been impossible for us to have known it; or, if it had, to have adduced it in evidence. That would have been of no consequence whatever to the public. It never could have attained to the public knowledge, excepting that interest I have so often alluded to, that interest of recommending himself to his patrons, and defying public justice.

I don't state the offence to have consisted in the conversation that was held between him and the printer; but I state the offence to arise in his anxiety to proclaim to the public, that such is the manner in which he dares to insult the justice of the country. There arises the aggravation of the crime, in the manner in which I have stated.

With regard to the rest, the strange conduct of the defendant—I don't know whether that is properly before the Court, any more than his misrepresentation of the proceedings of the Court; which I shall urge for no earthly purpose but this: in order to demonstrate that the aim and object of publishing so very infamous a libel as this, went even beyond the libel itself; to endeavour, if he could, to make a paradeful triumph over justice. That, I take it, is the aim and object of the whole.

I have done my duty with regard to the charge that is now before the Court. With regard to the punishment also, it is my province and my duty to speak.

All other crimes of specific denomination are followed by the letter of the law with peculiar punishments: and they are held forth, by that punishment and by that denomination, to the people in the true point of view in which it is the interest of the public that they should be seen. The law, by enacting particular punishment upon specific crimes, has stated to the public that degree of terror to arise from the example of punishment, which in wisdom, it is hoped, will be sufficient to restrain offenders from committing the same crimes. My lord, that is not so in the case of a misdemeanor; which in its variety and consequences may involve crimes of a different nature and complexion, and of very different degrees of guilt. Concerning those crimes the public neither has a right nor can possibly be informed in any other manner than by the judgment of this court. My lord, this Court, in pronouncing judgment upon this offence, is to do by this species of offence, with regard to the rest of the public, and to the purpose of deterring crimes, what the law does when it specifies particular punishments. Your lordships are in these cases to supply the deficiencies of the law, and to shew to those who have been desirous to offend the laws of their country, by the example of its punishment, in what sort of estimation this degree of guilt is held by the law: and I, whatever I have thought upon the subject, shall be obliged to confess, that if the punishment is less than the old deliberate judgment has gone to and rested upon, that I have been mistaken in the nature of the crime. All my apology for the mistake must consist simply in this single circumstance: that, lying so near to high treason, it was very difficult for my imagination and judgment to draw the line between them. That must be my apology, if I have mistaken the nature and quality of this crime.

My lord, the punishments to be inflicted upon misdemeanors of this sort, have usually been of three different kinds; fine, corporal punishment by imprisonment, and infamy by the judgment of the pillory. With regard to the fine, it is impossible for justice to make this sort of punishment, however the infamy will, always fall upon the offender; because it is well known, that men who have more wealth, who have better and more respectful situations and reputations to be watchful over, employ men in desperate situations both of circumstances and characters, in order to do that which serves their party purposes: and when the punishment comes to be inflicted, this court must have regard to the apparent situation and circumstances of the man employed, that is, of the man convicted, with regard to the punishment.

With regard to imprisonment, that is a species of punishment not to be considered alike in all cases, but varies with the person who is to be the object of it: and so varies with the person, that it would be proper for the judgment of the court to state circumstances which will make the imprisonment fall lighter or heavier, as the truth is, upon the person presented to the court. I say, my lord, that would be proper, if I had not been spared all trouble upon that account by hearing it solemnly avowed in your lordship's presence, by the defendant himself, that imprisonment was no kind of inconvenience to him: for that certain employments, which he did not state, would occasion his confinement in so close a way, that it was mere matter of circumstance whether it happened in one place or another; and that the longest imprisonment which this court could inflict for punishment, was not beyond the

reach of accommodation which those occasions rendered necessary to him. In this respect, therefore, imprisonment is not only as with respect to the person not an adequate punishment to the offence, but the public are told, and told by a pamphlet which bears the reverend gentleman's name (may be his name may have been forged to it; but by a pamphlet that bears that name) that it will be no punishment. And your lordships (according to the usual style with which he has affected to treat justice, from the beginning to the end) are told that you cannot punish him in that way: and therefore, if that is a species of punishment which cannot affect him, as your lordship has been before told in a manner to be relied upon, he has made it manifest that your lordships' judgment in that part of the punishment, operates nothing with respect to him personally; and consequently that it will lose its whole force and efficacy as with respect to that example which the public justice ought to hold out to the world.

I stated in the third place to your lordships, the pillory to have been the usual punishment for this species of offence. I apprehend it to have been so in this case for above two hundred years before the time when prosecutions grew rank in the Star-chamber, and to those degrees which made that court properly to be abolished. The punishment of the pillory was inflicted, not only during the time that such prosecutions were rank in the Star-chamber, but it also continued to be inflicted upon this sort of crime, and that by the best authority, after the time of the abolishing the Star-chamber, after the time of the Revolution, and while my lord chief justice Holt sat in this court. In looking over precedents for the sake of the other question, I observed that Mr. Tutchin* (an author of some eminence in his day) was angry with Holt, the lord chief justice, for transferring, as he called it, the punishment of bakers to authors. That was upon a personal conceit which such an author as Tutchin thought himself entitled to entertain of the superior dignity of that character all along. He thought that the falsifying of weights and measures was a more mechanical employment than the forging of lies; and that it was less gentleman-like to rob men of their money than of their good name. But that is a peculiarity which belongs to the little vanity that inspires an author. I trust therefore, when I speak of lord chief justice Holt, and of the time in which he lived, I speak (for all, but particularly for this) of as great an authority as ever sat in judgment upon any case whatever. His name was held high during his life, and has been held in reverence in all subsequent times. He deserved popularity, by doing that which was right upon great, trying, and important occasions. He obtained popularity, because he despised all other means of aiming at it, but that of doing right upon all occasions. From the temper of those times, from the vehemence and designs of that faction that opposed him, sir John Holt would have been reviled; if the revilers of that day had not observed in the greatness of his spirit and character, that it was impossible to reach him: and he has preserved a name which was highly honoured during his life, and which will live as long as the English constitution lives. Citing him, therefore, in support of this as a proper punishment to be inflicted upon this sort of offence, is giving, in my apprehension, the greatest authority for it.*

My lord, in pronouncing an opinion upon the objections started by the defendant, I would desire no better, no more pointed, nor any more applicable argument than what that great chief justice used, when it was contended before him that an abuse upon government, upon the administration of several parts of government, amounted to nothing, because there was no abuse upon any particular man. That great chief justice said, they amounted to much more: they are an abuse upon all men. Government cannot exist, if the law cannot restrain that sort of abuse. Government cannot exist, unless when offences of this magnitude, and of this complexion, are presented to a court of justice, the full punishment is inflicted which the most approved times have given to offences of much less denomination than these, of much less. I am sure it cannot be shewn, that in any one of the cases that were punished in that manner, the aggravation of any one of those offences were any degree adequate to those which are presented to your lordship now. If offences were so punished then, which are not so punished now, they lose that explanation which the wisdom of those ages thought proper to hold out to the public, as a restraint from such offences being committed again. It was my duty also to consider this as with a view to the public conviction.

I am to judge of crimes in order to the prosecution: your lordship is to judge of them ultimately for punishment. I should have been extremely sorry, if I had been induced by any consideration whatever to have brought a crime of the magnitude which this was (of the magnitude which this was when I first stated it) into a court of justice, if I had not had it in my contemplation also that it would meet with an adequate restraint; which I never thought would be done without affixing to it the judgment of the pillory. I should have been very sorry to have brought this man here, after all

* See Tutchin's Case, vol. 14, p. 1099, where the pillory is stiled the punishment of bakers; and for more concerning the pillory, see vol. 3, p. 401; vol. 7, p. 1209; vol. 14, p. 446; vol. 19, p. 809.

* Dr. Johnson appears not to have concurred in this opinion of Mr. Attorney General. "I hope," said he, "they did not put the dog in the pillory for his libel, he has too much literature for that." Boswell's Life of Johnson, vol. 3, p. 378, 8vo edition.

the aggravations that he has super-induced upon the offence itself, if I had not been persuaded that those aggravations would have induced the judgment of the pillory.* The punishment, however, to be inflicted for this crime rests finally with your lordship. If the Court is of opinion that that judgment is not to be pronounced, it will be my humble duty to submit with the most perfect acquiescence. I have no interest in the business but as the officer of the public. I am nothing near so good a judge of the interest which the public have in the business as your lordships sitting in this court; but when I am stating a matter to the Court for judgment, I must state it as I feel it; and I feel it so. And if it were my province to do more than to state it so, I should still continue to think of it as I do at present.

Mr. *Horne.* My lords, though your lordships' judgment is to be pronounced upon myself, I shall attend to hear it with the indifference and curiosity of a traveller; which I was early instructed to do in such circumstances as these, long before I could imagine I should ever be in them. My lords, I am a little the more at a loss to address your lordships, because (and I am not ashamed to be laughed at for my disappointment) I acknowledge that I came this morning into the court in the full assurance, that I should find less difficulty to go out of it than I did to come in. My lords, I had no notion at all that evidence could supply the defects of the information; or that it would be attempted to be so supplied by evidence. I did not, it is true, at the time I objected to the deficiencies of the information, I did not amongst other things add evidence. I believe I am time enough now to move any thing in arrest of judgment; and if I am, I desire that your lordships would understand me now to object to the supplying of the defects of an information by any evidence whatever. My lord, I apprehend that your lordship had directed Mr. Attorney General and myself (I ought, if what he has said of me be any thing like truth, to beg his pardon for coupling my unworthy name with his) but, my lord, I thought that he and I were directed, if we could, to produce precedents. I own to your lordship, I did not well understand the direction when I received it; because I had laid before you a sacred principle, with which I was much better acquainted than with precedents; and one for which I would willingly give up all the precedents that ever existed.

My lords, I shall no doubt be very irregular in the order of what I shall say to your lordships; and I should not have said a word, if there were not in Mr. Attorney General's harangue some things that might easily stir a man to anger, if he was not as little susceptible of it as I am. My lords, I feel not the least anger at any thing that has passed. The gentleman on the trial has stripped me of common sense; but he allowed me a sort of understanding. My lords, he shifted his ground in his reply. He first, out of kindness and compliment to me, supposed what I had written to be beneath common sense: my lords, he afterwards found it proper to make it beyond common sense. At first I was a fool: at last I was a madman. My lords, at first he thought it—(I forget his expression) but he thought it candour (I think he said) to the names of persons alluded to, though distantly, to suppose that what I had written was false. To save others from some scandal of imprudence or impropriety, he thought it candour to impute falsehood to me. My lords, when that was proved to be true, he only said, that he did not mend the matter: indeed, whichever side of the case I took, nothing could mend the matter.

It is not my business, my lord, to take the smallest notice of what fell from your lordship; nor shall I mention a number of things, which I might justly be permitted to mention, of wilful and gross misrepresentations of the evidence upon the trial: I should not have mentioned it at all; but Mr. Attorney General has hinted, though not specified, misrepresentations by me of the proceedings of the trial.

My lords, he has endeavoured to alarm me with monstrous fines, with long imprisonment, with infamous punishment. My lords, infamy is as little acquainted with my name as with that gentleman's or with your lordships. I feel no apprehensions from the pillory. I do feel some little pain that a gentleman, taking advantage of my situation, should say and offer those things, unfounded in appearances even of truth, against me, which neither he nor any man like him dare to insinuate in any other station but this.

He has attempted likewise to insinuate, my lords, a species of robbery. When he did so he was guilty of falsehood. He said, that my witness did not prove that the 50*l.* was paid into the bankers. My lords, he literally proved it.

My lords, he represents me as speaking the language of—"if you dare to punish me;"—and he says, "it is a language addressed to the lowest of the mob." Indeed I think so too: but it is his own language, not mine.

My lords, he has dwelt upon my occasions, my desperate situation, my want of character and fortune. My lords, it is my misfortune that from my cradle I have had as effeminate an education and care and course of life as Mr. Attorney General. It is my misfortune that there was not a greater want of fortune: and as for my occasions, my means have always been beyond them. I should rather, my lords, if I was speaking in extenuation or to mitigate your punishment, I should rather close in with Mr. Attorney General, and acknowledge myself that desperate, helpless wretch that he has represented me: perhaps it would be the most effectual motive to your lordships' compassion.

* See in the case of Patrick Hurly, vol. 14, p. 446, a counsel insisting that the pillory is the punishment for a cheat.

My lords, I never in my life solicited a favour: I never desire to meet with compassion.

My lords, he has talked to your lordships of my patrons. I have had in my life, and very early in my life, the greatest of patrons; aye! with all their power, greater than any that now hear me. My lords, I renounced my patrons, because I would not renounce my principles; repeatedly, over and over again, of different descriptions, and in different situations. My lords, I am proud, because I am insulted; or else I certainly should not have held any of this language.

My lords, Mr. Attorney General through a blameful carelessness has told you a story of a theological, polemical dispute between myself and a parishioner. I can easily conceive that he let himself fall into that mistake for the sake of drawing a smile from your lordships and the court upon the *reverend* gentleman. But in this, like the rest, my lords, there is not a syllable, not the smallest foundation of truth. I never had a theological, polemical dispute. My lords, I am free to acknowledge, that no theological disputes that ever I read, and I have endeavoured to read all that ever happened, none of them ever interested me in the manner that the present disputes do interest me. My lords, I was not made to be a martyr.* I have opinions of my own; but I never intended to suffer for them at the stake.

My lords, he has endeavoured to insinuate that all that I wrote, and all that I said, was for the sake of a paradeful triumph over justice: and he has talked again and again of the mob. My lords, the mob have conferred no greater favours upon me than upon Mr. Attorney General. I have been repeatedly followed by very numerous mobs in order to destroy me, single and alone, for a great length of way; not once, or twice, or three times, but four and five times; two or three thousand at my heels. I am sensible of the ridicule of the situation, even whilst I mention it. These are the only favours that I have ever received from the mob; these are the only favours that I have ever solicited; and I protest to your lordships I had much rather hear the mob hiss than halloo: for the latter would give me the head-ach, the first gives me no pain. My lord, I have heard of those who have expressed more wishes for popularity than ever I felt. I have heard it said, and I think it was in this court, that they "would have popularity: but it should be that popularity which follows, not that which is sought after."† My lords, I am proud enough to despise them both. If popularity should offer itself to me, I would speedily take care to kick it away.

My lords, as for ambition, and bodies of men, and parties, and societies, there is nothing of it in the case. There is no body of men, with whom I can think, that I know of. There is no body of men with whom I am connected. There is no man or men from whom I expect help, or assistance, or friendship, of any kind, beyond that which my principles or services may deserve from them individually. Private friendships I have, like other men; but they are very few: however, that is recompensed to me, for they are very worthy.

My lords, Mr. Attorney General has said, that I represented imprisonment as no kind of inconvenience to me. As no kind of inconvenience, my lords, will not certainly be true; because the great luxury of my life is a very small but a very clean cottage: yet, though imprisonment will be so far inconvenient to me, the cause of it will make it not painful.

My lords, I find that not only I have a sort of understanding very different from that of Mr. Attorney General, but my notions of law, and my notions of humanity, are equally different from his. My lords, between the time that I had last the honour of appearing before you and the present time, it happens very unfortunately for Mr. Attorney General that he has proved, that not only my notions of law and decency, but my notions of propriety and humanity, are widely different from his: and I mention it, my lords, because it goes immediately to the doctrine now attempted to be established. Mr. Attorney General has heard a person, as great as himself, between that time and this, justify the legality, the propriety, the humanity of the tomahawk and the scalping knife. Between the last time I appeared here and this time, these have been the sorts of king's troops justified, by a high officer of the law,* to be employed, as legal, proper, mild, and humane.

My lords, Mr. Attorney General has said, that I declared upon the trial that I had a certain employment which made it necessary for me to be confined as long as your lordships should or would confine me. That is not true. My lords, I did say that I had an employment, had something to do, that would confine me to my room longer than your lordships would confine me. I believe I said more—I neither intended when I said it to affront you, nor will attempt at this time to appease you—I said longer than your lordships dare to confine me; those were the words: and I said it, because I did believe and do still believe that your lordships dare not wilfully do injustice. My lords, as for that certain employment, I did not say it was necessary. It is an employment of amusement merely; an employment that I meant to make public; but not for the sake of gain or praise. My lords, when first I began my life, I was encouraged to worthy and to virtuous actions by the temptation of praise: I have long since learned, my lords, to be able to do those actions which I think virtuous, in despite of shame.

My lords, Mr. Attorney General has done

* But see his Letter to Junius, July 13, 1771.

† See lord Mansfield's judgment in Wilkes's case, vol. 19, p. 1112.

* See New Parl. Hist. vol. 18.

what I have before heard attempted to be done with very great sorrow: he has attempted to reinstate the Star Chamber. The fault he finds with it is only its rankness,—"before the prosecutions grew so rank in the Star Chamber, and which rankness caused it to be abolished."—I don't recollect the words of that act by which it was abolished; but I am sure that its rankness alone is not the reason given. If the gentleman would lend me his memory, I would then repeat them—none of the powers, nor any like them (your lordships know better the words, I don't recollect the words) but nothing like them was ever to be put in use again in that or in any other court, as well as I can remember.

Mr. Attorney General has talked of the personal conceit of Tutchin concerning authors. I thought myself, till a strong zeal made me act otherwise, as little likely to become an author as any of those gentlemen who hear me. I have never been a contractor with any news-papers; he knows I have not. If I desired the printer of the Public Advertiser to give me up always to justice, my lords, I cannot easily conceive how Mr. Attorney General could find any thing to justify his oratory upon that subject. Is that a defiance of a court of justice? Is that flying in the face of the justice of the country? To be willing to abide its sentence; not to withdraw myself from its censure: not to wish even to avoid any enquiry into my conduct; is that to be that bold-faced audacious man that defies the justice of his country? My lords, if it is, I can only again deplore that a gentleman, who must have great understanding, and great talents and abilities, from the office which he holds, that the understanding of that gentleman should be so very different from mine.

My lords, I have already appeared in this situation often enough; and if I had, as he imagines I have, any luxury or pleasure in holding myself forth in public; if I had, it would long before this have been satisfied.—There are many other things which I might say to your lordships; but as I trust, and fully trust, that I shall still find a remedy, my lords, against the present decision, I shall forbear saying one syllable in extenuation of what the Attorney General has been pleased to charge me with; and leave your lordships to pronounce your judgment without the least consideration of me, without the smallest desire that you should abate a hair from what you think necessary for the justice of my country. I shall leave it entirely to your lordships' discretion.

Mr. Justice *Aston*. John Horne, clerk, you stand convicted, upon an information filed against you by his majesty's attorney-general, of writing and publishing, and causing to be printed and published, a false, wicked, and seditious libel, of and concerning his majesty's government and the employment of his troops. The libel has been openly read in court from the record; and, upon the report of his lordship who tried this information, it appears that, upon your own cross-examination of one of the witnesses, you gloried in the publication of it; that you avowed you did not desire to be screened; and that you avowed yourself the author of it. Since that indeed, in this court, you attempted to gloss over parts of this libel, and to confine its tendency to a possible private charge upon the king's troops, and not concerning his majesty's government; to treat the word 'troops' as being indeterminate in its signification, and not carrying with it the construction which the information avers, and which the jury have found, of its "concerning the king's government and the employment of those troops by his authority." You have said very truly that evidence is not to supply any defect in an information. There is no defect in the information: the information sets forth the libel at large; and the information charges that libel to be "of and concerning his majesty's government," as I before-mentioned. Upon that the court has now decided agreeably to the finding of the jury; and no man can really mistake the malicious meaning and insinuation of it. It is a libel which contains a most audacious insult upon his majesty's administration and government, and the conduct of his loyal troops employed in America. It treats those disaffected and traitorous persons who have been in arms and in open rebellion against his majesty, as faithful subjects—faithful to the character of Englishmen: and it falsely and seditiously asserts, that for that reason only they were inhumanly murdered by his majesty's troops at Lexington and Concord. By this same libel subscriptions too are proposed and promoted for the families of those very rebels who fell in that cause, traitorously fighting against the troops of their lawful sovereign. This is the light in which this libel must appear to every man of a sound and impartial understanding; this is the plain and the unartificial sense of it. The contents of this libel have been too effectually scattered and dispersed by your means, as charged in the several counts of the information, and they have been inserted in divers and different newspapers. The contents are too well known, and I trust abhorred, to need any repetition from me, for the sake of observing farther upon their malice, sedition, and falsehood. The court have considered of the punishment fit to be inflicted upon you for this offence: and the sentence of the court is,——That you do pay a fine to the king of 200*l*., that you be imprisoned for the space of twelve months, and until that fine be paid; and that upon the determination of your imprisonment, you do find sureties for your good behaviour for three years, yourself in 400*l*. and two sureties in 200*l*. each.

Mr. *Horne*. My lord, I am not at all aware of what is meant by finding sureties for the good behaviour for three years. It is that part of the sentence that perhaps I shall find most difficulty to comply with, because I don't understand it. If I am not irregular in entreating your lordship to explain it to me:—your lordships, I suppose, would chuse to have your

sentences plainly understood, and I know not the nature of this suretyship.

Lord *Mansfield.* It is a common addition.

Mr. *Horne.* And, it may be, a common hardship.

Mr. Just. *Aston.* Not to repeat offences of this sort.

Mr. *Horne.* Of this sort?

Lord *Mansfield.* Any misdemeanour.

Mr. Just. *Aston.* Whatever shall be construed bad behaviour.

Mr. *Horne.* If your lordships would imprison me for these three years, I should be safer; because I can't foresee, but that the most meritorious action of my life may be construed to be of the same nature.

Lord *Mansfield.* You must be tried by a jury, by your country, and be convicted. You know it is a most constant addition. You know that yourself very well.—Where are the tipstaves?

To reverse this judgment, Mr. Horne brought a writ of error in parliament, and on his behalf it was argued by Mr. Lee and Mr. Dunning, that it is a principle in the law of England, that, in criminal prosecutions, the information or indictment must contain in itself a certain and explicit charge of the offence intended to be imputed to the defendant, and no defect of certainty in the charge can be helped or supplied by any proof, and still less by presumption or intendment, either in the jury who give the verdict, or in the court which pronounces judgment upon it. It is equally true, that all penal charges ought to be taken most favourably for the subject, in every stage of the prosecution; so that if it appears doubtful whether the fact alleged in the information or indictment be necessarily criminal, or may possibly be innocent, the prosecution shall fail; and though the jury find a general verdict, such verdict ought not to be construed by the court to find any thing beyond the plain and certain allegations in the indictment or information. In this case the jury had found that the king's troops, mentioned in the advertisement, meant 'his majesty's troops;' for this, and the publication by the defendant, were facts charged, and therefore might be properly said to have been found. If it should be admitted, which was not found, that the troops meant his majesty's army in America, there was nothing in the information that extended the imputation on those troops to his majesty or his ministers, unless it was in the introductory words, which had been resorted to as charging the advertisement to be written, 'of and concerning his majesty's government, and the employment of his troops.' If the jury were to be understood to have found it to be so written, (though from the company that passage kept with the words 'false, wicked, malicious, scandalous, seditious,' it might more properly be considered as a matter of inference than of charge,) it would not of necessity follow, that the employment of the troops with which Mr. Horne expressed his dissatisfaction, was an employment by his majesty, or by any person in authority under him. It was equally consistent with a supposition, that the troops in the instance complained of employed themselves in acting without, or even contrary to the orders of those to whose orders they ought to have conformed. Nor did it follow, that because the advertisement was found to have been written concerning his majesty's government, that it therefore necessarily imported an intention to arraign that government. Armies are properly considered as among the instruments of government, and are properly employed, whenever they are so employed in the defence of a just government. Whoever writes therefore concerning his majesty's armies, may be said to write concerning his majesty's government. But the supposed libel carried no imputation against his majesty, or his government; unless it should be understood to mean, that the misbehaviour which it was supposed to impute to the troops was in an instance wherein they were acting in due obedience to legal orders, under an authority derived from his majesty; but this was no where charged, and consequently not found. In order to have supported the information in the manner in which probably the prosecutor wished to have it understood, he ought to have shewn by proper averments, that there was at the time a rebellion existing in America; that the troops were sent thither to suppress it; that they were in the act of exerting themselves, in obedience to proper orders, towards this object; and that though the loss of lives was among the consequences of that exertion, it was no murder, nor in any sense a violation of law, but, on the contrary, perfectly justified by the occasion. Why averments to this effect were not to be found in the record, it was not difficult to conjecture, to those at least who understand that averments must be proved; and it might not be thought certain that a jury would be found who would assent to the truth of these propositions. It would be no answer to say that all this was notorious; or that at the trial it was proved; for if it were so, which was by no means admitted, it was perfectly immaterial, if the principle be, as it was conceived to be, that the judges are to receive or use no other knowledge of the facts essential to constitute a criminal charge, but what they collect from the record.

On the other side it was contended by the Attorney General Thurlow and Solicitor General Wedderburn, that the crime of a libel consists in opprobrious words or signs, written, made, exhibited, or published, concerning some person, or other subject, which it is criminal so to revile. The accusation must therefore state the opprobrious words or signs, and they must be applied to the person or thing supposed to be reviled: but no technical form of words is necessary for that purpose. If the natural and apparent sense of the words themselves be opprobrious, and require no other medium to fix such meaning upon them, no

innuendo or averment to support it can be necessary to raise an apparent meaning. If the application of such opprobrious words be expressly made in the phrase of the libel, no innuendo, or averment to support it, can be wanting to raise an express application. It is a well known rule, that judges are to understand a libel as others do, without straining to find a loop-hole to palliate the offence, which in some measure would be to encourage scandal. It would be a ridiculous absurdity to say, that a writing, understood by the meanest capacity, cannot possibly be understood by a judge and jury; therefore judges will not resort to every possible construction, only to avoid the natural one; much less give a different sense to the words, by supposing circumstances which, if they exist, should be proved. The words complained of conveyed, in their natural and apparent meaning, a gross reflection, the imputation of an heinous and hateful crime, upon the employment of the national force, and consequently upon his majesty's government, of which the employment of that force is an important part. These words, 'the king's troops,' in a common and obvious sense, mean that national force which the law takes notice of and authorises. The literal meaning of the words was confirmed by the context, and it was impossible to believe that any English reader had put another interpretation upon them, much less had any such reader mistaken them to mean flocks or companies of strollers, &c. as the objection idly supposed. The application of these opprobrious words to the king's government, and the employment of his troops, not only appeared in the phrase of the libel itself, but was expressly charged in the information, and proved even by the defendant's witnesses, and found by the jury; that matter therefore was also concluded. The averments suggested in the defendant's argument were by no means necessary to constitute a state of this crime; for supposing there had been no rebellion, or troops employed to suppress it, or engagement by the king's troops, or slaughter made of the rebels, the guilt of this calumny would not have been diminished by its total want of foundation or colour of truth.

After hearing counsel on this writ of error, the following Question was put to the Judges; "Whether the writing contained in the information is, in point of law, sufficiently charged to be a libel upon his majesty's government?"—*(Brown's Cases in Parliament, vol. 4, p. 370.)*

And, on Monday, May 11, 1778,

Lord Chief-Justice *De Grey* delivered the unanimous opinion of all the judges in the affirmative, and gave the reasons as follow:

My lords, I have conferred with the Lord Chief Baron, and the rest of my brethren the judges, upon the question which your lordships have propounded to us; and I am deputed to deliver their opinion to your lordships upon it.

The question is, 'Whether the writing described in the information is sufficiently 'charged to make it a libel upon his majesty's 'government?'

By the words 'sufficiently charged' I understand to be meant, Whether it is charged with sufficient certainty?* But, though the law requires certainty, we have no precise idea of the signification of the word; which is as indefinite in itself, as any word that can be used. Lord Coke, speaking of it, represents it thus [Co. Litt. 330, a. & 5 Co. 121]: 'There 'are three kinds of certainties: certainty to a 'certain intent in general; certainty to a com-'mon intent; and certainty to a certain intent 'in every particular.' This last is rejected in all cases, as partaking of too much subtlety. The second is sufficient in defence: the first is required in a charge or accusation.

Perhaps this account of it does not convey a much clearer idea; but I apprehend it will become intelligible, by considering the grounds of the distinctions, taken in the present case, upon the certainty required in a charge.

The charge must contain such a description of the crime, that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of 'guilty' or 'not 'guilty' upon the premises delivered to them; and that the Court may see such a definite crime, that they may apply the punishment which the law prescribes.

This, I take to be what is meant by the different degrees of certainty mentioned in the books: and it consists of two parts; the matter to be charged, and the manner of charging it.

As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed, must be set out; and all beyond are surplusage. And therefore, in the instance of the prosecution for perjury which has been cited, it was necessary to set out the oath, as an oath taken in a judicial proceeding, and before proper persons, in order to see, whether it was an oath which the Court had jurisdiction to administer. In the prosecution of a constable for not serving the office [5 Mod. 96], it is necessary to set out the mode of his election; because, if he is not legally elected, he cannot be guilty of a crime in not serving the office. Where the circumstances go to constitute a crime they must be set out: where the crime is a crime independently of such circumstances, they may aggravate, but do not contribute to make the offence.

To apply these principles to the case of a libel: it may happen, that a writing may be so expressed, and in such clear and unambiguous words, as that it may amount of itself to a libel. In such a case, the Court wants no circumstances to make it clearer than it is of itself: and therefore, all foreign circumstances intro-

* Respecting certainty, see the "Ἔκθεσις ἀναγκαίων" Advertisement, part 2, ch. 6, and a Note to Eunomus, Dialogue 2, p. 46.

duced upon the record would be only matter of supererogation. But, if the terms of the writing are general, or ironical, or spoken by way of allusion or reference; although every man who reads such a writing, may put the same construction upon it, it is by understanding something not expressed in direct words; and it being a matter of crime, and the party liable to be punished for it, there wants something more. It ought to receive a judicial sense, whether the application is just: and the fact, or the nature of the fact, on which that depends, is to be determined by a jury. But a jury cannot take cognizance of it, unless it appears upon the record; which it cannot do without an averment.

Thus much is sufficient to be said, in regard to the matter that is necessary to be averred.

Secondly, as to the manner of making the averment: there are cases, where a direct and positive averment is necessary to be made in specific terms; as, where the law has affixed and appropriated technical terms to describe a crime; as in murder, burglary, and others. It is likewise true, that in all cases, those facts which are descriptive of the crime, must be introduced upon the record by averments, in opposition to argument and inference. In the case of a libel which does not in itself contain the crime, without some extrinsic aid, it is necessary that it should be put upon the record, by way of introduction, if it is new matter; or by way of innuendo, if it is only matter of explanation. For an innuendo means nothing more than the words, 'id est,' 'scilicet,' or 'meaning,' or 'aforesaid,' as explanatory of a subject matter sufficiently expressed before; as, such a one, meaning the defendant, or such a subject, meaning the subject in question. But as an innuendo is only used as a word of explanation, it cannot extend the sense of the expressions in the libel beyond their own meaning, unless something is put upon the record for it to explain. As in an action upon the case against a man for saying of another, 'He has 'burnt my barn,' [4 Co. Barham's case], the plaintiff cannot there, by way of innuendo, say, meaning 'his barn full of corn;' because, that is not an explanation of what was said before, but an addition to it. But if in the introduction it had been averred, that the defendant had a barn full of corn, and that in a discourse about the barn, the defendant had spoken the words charged in the libel of the plaintiff; an innuendo of its being the barn full of corn would have been good: for by coupling the innuendo in the libel with the introductory averment, 'his barn full of corn,' it would have made it complete.

And I conceive, that this kind of extrinsic matter may be introduced upon the record, either by direct averment, or by recitals, or by general inference; and that such introductory matters and explanatory innuendoes so made to appear upon the record do all amount to sufficient averments.

An innuendo is an averment, that such a one, means such a particular person; or, that such a thing, means such a particular thing: and when coupled with the introductory matter, it is an averment of the whole connected proposition, by which the cognizance of the charge will be submitted to the jury, and the crime appear to the Court.

The libel in the present case says, 'That the 'subscription proposed to be entered into was 'for the relief of the widows, orphans, and aged 'parents of our beloved American subjects, 'who, faithful to the character of Englishmen, 'and preferring death to slavery, were for that 'reason only inhumanly murdered by the 'king's troops.' It is not necessary to consider, whether this libel comes within the description of a libel, which constitutes a crime of itself, without any assistance of other circumstances; or what our opinions upon that question might be; because, we are all of opinion, that there is sufficient matter expressed with sufficient certainty to constitute the crime.

But, two questions have been made upon the introductory part of the information: First, Whether, the interior subsequent matter being introduced by the words 'of and concerning 'his majesty's government, and the employment of his troops,' these words amount to a sufficient averment to put it legally upon the record? And secondly, Whether, admitting it to be legally put upon the record, the sense of it must be understood to be a libel upon his majesty's government?

And first, 'Whether it is legally put upon the record in point of form?'—It is put upon the record by these words:—'That the de- 'fendant wrote and published such a libel, of 'and concerning his majesty's government and 'the employment of his troops.' This is an averment; for the fact is, that 'he wrote and 'published the libel;' and the circumstance connected with the fact, and which therefore makes a part of it, is, that 'he wrote and pub- 'lished the paper or libel, of and concerning 'his majesty's government and the employ- 'ment of his troops.' If the jury, upon the defence set up, had found, that the libel was not published relative to the king's government, or the employment of his troops, the information was not proved: for it contains an entire proposition. And if it had appeared, that the paper related to a voluntary act of the troops only, and not to an employment of them by government, the information would be false: because the prosecutor would have failed in the proof of the proposition, that it was written, 'of and concerning the king's government and 'the employment of his troops.'

This is no new doctrine: the cases cited at the bar shew it. In Tutchin's case,* one part of the libel was this: 'The mismanagements 'of the navy, have been a greater tax upon 'the merchants, than the duties raised by go- 'vernment.' It might have been said there, What navy? Whose navy? was it the navy of

* See it in this Collection, vol. 14, p. 1095.

England, or did it mean only the merchant ships? The information charged, that the defendant had written a scandalous and seditious libel; in which the information stated in the introductory part, 'of and concerning the royal 'navy of this kingdom and the government of 'the said navy, it is written so and so.' When the information came, in stating the libel, to the word 'navy,' by an innuendo, it explains it thus: 'meaning the royal navy of this kingdom;' which, being coupled with the averment in the introductory part of it, made the sense and the charge complete.—Again, in another part of the same information for another libel, one part of the libel was thus: 'There is 'another plot against you:' 'and afterwards, 'it is a plot preparatory to your trial.' What trial? The introductory part of the information charged, that this libel was written, 'of 'and concerning the defendant, and a prosecu-'tion to be had against him for divers seditious 'libels by him, before that time, composed and 'published.' The information afterwards explains 'you' thus; meaning 'the defendant.' This, connected with the averment in the introductory part, was a sufficient explanation of the charge. The defendant was found guilty of the several libels in the information. He moved in arrest of judgment; but not upon the ground of the insufficiency of the averments: for it was sufficiently understood, that 'of and con-'cerning the royal navy, &c.' was good without any other additional averments. In the case of Rex *v.* Matthews,* which was an indictment upon stat. 6 Ann. c. 7, the words of the libel were these; 'From the solemnity of 'the Chevalier's birth, and if hereditary right 'be any recommendation, he has that to plead 'in his favour.' It was there said, What Chevalier? Who is he? What recommendation? And to what thing?—In the introductory part, the information charged the libel to have been written, 'of and concerning the Pretender,' and 'of and concerning his right to the crown 'of Great Britain.' And it was held, that the innuendoes in the body of the libel, explaining the words 'Chevalier, &c.' to mean the Pretender and his hereditary right to the crown of Great Britain, when connected with the averments in the introductory part, of its being written, 'of and concerning the Pretender and 'his right to the crown of Great Britain,' were a sufficient explanation to make good the charge.

In the case of Rex *versus* Alderton, [Sayer's Reports, 280], the libel was an advertisement, reciting certain orders made for collecting money on account of the distemper amongst the horned cattle, advertised by the clerk of the peace for the county of Suffolk; and it charged, that by these orders the money collected had been improperly applied. The information charged this to be a libel on the justices of Suffolk. In the body of the libel, it was not said, 'by order of the justices,' nor did the information in the introductory part say, that it was a libel 'of and concerning the jus-'tices of Suffolk.' But when the information came to state any of the orders in the advertisement, it added this innuendo, 'meaning 'an order of the justices of peace for the county 'of Suffolk.' But these innuendoes could not supply the want of an averment in the introductory part, of its being written of and concerning the justices; because they were not explanatory of, but in addition to, the former matter; and the Court were of opinion, that the information having omitted the words, 'of 'and concerning the justices' in the introductory part, such omission was fatal: and judgment was accordingly arrested.

From these cases it is clear, that the words 'of and concerning' are a sufficient introduction of the new matter. And therefore in the present case, it is, in point of form, a sufficient averment upon the record, that the paper was written 'of and concerning the king's govern-'ment.'

But secondly, it has been argued upon the further charge respecting the troops, that it does not import that these troops were so employed by act of government. And therefore, though it should be held to have been written, 'of and concerning the king's government,' yet 'it does not appear to be so, relative to the 'act of the troops.' It has been further argued, that in giving their opinion upon this point, 'The judges can take no knowledge of any 'thing that is said or written, but what they 'can collect from the record;' and likewise, 'That every accusation taken from the record 'must be plain and clear, and is not to be 'strained by any forced meaning or construc-'tion.' But, as the crime of a libel consists in conveying and impressing injurious reflections upon the minds of the subject; if the writing is so understood, by all who read it, the injury is done by the publication of these injurious reflections, before the matter comes to the jury and to the Court. And if courts of justice were bound by law to study for any one possible or supposable case or sense, in which the words used might be innocent, such a singularity of understanding might screen an offender from punishment, but it could not recal the words, or remedy the injury. It would be strange to say, and more so to give out as the law of the land, that a man may be allowed to defame in one sense, and to defend himself by another. Such a doctrine would indeed be pregnant with the 'nimia subtilitas,' which my lord Coke so justly reprobates.

The true rule to go by, is laid down by my lord King in the case of Rex *versus* Matthews, which is this: 'That the court and jury must 'understand the record as the rest of mankind do.'

This being the rule, and the accusation such as I have before stated, it remains to be seen only what the words in the present case are. They are these: 'That the defendant, of and 'concerning the king's government and the

* See it in this Collection, vol. 15, p. 1323.

'employment of his troops,' said, 'that inno-
'cent subjects had been inhumanly murdered
'by the king's troops, only for preferring death
'to slavery.' Do these words import in their natural and obvious sense, that the king's troops were employed by the act of government, inhumanly to murder the king's innocent subjects?—There can be no doubt but that the king's government comprehends all the executive power of the state, both civil and military; that he employs all the national force, and that his troops are the instruments with which part of the executive government is to be carried on. The introductory part of this information charges, that the subject of the writing in the present case was, 'The troops,
'and the king's troops, and the business they
'had done.'

It has been truly said, that the king's troops may, like other men, act as individuals: but they can be employed as troops by the act of government only. If the averment therefore amounts to this, that, in the discourse which was held, the words were said 'of and concern-
'ing the king's government;' the natural import of them, without any forced or strained meaning, appears to us to be this; I am speaking of the king's administration of his government relative to his troops, and I say, 'that our
'fellow subjects, faithful to the character of
'Englishmen, and preferring death to slavery
'were for that reason only inhumanly mur-
'dered by the king's order; or the orders of
'his officers.' The motive imputed tends to aggravate the inhumanity of the act, and consequently, of the imputation itself: because it arraigns the government of a breach of public trust, in employing the means of the defence of the subject in the destruction of the lives of those who are faithful and innocent.

As to any other circumstances not stated in the information; if those which are stated, do of themselves constitute an offence, the rest supposed by the defendant, whether true or false, would have been only matter of aggravation, and not any ingredient essential to the constitution of the crime, and therefore not necessary to be averred by the record.

Upon the whole of the case therefore, we are unanimously of opinion, that the record contains 'all facts and circumstances necessary
'to warrant the conclusion of the jury. And
'that it likewise contains all facts and circum-
'stances necessary for the information of the
'Court to give their judgment upon the occa-
'sion.'

Whereupon it was ordered and adjudged, That the judgment, given in the court of King's-bench for the king, be affirmed, and the record remitted, &c.—*(Cowper's Reports,* p. 682.*)*

In the course of the debate July 17, 1812, respecting lord Holland's bills relative to informations *ex officio*, (see New Parl. Deb. vol. 23, p. 837, 1069, *et seq.*) lord Holland having, in support of his argument, relied on the authority of Mr. Justice Blackstone's Commentaries, it appears that lord Ellenborough mixed with general expressions of praise others extremely depreciatory of that work. "He would say that at the time of writing his Commentaries, judge Blackstone was extremely ignorant of criminal law."—"Blackstone when he compiled his lectures was comparatively an ignorant man, he was merely a fellow of All Souls College, moderately skilled in the law. His true and solid knowledge was acquired afterwards; he grew learned as he proceeded with his work."—"There were many things in Blackstone's work which, as a lawyer, he was bound to say were mis-statements, among them was the proposition to which the noble lord had referred." Lord Erskine, however, powerfully vindicated the Commentaries; "The work shewed the author's deep researches into all the principles of our legal constitution, and as informations *ex officio* were part of the ancient law, it was from history and writers of authority which were open to him, that their true nature was to be traced; from his not having attended the courts, he might not know the modern practice, but he knew the grounds upon which such informations had been first adopted and finally retained, when their expediency came to be considered; and he appeared to him to be correct, when he said, 'that the objects of them, were properly such enormous misdemeanors as tended to endanger or disturb the government, and in which a moment's delay might be fatal; in such cases, the law had given to the crown the power of an immediate prosecution without waiting for any previous application to any other tribunal.' —He entirely agreed with his noble and learned friend that this was not quite a correct view of the *use* of informations in our own times, nor even when the Commentaries were written; but to arraign the work on that account, would be trying it not by the principles of the law, but by the very abuse complained of."

Indeed, whatever be the authority of Mr. Justice Blackstone's opinions at the time of his death, to that authority, and not merely to the weight of his opinions when he compiled his lectures, are his Commentaries as he left them entitled. Nine editions of Blackstone's Commentaries were published in his life-time, and it appears from Hargrave's Jurisconsult Exercitations, vol. 1, p. 381, that the tenth edition, though published after Blackstone's death, had been corrected by him.

Not unconnected with the law of libel upon which Mr. Horne said so much in this case, is the *dictum* of lord Ellenborough in the case of Dubost *v.* Beresford, (2 Campbell's Nisi Prius Rep. 511,) being an action for destroying a picture, which was publicly exhibited, but which it appeared was highly defamatory of a gentleman and his wife who was the defendant's sister. Lord Ellenborough, C. J. B. R. said "If it was a libel upon the persons introduced into it, the

law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it."

I have been informed by very high authority, that the promulgation of this doctrine relating to the Lord Chancellor's injunction excited great astonishment in the minds of all the practitioners of the courts of equity, and I had apprehended that this must have happened; since I believe there is not to be found in the books any decision or any dictum, posterior to the days of the Star Chamber, from which such doctrine can be deduced, either directly, or by inference or analogy: unless indeed we are to except the proceedings of lord Ellenborough's predecessor Scroggs and his associates, in the case of Henry Care; in which case "Ordinatum est quòd liber intitulat 'the Weekly Packet of Advice from Rome, or the History of Popery,' non ulteriùs imprimatur vel publicetur per aliquam personam quamcúnque." See the Order in vol. 8, p. 198, in Scroggs's Case. See Henry Care's Case, in vol. 7, p. 1111. See also, vol. 19, p. 1152.

Concerning appeal of murder, spoken of in p. 716, see the cases of Spencer Cowper, vol. 12, p. 1106, and Thomas Bambridge, vol. 17, p. 397.

In Vol. 16, which is just published, of the New Parliamentary History (p. 42.) it appears that the attempt at the time of the Revolution to take away Informations in the court of King's Bench, (see p. 678) was mentioned by Mr. Nicholson Calvert in his speech on March 4, 1765, in the House of Commons, upon moving for leave to bring in a Bill 'for the relief of his Majesty's subjects, touching Informations in the King's-bench, by and in the name of his Majesty's Attorney-General.'

On the writ of error in Wilkes's Case, (See Vol. 19, p. 1126) in support of the first error assigned, viz. "That it does not appear by the said records, that the said sir Fletcher Norton, knight, by whom the said informations against the said John Wilkes were exhibited, had any lawful power, warrant, or authority, according to the law of the land, to exhibit the said informations in the records aforesaid specified; and, therefore, that the said informations are not sufficient informations in law, whereon to convict the said John Wilkes of the offences in and by the same informations charged upon him, and to ground the aforesaid judgments against him," the following reasons were alleged in his printed Case, signed by his counsel (Glynn and Davenport.)

"I. Because the said informations are exhibited and filed by the said sir Fletcher Norton, as his Majesty's Solicitor General, *ex officio*, when, by virtue of such his office, he had no general authority so to do.

"II. Because it does not appear, that he had any special authority so to do.

"Much doubt has been formerly entertained by those who where most eminently distinguished for their knowledge of the criminal laws of this country, whether any criminal informations were lawful. The constructions of Magna Charta, cap. 29, some ancient statutes, and books of the law, declare and agree, That no man can be charged, but by indictment or presentment.—In the case of the King and Berchet and others, 1 and 2 William and Mary, reported in 5th Mod. 463, and there called Prynne's case, sir Francis Winnington averred that lord chief justice Hale had often said, 'That if ever informations came in dispute, they could not stand, but must necessarily fall to the ground.'—It is admitted, however, that the court of King's-bench in that case held, that informations lay at common law.

"The present question therefore will be, Who are the officers known to the law, and described in the law books, as the persons with whom only this right of exhibiting informations *ex officio* rested?—It may be clearly collected, from the authority of the legislature, and the law books, that these officers were only the king's attorney-general, and the king's coroner, to which latter is always added, in such cases, the title of attorney also—No act of parliament, no law book, mentions any other officer, as having this power in any case, or under any circumstances.—From the king's coroner this power was taken away by the statute 4 and 5 William and Mary, cap. 18, and was then left in the attorney general only.—Serjeant Hawkins in his second volume of Pleas of the Crown, fol. 268, observing upon that statute's taking away this power from the king's coroner and attorney only, says, from whence it follows, that informations exhibited by the attorney general remain as they were at common law.

"Such informations can only be exhibited in the court of King's-bench, of which court the king's attorney general and the king's coroner and attorney, commonly called the master of the Crown-office, are officers upon record, and have their known seats and places there as such.

"Sir Bartholomew Shower, in his Reports fol. 114, in the same case above mentioned in 5 Mod. argues and observes, upon the statute 31 Elizabeth, cap. 5, and its proviso in sect. 3, providing "That that act shall not extend to any such officers of record as have, in respect of their offices, theretofore lawfully used to exhibit informations,' that it is the judgment of parliament, that there were officers to exhibit them, and those that are meant must be the attorney and his deputy the coroner, for I know, says he, no other.—It may be thought that sir Bartholomew Shower is inaccurate in calling the coroner deputy to the attorney, because the coroner has a superior seat in the court of King's-bench to the attorney.—But sir Bartholomew Shower must be understood to speak of the coroner, as deputy only in this instance, he not having equal power with the attorney over the information when exhibited; for the coroner cannot put a stop to it even though he

should have the king's warrant under his sign manual for the purpose; and yet the attorney-general can, by virtue of his office, stop it at once by a *noli prosequi*, which appears by the case of the King *v.* Benson, 1 Vent. 33. Sir Bartholomew Shower, fol. 120, says further, That in case of malicious prosecution, no action lies against the attorney or coroner, any more than against a grand juror or prosecutor; and the reason given for it is, because they are upon their oaths, and so says he, they (meaning the attorney and coroner) are here as officers upon record; and fol. 122, he says, the way of apprizing the Court is, by 'dedit curiæ hic intelligi et informari' before any process, which is done by a sworn officer filed of record.

"If it be contended, that during the vacancy of the office of attorney general, his authority, in this respect, devolves upon the solicitor general; it is answered, that no law book or judicial determination warrants that argument. It is admitted that there are some modern instances in the rolls of the Crown-office of informations filed by the solicitor general, *ex officio*, some of which describe the vacancy of the office of attorney general, as if that was the circumstance from which the solicitor general derived his authority, and raised to himself this power. But as the others are silent about such vacancy, they must prove a general original authority, or nothing; because if a special authority is to give the title, it must by the rules of law be set forth in the record, for nothing out of the record can warrant the judgment upon the record. There does not appear to be one instance of a litigation, or judicial opinion, concerning such informations filed by the solicitor general.

"It appears upon the records, that the attorney general became the prosecutor of the present informations, before the judgments were given. But no adoption afterwards, by the attorney general, of these illegitimate offspring can sanctify their birth. If the informations were bad when they were filed, no subsequent act whatsoever could make them good.

"Wherefore, as the legislature has not substituted, nor meant to substitute the solicitor general, or any other person or persons, in the room of the coroner, from whom they took this power, or in the place of the attorney general, during the vacancy of that office, as it was always in the power of the king to supply that vacancy at any moment he pleased; as the legislature has left the attorney general the only known officer in law, authorised to exhibit criminal informations *ex officio*; as the solicitor general is no sworn officer of the court of King's-bench, either filed of record, or otherwise; as all the law-books are consistently silent, about any power lodged in him for such purpose; as this power has of late time only been usurped by the solicitor general in some modern instances, and those too varying in their form, as if he did not know on what ground he claimed or exercised the power; and as he appears to have had no warrant or authority whatsoever to act in this instance as attorney for the crown; it is humbly submitted by the plaintiff in error, that the informations in question were filed without any lawful authority, and for that reason are fundamentally bad and void, so as not to warrant any judgments upon them against the plaintiff in error."

On the part of the crown it was said in answer, "That an information for an offence is a surmise or suggestion upon record, on behalf of the king, to a court of criminal jurisdiction, and is, to all intents and purposes, the suit of the king; and that it would be difficult to assign a reason, why his majesty should not have equal liberty with the subject of commencing and prosecuting his suits, by those persons whom he thinks fit to confide in and employ. That the attorney and solicitor general are invested, by their offices, with general authority to commence and prosecute the suits of the crown: it is true, the attorney general, as the superior officer, has the direction and control of his majesty's prosecutions, in which the solicitor general seldom interferes; but it is equally true, that during the vacancy of the office of attorney general, all the suits of the crown, both criminal and civil, are commenced, prosecuted, and carried on by the Solicitor General. That at the time when these informations were filed against Mr. Wilkes, the office of attorney general was vacant, and consequently the solicitor general was the proper officer to exhibit them. But it is said, that the fact of the vacancy ought to appear upon the record: the only pretence for such an averment is to inform the court of the vacancy, as an inducement to receive the information from the solicitor general; but there is no necessity for that intelligence. The attorney general is, in truth, an officer of and has a place in the court of King's-bench, and the Court will take notice of the vacancy of the office; and there are multitudes of instances of suits commenced and prosecuted by the solicitor general on behalf of the Crown, without any averment or notice taken of the vacancy of the office of attorney general. But if the circumstance of an information being filed by the solicitor general furnished any real ground of objection to the prosecution, yet it was conceived, that the plaintiff in error was now precluded from availing himself of it; it could at most amount only to an irregularity, and the remedy must have been by application to the court to have the information taken off the file, or the proceedings stayed. It could never be a cause of demurrer, or of arrest of judgment, or a ground of error; and Mr. Wilkes, having pleaded to the offence, had waived any advantage of that irregularity. Besides, the solicitor general having, during the suit, been appointed Attorney General adopted the information, joined issue with the plaintiff in error, and prosecuted the suit to a conviction."

553. The Trial of JOHN ALMON, Bookseller, upon an Information, filed *ex officio*, by William De Grey, esq. his Majesty's Attorney-General, for selling Junius's Letter to the King: Before the Right Hon. William Lord Mansfield, and a Special Jury of the County of Middlesex, in the Court of King's-Bench, Westminster-Hall, on Saturday the 2d day of June, 10 GEORGE III. A. D. 1770. [Taken in Short-hand.*]

COPY of an INFORMATION, filed EX-OFFICIO by WILLIAM DE GREY, esq. his Majesty's Attorney General, against JOHN ALMON, Bookseller, for publishing a Libel.

Middlesex, Filed Hilary Term, 10 *Geo.* 3.

INFORMATION sets forth, That John Almon, late of the parish of St. James, within the liberty of Westminster in the county of Middlesex, bookseller, having no regard to the laws of this kingdom, or the public peace, good order, and government thereof, and most unlawfully, seditiously, and maliciously contriving and intending by wicked, artful, scandalous, and malicious allusions, suppositions and insinuations, to molest and disturb the happy state, and the public peace and tranquillity of this kingdom, and most insolently, audaciously, and unjustly to asperse, scandalize, and vilify our said present sovereign lord the king, and to represent, and to cause it to be believed, that our said sovereign lord the king had by his measures of government lost the affections of his subjects in that part of Great Britain called England, and in Ireland, and in his dominions of America, and brought the public affairs of this kingdom into a most distressed, disgraceful, and lamentable state and condition; and also, most unlawfully and maliciously contriving and intending to represent, and cause it to be believed, that our said lord the king had bestowed promotions and favours upon his subjects of that part of his kingdom of Great Britain, called Scotland, in preference to his subjects of that part of Great Britain called England, and thereby to create groundless jealousies and uneasiness in his majesty's subjects of England, and also most unjustly to represent, and cause it to be believed, that our said lord the king had bestowed promotions and favours upon one part of his said majesty's army, commonly called the guards, in preference to another part of his army, commonly called the marching regiments, and thereby to create groundless jealousies, uneasiness, and mutiny, in that part of his army called the marching regiments, and to bring our said lord the king and his administration of the government of this kingdom, into the utmost dishonour and contempt, and to poison and infect the minds of his majesty's subjects, with notions and opinions of our said lord the king, highly unworthy of our said lord the king, and of that paternal love and concern which he hath always showed and expressed for all his subjects, as if our said lord the king had unjustly taken a part with some of his subjects against others, and had unjustly prostituted the measures of his government to gratify personal resentment; and also, thereby as much as in him the said John Almon lay to alienate and withdraw from our said lord the king that cordial love, allegiance, and fidelity which every subject of our said lord the king should and of right ought to have and shew towards our said lord the king; and also, most unlawfully, wickedly and maliciously contriving and intending, by wicked, artful, scandalous, and malicious allusions, suppositions and insinuations, to traduce, scandalize, and vilify the principal officers and ministers of our said lord the king, employed and entrusted by our said lord the king in the conduct and management of the weighty and arduous affairs of this government, and to represent, and cause it to be believed, that said principal officers and ministers had violated the laws and constitution of this kingdom, and adopted weak, oppressive, and infamous measures in the administration of the public affairs of this kingdom, and had brought distress and misery upon the subjects of this kingdom; and thereby to weaken and diminish the public credit, power and authority of the government, and also, as much as in him the said John Almon lay, contriving and intending to asperse, scandalize and vilify the members of the present House of Commons of this kingdom, and to represent them as an abandoned, profligate set of men, who had arbitrarily invaded the rights of the people, violated the laws, and subverted the constitution of this kingdom, and also as much as in him the said John Almon lay, to move, excite, and stir up the subjects of our said lord the king to insurrection and rebellion against our said lord the king, he the said John Almon, upon the first day of January, in the 10th year of the reign of our said present sovereign lord George the 3d, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth, with force and arms, at the parish

* Printed for J. Miller, in Queen's-Head-Passage, Paternoster-row, 1770.

of St. James aforesaid, within the liberty of Westminster aforesaid, in the county of Middlesex aforesaid, unlawfully, wickedly, seditiously, and maliciously did publish, and did cause and procure to be published, a most wicked, scandalous, seditious, and malicious libel intituled, The London Museum of Politics, Miscellanies, and Literature, in which said libel of and concerning our said present sovereign lord the king, and of his administration of the government of this kingdom, and also of and concerning the public affairs of this kingdom, and also of and concerning the principal officers and ministers of our said lord the king, employed and entrusted by our said lord the king in the conduct and management of the weighty and arduous affairs of this government, and also of and concerning the members of the present House of Commons of this kingdom, are contained (amongst other things) divers, wicked, scandalous, seditious, and malicious matters (that is to say) in one part thereof according to the tenor following, to wit, "Junius's Letter to the **** (meaning our said lord the king). When the complaints of a brave and powerful people are observed to encrease in proportion to the wrongs they have suffered, when, instead of sinking into submission, they are roused to resistance, the time will soon arrive at which every inferior consideration must yield to the security of the sovereign, and to the general safety of the state. There is a moment of difficulty and danger, at which flattery and falshood can no longer deceive, and simplicity itself can no longer be misled. Let us suppose it arrived. Let us suppose a gracious, well-intentioned prince, made sensible at last of the great duty he owes to his people, and of his own disgraceful situation; that he looks round him for assistance, and asks for no advice, but how to gratify the wishes, and secure the happiness of his subjects. In these circumstances it may be matter of curious speculation to consider, if an honest man were permitted to approach his king, in what terms would he address himself to his sovereign. Let it be imagined, no matter how improbable, that the first prejudice against his character is removed, that the ceremonious difficulties of an audience are surmounted, that he feels himself animated by the purest and most honourable affections to his king and country, and that the great person, whom he addresses, has spirit enough to bid him speak freely, and understanding enough to listen to him with attention. Unacquainted with the vain impertinence of forms, he would deliver his sentiments with dignity and firmness, but not without respect. Sir, (meaning our present sovereign lord the king) it is the misfortune of your life, and originally the cause of every reproach and distress which has attended your government, that you (again meaning our present sovereign lord the king) should never have been acquainted with the language of truth, until you heard it in the complaints of your people. It is not, however, too late to correct the error of your education. We are still inclined to make an indulgent allowance for the pernicious lessons you received in your youth, and to form the most sanguine hopes from the natural benevolence of your disposition. We are far from thinking you capable of a direct, deliberate purpose to invade those original rights of your subjects, on which all their civil and political liberties depend. Had it been possible for us to entertain a suspicion so dishonourable to your character, we should long since have adopted a stile of remonstrance very distant from the humility of complaint. The doctrine inculcated by our laws, that the king can do no wrong, is admitted without reluctance. We separate the amiable good-natured prince from the folly and treachery of his servants, and the private virtues of the man from the vices of his government. Were it not for this just distinction, I know not whether your m——y's (meaning majesty's) condition, or that of the English nation, would deserve most to be lamented. I would prepare your mind for a favourable reception of truth, by removing every painful, offensive idea of personal reproach. Your subjects, Sir, (again meaning our said present sovereign lord the king) wish for nothing but that as they are reasonable and affectionate enough to separate your person from your government, so you (again meaning our said present sovereign lord the king) in your turn should distinguish between the conduct, which becomes the permanent dignity of a k—g, (meaning king) and that which serves to promote the temporary interest and miserable ambition of a minister. You ascended the throne with a declared, and I doubt not, a sincere resolution of giving universal satisfaction to your subjects. You (again meaning our said present sovereign lord the king) found them pleased with the novelty of a young prince, whose countenance promised even more than his words, and loyal to you not only from principle but passion. It was not a cold profession of allegiance to the first magistrate, but a partial, animated attachment to a favourite prince, the native of their country. They did not wait to examine your conduct, nor to be determined by experience, but gave you a generous credit for the future blessings of your reign, and paid you in advance the dearest tribute of their affections. Such, Sir, (again meaning our said present sovereign lord the king) was once the disposition of a people, who now surround your throne with reproaches and complaints. Do justice to yourself. Banish from your mind those unworthy opinions with which some interested persons have laboured to possess you. Distrust the men who tell you the English are naturally light and inconstant, that they complain without a cause. Withdraw your confidence from all parties; from ministers, favourites, and relations; and let there be one moment in your life in which you (again meaning our said present sovereign lord the king) have consulted your own understanding. When you (again meaning our said lord the

king) affectedly renounced the name of Englishman, believe me, Sir, (again meaning our said lord the king) you were persuaded to pay a very ill-judged compliment of one part of your subjects at the expence of another. While the natives of Scotland are not in actual rebellion, they are undoubtedly entitled to protection, nor do I mean to condemn the policy of giving some encouragement to the novelty of their affections for the House of Hanover. I am ready to hope for every thing from their new-born zeal, and from the future steadiness of their allegiance. But hitherto they have no claim to your favour. To honour them with a determined predilection and confidence in exclusion of your English subjects, who placed your family, and, in spite of treachery and rebellion have supported it upon the th—ne (meaning throne) is a mistake too gross even for the unsuspecting generosity of youth. In this error we see a capital violation of the most obvious rules of policy and prudence. We trace it however to an original bias in your education, and are ready to allow for your inexperience. To the same early influence we attribute it, that you have descended to take a share not only in the narrow views and interest of particular persons, but in the fatal malignity of their passions. At your accession to the throne, the whole system of government was altered, not from wisdom or deliberation, but because it had been adopted by your predecessor. A little personal motive of pique and resentment was sufficient to remove the ablest servants of the crown, but it is not in this country, Sir, (again meaning our said lord the king) that such men can be dishonoured by the frowns of a k—, (meaning the king) they were dismissed but could not be disgraced. Without entering into a minuter discussion of the merits of the peace, we may observe in the imprudent hurry with which the first overtures from France were accepted, in the conduct of the negociation, and terms of the treaty, the strongest marks of that precipitate spirit of concession with which a certain part of your subjects have been at all times ready to purchase a peace with the natural enemies of this country. On your part we are satisfied that every thing was honourable and sincere, and if E——d (meaning England) was sold to F——e (meaning France) we doubt not that your m——y (meaning majesty) was equally betrayed. The conditions of peace were matter of grief and surprise to your subjects, but not the immediate cause of their present discontent. Hitherto, Sir, (again meaning our said lord the now king) you had been sacrificed to the prejudices and passions of others. With what firmness will you (again meaning our said lord the king) bear the mention of your own? A man not very honourably distinguished in the world, commences a formal attack upon your favourite, considering nothing but how he might best expose his person and principles to detestation, and the national character of his countrymen to contempt. The natives of that country, Sir, (again meaning our said lord the now king) are as much distinguished by a particular character as by your majesty's favour. Like another chosen people they have been conducted into the land of plenty, where they find themselves actually marked and divided from mankind. There is hardly a period at which the most irregular character may not be redeemed. The mistakes of one sex find a retreat in patriotism, those of the other in devotion. Mr. Wilkes brought with him into politics the same liberal sentiments by which his private conduct had been directed, and seemed to think that, as there are few excesses, in which an English gentleman may not be permitted to indulge, the same latitude was allowed him in the choice of his political principles and in the spirit of maintaining them, I mean to state, not entirely to defend his conduct; in the earnestness of his zeal, he suffered some unwarrantable insinuations to escape him. He said more than moderate men would justify, but not enough to intitle him to the honour of your m—y's (meaning majesty's) personal resentment. The rays of r—l (meaning royal) indignation, collected upon him, served only to illuminate, and could not consume. Animated by the favour of the people on one side, and heated by persecution on the other, his views and sentiments changed with his situation. Hardly serious at first, he is now an enthusiast; the coldest bodies warm with opposition, the hardest sparkle in collision. There is a holy mistaken zeal in politics as well as religion. By persuading others we convince ourselves. The passions are engaged, and create a material affection in the mind, which forces us to love the cause for which we suffer. Is this a contention worthy of a k—? (meaning king). Are you (again meaning our lord the now king) not sensible how much the meanness of the cause gives an air of ridicule to the serious difficulties, into which you (again meaning our said lord the king) have been betrayed? The destruction of one man has been now, for many years, the sole object of your government, and if there can be any thing still more disgraceful, we have seen for such an object, the utmost influence of the executive power, and every ministerial artifice exerted without success. Nor can you (again meaning our said lord the now king) ever succeed, unless he should be imprudent enough to forfeit the protection of those laws, to which you owe your c——n (meaning crown) or unless your ministers should persuade you to make it a question of force alone, and try the whole strength of government in opposition to the people. The lessons he has received from experience will probably guard him from such excess of folly; and in your m——s (meaning majesty's) virtues we find an unquestionable assurance that no illegal violence will be attempted. Far from suspecting you (again meaning our said lord the now king) of so horrible a design, we would attribute the continual violation of the laws, and even this last enormous attack upon the vital principles of the constitution, to an ill-advised, unworthy,

personal resentment. From one false step you (again meaning our said lord the now king) have been betrayed into another, and as the cause was unworthy of you (again meaning our said lord the now king) your ministers were determined that the prudence of the execution should correspond with the wisdom and dignity of the design. They have reduced you (again meaning our said lord the now king) to the necessity of choosing out of a variety of difficulties;—to a situation so unhappy that you (again meaning our said lord the now king) can neither do wrong without ruin, nor right without affliction. These worthy servants have undoubtedly given you many singular proofs of their abilities. Not contented with making Mr. Wilkes a man of importance, they have judiciously transferred the question from the rights and interest of one man to the most important rights and interests of the people, and forced your subjects, from wishing well to the cause of an individual, to unite with him in their own. Let them proceed as they have begun, and your m——y (meaning majesty) need not doubt that the catastrophe will do no dishonour to the conduct of the piece. The circumstances to which you (again meaning our said lord the now king) are reduced will not admit of a compromise with the English nation. Undecisive, qualifying measures will disgrace your government still more than open violence, and, without satisfying the people, will excite their contempt. They have too much understanding and spirit to accept of an indirect satisfaction for a direct injury. Nothing less than a repeal, as formal as the resolution itself, can heal the wound which has been given to the constitution, nor will any thing less be accepted. I can readily believe that there is an influence sufficient to recal that pernicious vote. The H—— of —— (meaning the House of Commons in this kingdom) undoubtedly consider their duty to the c——n (meaning crown) as paramount to all other obligations. To us they are only indebted for an accidental existence, and have justly transferred their gratitude from their parents to their benefactors; from those, who gave them birth, to the minister, from whose benevolence they derive the comforts and pleasures of their political life;—who has taken the tenderest care of their infancy, relieves their necessities without offending their delicacy, and has given them, what they value most, a virtuous education. But if it were possible for their integrity to be degraded to a condition so vile and abject, that compared with it, the present estimation they stand in is a state of honour and respect, consider, Sir, (again meaning our said lord the now king) in what manner you will afterwards proceed. Can you (again meaning our said lord the now king) conceive that the people of this country will long submit to be governed by so flexible a H—— of ——! (meaning the House of Commons.) It is not in the nature of human society, that any form of government in such circumstances, can long be preserved. In ours the general contempt of the people is as fatal as their detestation. Such, I am persuaded, would be the necessary effect of any base concession made by the present H—— of —— (again meaning the present House of Commons of this kingdom) and as a qualifying measure would not be accepted, it remains for you (again meaning our said lord the now king) to decide whether you will, at any hazard, support a set of men, who have reduced you to this unhappy dilemma, or whether you will gratify the united wishes of the whole people of England, by dissolving the p———, (meaning parliament) Taking it for granted, as I do very sincerely, that you (again meaning our said lord the king) have personally no design against the constitution, nor any views inconsistent with the good of your subjects, I think you cannot hesitate long upon the choice, which it equally concerns your interest and your honour to adopt. On one side, you (again meaning our said lord the now king) hazard the affections of all your English subjects; you relinquish every hope of repose to yourself, and you (again meaning our said lord the now king) endanger the establishment of your family for ever. All this you venture for no object whatsoever, or for such an object, as it would be an affront to you to name. Men of sense will examine your conduct with suspicion; while those who are incapable of comprehending to what degree they are injured, afflict you with clamours equally insolent and unmeaning. Supposing it possible that no fatal struggle should ensue, you (again meaning our said lord the present king) determine at once to be unhappy, without the hope of a compensation, either from interest or ambition. If an E——sh (meaning English) k—— (meaning king) be hated or despised, he must be unhappy; and this perhaps is the only political truth, which he ought to be convinced of without experiment. But if the English people should no longer confine their resentment to a submissive representation of their wrongs; if following the glorious example of their ancestors, they should no longer appeal to the creature of the constitution, but to that high being who gave them the rights of humanity, whose gifts it were sacrilege to surrender, let me ask you, Sir, (again meaning our said lord the present king) upon what part of your subjects would you rely for assistance? The people of I—l—d (meaning Ireland) have been uniformly plundered and oppressed. In return, they give you every day fresh marks of their resentment. They despise the miserable governor you (again meaning our said present sovereign lord the king) have sent them, because he is the creature of lord Bute; nor is it from any natural confusion in their ideas, that they are so ready to confound the original of a k—g (meaning king) with the disgraceful representation of him. The distance of the colonies would make it impossible for them to take an active concern in your affairs, if they were as well affected to your government as they once

pretended to be to your person. They were ready enough to distinguish between you (again meaning our said present sovereign lord the king) and your ministers. They complained of an act of the legislature, but traced the origin of it no higher than to the servants of the c—n (meaning crown) they pleased themselves with the hope that their s—r—n (meaning sovereign) if not favourable to their cause, at least was impartial. The decisive personal part you took against them, has effectually banished that first distinction from their minds. They consider you as united with your servants against A—r—a (meaning America) and know how to distinguish the s————n (meaning sovereign) and a venal p————t (meaning parliament) on one side, from the real sentiments of the English people on the other. Looking forward to independence they might possibly receive you (again meaning our said lord the now king) for their k—; (meaning king) but if ever you retire to A—r—a (meaning America) be assured they will give you such a covenant to digest, as the presbytery of Scotland would have been ashamed to offer to Charles the second. They left their native land in search of freedom, and found it in a desart. Divided as they are, into a thousand forms of policy and religion, there is one point in which they all agree: they equally detest the pageantry of a k—, (meaning king) and the supercilious hypocrisy of a bishop. It is not then from the alienated affections of I—l—d (meaning Ireland) or A—r—a (meaning America) that you (again meaning our said present sovereign lord the king) can reasonably look for assistance; still less from the people of E—l—d (meaning England) who are actually contending for their rights, and, in this great question, are parties against you (again meaning our said present sovereign lord the king.) You (again meaning our said present sovereign lord the king) are not however destitute of every appearance of support; you (again meaning our said present sovereign lord the king) have all the Jacobites, Nonjurors, Roman Catholics, and Tories of this country, and all S—l—d (meaning Scotland) without exception. Considering from what family you are descended, the choice of your friends has been singularly directed; and truly, Sir, (again meaning our said lord the now king) if you had not lost the Whig interest of England, I should admire your dexterity in turning the hearts of your enemies. Is it possible for you to place any confidence in men, who, before they are faithful to you must renounce every opinion, and betray every principle both in church and state, which they inherit from their ancestors, and are confirmed in by their education? whose numbers are so considerable, that they have long since been obliged to give up the principles and language which distinguished them as a party, and to fight under the banners of their enemies? their zeal begins with hypocrisy and must conclude in treachery. At first they deceive; at last they betray. As to the Scotch, I must suppose your heart and understanding so biassed, from your earliest infancy, in their favour, that nothing less than your own misfortunes can undeceive you. You (again meaning our said present sovereign lord the king) will not accept of the uniform experience of your ancestors; and when once a man is determined to believe, the very absurdity of the doctrine confirms him in his faith. A bigotted understanding can draw a proof of attachment to the House of H—n—r (meaning Hanover) from a notorious zeal for the House of Stuart, and find an earnest of future loyalty in former rebellions. Appearances are however in their favour; so strongly indeed, that one would think they had forgotten that you are their lawful k—, (meaning king) and had mistaken you for a pretender to the c—n. (meaning crown) Let it be admitted then, that the Scotch are as sincere in their present professions, as if you were in reality not an Englishman, but a Briton of the north, you would not be the first p—e (meaning prince) of their native country against whom they have rebelled, nor the first whom they have basely betrayed. Have you (meaning our said lord the now king) forgotten, Sir, or has your favourite concealed from you that part of our history, when the unhappy Charles (and he too had private virtues) fled from the open avowed indignation of his English subjects, and surrendered himself at discretion to the good faith of his own countrymen. Without looking for support in their affections as subjects, he applied only to their honour, as gentlemen, for protection. They received him as they would your m——y (meaning majesty) with bows, and smiles, and falshood, and kept him until they had settled their bargain with the English parliament; then basely sold their native k— (meaning king) to the vengeance of his enemies. This, Sir, was not the act of a few traitors, but the deliberate treachery of a Scotch parliament representing the nation. A wise p—ce (meaning prince) might draw from it two lessons of equal utility to himself; on one side he might learn to dread the undisguised resentment of a generous people, who dare openly assert their rights, and who, in a just cause, are ready to meet their s——n (meaning sovereign) in the field; on the other side, he would be taught to apprehend something far more formidable—a fawning treachery, against which no prudence can guard, no courage can defend. The insidious smile upon the cheek would warn him of the canker in the heart. From the uses, to which one part of the army has been too frequently applied, you (again meaning our said lord the now king) have some reason to expect, that there are no services they would refuse. Here too we trace the partiality of your understanding. You take the sense of the army from the conduct of the guards, with the same justice with which you collect the sense of the people from the representations of the ministry. Your marching regiments, Sir, (again meaning our

said lord the new king) will not make the guards their example either as soldiers or subjects. They feel and resent, as they ought to do, that invariable, undistinguishing favour with which the guards are treated, while those gallant troops, by whom every hazardous, every laborious service is performed, are left to perish in garrisons abroad, or pine in quarters at home, neglected and forgotten. If they had no sense of the great original duty they owe their country, their resentment would operate like patriotism, and leave your cause to be defended by those to whom you (again meaning our said present sovereign lord the king) have lavished the rewards and honours of their profession. The prætorian bands, enervated and debauched as they were, had still strength enough to awe the Roman populace: but when the distant legions took the alarm, they marched to Rome, and gave away the empire. On this side then, whichever way you (again meaning our said lord the now king) may determine to support the very ministry who have reduced your affairs to this deplorable situation: you may shelter yourself under the forms of a p———t (meaning parliament) and set your people at defiance. But be assured, Sir, that such a resolution would be as imprudent as it would be odious. If it did not immediately shake your establishment, it would rob you of your peace of mind for ever. On the other, how different is the prospect! how easy, how safe and honourable is the path before you! the English nation declare they are grossly injured by their representatives, and solicit your m—— (meaning majesty) to exert your lawful prerogative, and give them an opportunity of recalling a trust which, they find, has been so scandalously abused. You are not to be told that the power of the H—— of ——— (meaning House of Commons) is not original, but delegated to them for the welfare of the people, from whom they receive it. A question of right arises between the constituent and the representative body. By what authority shall it be decided? will your m——y (meaning majesty) interfere in a question in which you have properly no immediate concern? it would be a step equally odious and unnecessary. Shall the Lords be called upon to determine the rights and privileges of the Commons? They cannot do it without a flagrant breach of the constitution. Or will you (again meaning our said lord the now king) refer it to the judges? They have often told your ancestors, that the law of parliament is above them. What party then remains but to leave it to the people to determine for themselves? they alone are injured; and since there are no superior power to which the cause can be referred, they alone ought to determine. I do not mean to perplex you (again meaning our said present sovereign lord the king) with a tedious argument upon a subject already so discussed, that inspiration could hardly throw a new light upon it. There are, however, two points of view, in which it particularly imports your m——y (meaning majesty) to consider the late proceedings of the H—— of ——— (meaning House of Commons.) By depriving a subject of his birthright, they have attributed to their own vote an authority equal to an act of the whole legislature; and though perhaps not with the same motives, have strictly followed the example of the Long Parliament, which first declared the regal office useless, and soon after, with as little ceremony, dissolved the House of Lords. The same pretended power which robs an English subject of his birthright may rob an English k— (meaning king) of his c——n (meaning crown.) In another view, the resolution of the H—— of ——— (meaning House of Commons) apparently not so dangerous to your m———, (meaning majesty) is still more alarming to your people. Not contented with divesting one man of his right, they have arbitrarily conveyed that right to another. They have set aside a return as illegal, without daring to censure those officers who were particularly apprised of Mr. Wilkes's incapacity, not only by the declaration of the H—— (meaning the said House) but expressly by the writ directed to them, but who nevertheless returned him as duly elected. They have rejected the majority of votes, the only criterion by which our laws judge of the sense of the people; they have transferred the right of election from the collective to the representative body; and by these acts, taken separately or together, they have essentially altered the original constitution of the H—— of C——— (meaning House of Commons.) Versed, as your m——— (meaning majesty) undoubtedly is, in the English history, it cannot easily escape you, how much it is your interest, as well as your duty, to prevent one of the three estates from encroaching upon the province of the other two, or assuming the authority of them all. When once they have departed from the great constitutional line, by which all their proceedings should be directed, who will answer for their future moderation? Or what assurance will they give you (again meaning our said present sovereign lord the king) that, when they have trampled upon their equals, they will submit to a superior? Your m——— (meaning majesty) may learn hereafter, how nearly the slave and tyrant are allied. Some of your council, more candid than the rest, admit the abandoned profligacy of the present H—— of ——— (meaning House of Commons) but oppose their dissolution upon an opinion, I confess not very unwarrantable, that their successors would be equally at the disposal of the treasury. I cannot persuade myself that the nation will have profited so little by experience. But if that opinion were well founded, you (again meaning our said present sovereign lord the king) might then gratify our wishes at an easy rate, and appease the present clamours against your government, without offering any material injury to the favourite cause of corruption. You (again meaning our said present sovereign lord

the king) have still an honourable part to act. The affections of your subjects may still be recovered. But before you (again meaning our said present sovereign lord the king) subdue their hearts, you must gain a noble victory over your own. Discard those little personal resentments which have too long directed your public conduct. Pardon this man the remainder of his punishment, and if resentment still prevails, make it what it should have been long since, an act, not of mercy, but contempt. He will soon fall back into his natural station, a silent senator, and hardly supporting the weekly eloquence of a news-paper. The gentle breath of peace would leave him on the surface, neglected and unremoved. It is only the tempest that lifts him from his place. Without consulting your minister, call together your whole council. Let it appear to the public that you can determine and act for yourself. Come forward to your people. Lay aside the wretched formalities of a k— (meaning king) and speak to your subjects with the spirit of a man and in the language of a gentleman. Tell them you (again meaning our said present sovereign lord the king) have been fatally deceived. The acknowledgment will be no disgrace, but rather an honour to your understanding. Tell them you are determined to remove every cause of complaint against your government; that you will give your confidence to no man who does not possess the confidence of your subjects; and that you (again meaning our said present sovereign lord the king) will leave it to themselves to determine, by their conduct at a future election, whether or not it be in reality the general sense of the nation, that their rights have been arbitrarily invaded by the present H—— of C——— (meaning House of Commons) and the constitution betrayed. They will then do justice to their representatives and to themselves. These sentiments, Sir, (again meaning our said present sovereign lord the king) and the stile they are conveyed in, may be offensive perhaps because they are new to you. Accustomed to the language of courtiers, you measure their affections by the vehemence of their expressions; and when they only praise you indirectly you admire their sincerity. But this is not a time to trifle with your fortune. They deceive you, Sir, (again meaning our said present sovereign lord the king) who tell you that you (again meaning our said lord the king) have many friends, whose affections are founded upon a principle of personal attachments. The first foundation of friendship is not the power of conferring benefits, but the equality with which they are received, and may be returned. The fortune which made you (again meaning our said present sovereign lord the king) a king (meaning king) forbad you to have a friend. It is a law of nature which cannot be violated with impunity. The mistaken p—e (meaning prince) who looks for friendship, will find a favourite, and in that favourite the ruin of his affairs. The people of E—gl—d (meaning England) are loyal to the House of Ha—ver (meaning Hanover) not from a vain preference of one family to another, but from a conviction that the establishment of that family was necessary to the support of their civil and religious liberties. This, Sir, (again meaning our said present sovereign lord the king) is a principle of allegiance equally solid and rational, fit for Englishmen to adopt, and well worthy your m——y's (meaning majesty's) encouragement. We cannot long be deluded by nominal distinctions. The name of Stuart itself is only contemptible;—armed with the sovereign authority their principles were formidable. The prince who imitates their conduct should be warned by their example; and while he plumes himself upon the security of his title to the crown, should remember, that as it was acquired by one revolution, it may be lost by another. JUNIUS."—To the great scandal and dishonour of our said present sovereign lord the king and of his administration of the government of this kingdom. To the great scandal and dishonour of the said present House of Commons of this kingdom; and also to the great scandal and disgrace of the said principal officers and ministers of our said lord the king employed and entrusted by our said lord the king in the managing and conducting the weighty and arduous affairs of this kingdom. To the great disturbance of the public peace and tranquillity of this kingdom. In contempt of our said lord the king and his laws. To the evil and pernicious example of all others in the like case offending; and also against the peace of our said lord the king his crown and dignity. And the said Attorney-General of our said lord the king for our said lord the king giveth the Court here further to understand and be informed, that the said John Almon again disregarding the laws of this kingdom, and the public peace, good order and government thereof, and most unlawfully, seditiously, and maliciously, contriving and intending by wicked, artful, scandalous, and malicious suppositions, allusions, and insinuations, to disturb the happy state and public peace and tranquillity of this kingdom, and most insolently, audaciously, and unjustly, to asperse, scandalise, and vilify our said present sovereign lord the king, and to represent, and to cause it to be believed, that our said lord the king had, by his measures of government, lost the affections of his subjects in that part of Great Britain called England, and in Ireland, and in his dominions of America, and brought the public affairs of this kingdom into a most distressed, disgraceful, and lamentable state and condition. And also most unlawfully and maliciously contriving and intending to represent, and cause it to be believed, that our said lord the king had bestowed promotions and favours upon his subjects of that part of his kingdom of Great Britain called Scotland, in preference to his subjects of that part of Great Britain called England, and thereby to create groundless jealousies and uneasinesses in his majesty's subjects of England aforesaid. And

also, most unjustly to represent, and to cause it to be believed, that our said lord the king had bestowed promotions and favours upon one part of his said majesty's army, commonly called the guards, in preference to another part of his army, commonly called the marching regiments, and thereby to create groundless jealousies, uneasiness, and mutiny, and desertion, in that part of his army called the marching regiments, and to bring our said lord the king and his administration of the government of this kingdom into the utmost dishonour and contempt, and to poison and infect the minds of his majesty's subjects with notions and opinions of our said lord the king, highly unworthy of our said lord the king, and of that paternal love and concern which he has always shewed and expressed for all his subjects, as if our said lord the king had unjustly taken a part with some of his subjects against others, and had unjustly prostituted the measures of his government to gratify personal resentments, and also thereby, as much as in him the said John Almon lay, to alienate and withdraw from our said lord the king, that cordial love, allegiance, and fidelity, which every subject of our said lord the king, should, and of right ought to have and shew towards our said lord the king. And also as much as in him the said John Almon lay, to move, excite, and stir up the subjects of our said lord the king to insurrection and rebellion, he the said John Almon afterwards (that is to say) upon the said first day of January, in the 10th year aforesaid, with force and arms at the parish aforesaid, and within the liberty aforesaid, in the said county of Middlesex, unlawfully, wickedly, seditiously, and maliciously, did publish and cause and procure to be published a certain other scandalous, seditious, and malicious libel. In which said last mentioned libel of and concerning our said lord the king and of his administration of the government of this kingdom, and also of and concerning the public affairs of this kingdom are contained amongst other things, divers scandalous, seditious, and malicious matters, (that is to say) in one part thereof according to the tenor following: "When you (meaning our said lord the king) affectedly renounced the name of Englishman, believe me, Sir, (again meaning our said lord the king) you were persuaded to pay a very ill-judged compliment to one part of your subjects at the expence of another. While the natives of Scotland (meaning that part of Great Britain called Scotland) are not in actual rebellion, they are undoubtedly intitled to protection; nor do I mean to condemn the policy of giving some encouragement to the novelty of their affections for the House of Hanover. I am ready to hope for every thing from their new born zeal, and from the future steadiness of their allegiance. But hitherto they have no claim to your favour. To honour them with a determined predilection and confidence, in exclusion of your English subjects (meaning the subjects of our said lord the king in that part of Great Britain called England) who placed your family, and, in spite of treachery and rebellion, have supported it upon the th—ne (meaning throne) is a mistake too gross even for the unsuspecting generosity of youth. In this error we see a capital violation of the most obvious rules of policy and prudence. We trace it, however, to an original bias in your education, and are ready to allow for your inexperience." And in another part of the said last mentioned libel according to the tenor following: "it is not then from the alienated affections of I—l—d (meaning Ireland) or A—r—a (meaning America) that you (again meaning our said lord the now king) can reasonably look for assistance; still less from the people of E—l—d, (meaning England) who are actually contending for their rights, and, in this great question, are parties against you (again meaning our said lord the now king) you (again meaning our said lord the now king) are not however destitute of every appearance of support: you (again meaning our said lord the now king) have all the Jacobites, Nonjurors, Roman Catholics, and Tories of this country, and all S—l—d (meaning that part of Great Britain called Scotland) without exception." And in another part of the said last mentioned libel according to the tenor following: "From the uses to which one part of the army (meaning the army of our said lord the king) has been too frequently applied, you (again meaning our said lord the now king) have some reason to expect, that there are no services they would refuse. Here too we trace the partiality of your (again meaning our said lord the king's) understanding. You (again meaning our said lord the king) take the sense of the army from the conduct of the guards, (meaning the said part of the army of our said lord the king called the guards) with the same justice with which you (again meaning our said lord the king) collect the sense of the people from the representations of the ministry. Your marching regiments (meaning the said other part of the army of our said lord the king called the marching regiments) Sir, (again meaning our said lord the now king) will not make the guards their example either as soldiers or subjects. They feel and resent as they ought to do, that invariable undistinguishing favour with which the guards are treated; while those gallant troops, by whom every hazardous, every laborious service is performed, are left to perish in garrisons abroad, or pine in quarters at home, neglected and forgotten. If they had no sense of the great original duty they owe to their country, their resentment would operate like patriotism, and leave your cause to be defended by those to whom you (again meaning our said lord the king) have lavished the rewards and honours of their profession. The prætorian bands, enervated and debauched as they were, had still strength enough to awe the Roman populace: but when the distant legions took the alarm, they marched to Rome and gave away the empire." And in another

part of the said last mentioned libel according to the tenor following: "You (again meaning our said lord the now king) have still an honourable part to act. The affections of your subjects may still be recovered. But before you (again meaning our said lord the now king) subdue their hearts, you (again meaning our said lord the now king) must gain a noble victory over your own. Discard those little personal resentments which have too long directed your public conduct." And in another part of the said last mentioned libel according to the tenor following: "The people of E—gl—d (meaning England) are loyal to the House of Ha—ver (meaning Hanover) not from a vain preference of one family to another, but from a conviction that the establishment of that family was necessary to the support of their civil and religious liberties. This, Sir, (again meaning our said lord the now king) is a principle of allegiance equally solid and rational, fit for Englishmen to adopt, and well worthy your m—y's (meaning majesty's) encouragement. We cannot long be deluded by nominal distinctions. The name of Stuart itself is only contemptible; —armed with the sovereign authority, their principles were formidable. The prince who imitates their conduct should be warned by their example; and while he plumes himself upon the security of his title to the crown, should remember, that as it was acquired by one revolution, it may be lost by another.

"JUNIUS."

To the great scandal and dishonour of our said present sovereign lord the king, and of his administration of the government of this kingdom. To the great disturbance of the public peace, order, and government of this kingdom. In contempt of our said lord the king and his laws. To the evil and pernicious example of all others in the like case offending; and also against the peace of our said lord the king his crown and dignity. And the said Attorney-General of our said lord the king for our said lord the king giveth the court here further to understand and be informed, that he the said John Almon being such person as aforesaid, and further most insolently, audaciously, wickedly, and maliciously contriving and intending as aforesaid, and the sooner to accomplish, perfect, and bring to effect his said most unlawful, wicked, and seditious purposes, afterwards (that is to say) upon the said first day of January, in the said tenth year of the reign of our said lord the king, with force and arms, at the parish aforesaid, within the liberty aforesaid, in the county aforesaid, out of his further malice towards our said lord the king, and to his administration of the government of this kingdom, and also out of his further malice towards the said present House of Commons of this kingdom, a certain other wicked, scandalous, seditious, and malicious libel, intitled The London Museum of Politics, Miscellanies, and Literature—did unlawfully, wickedly, seditiously, and maliciously publish, and did cause and procure to be published, in which said libel last above mentioned, he the said John Almon hath by such wicked, artful, scandalous, and malicious allusions, suppositions, and insinuations as aforesaid, most unlawfully, wickedly and maliciously aspersed, scandalized, and vilified our said present sovereign lord the king, and his administration of the government of this kingdom, and hath thereby as much as in him the said John Almon lay, endeavoured to bring our said lord the king and his administation of the government of this kingdom into the utmost dishonour, hatred, and contempt with his subjects, and to poison and infect the minds of his majesty's subjects with notions and sentiments highly unworthy of our said lord the king. And hath also by that means (as much as in him the said John Almon lay) endeavoured to alienate and withdraw from our said lord the king, that cordial love, allegiance, and fidelity which every true and faithful subject of our said lord the king should, and of right ought to bear towards our said lord the king, and hath also by that means (as much as in him the said John Almon lay) attempted to move, excite, and stir up the subjects of our said lord the king to a most unnatural insurrection against our said lord the king, and in which said libel last above mentioned, he the said John Almon hath also by such wicked, artful, scandalous, and malicious allusions, suppositions, and insinuations as aforesaid, most unlawfully, wickedly, and maliciously traduced, scandalized, and vilified the present House of Commons of this kingdom, and hath most audaciously, wickedly, and falsely represented the said present House of Commons as a most vile, profligate, abandoned, wicked, arbitrary, venal, and detestable set of men, and hath thereby (as much as in him the said John Almon lay) endeavoured to fill and possess the minds of all the people of this kingdom with notions and opinions of the present House of Commons highly unworthy of the said present House of Commons, and hath also thereby (as much as in him the said John Almon lay) attempted to bring the said present House of Commons into the utmost contempt, hatred, scorn, and dislike, and by that means to weaken and diminish the public credit and authority of that House, to the great scandal and dishonour of our said lord the king and of his administration of the government of this kingdom. And also to the great scandal and dishonour of the said House of Commons. In contempt of our said lord the king and his laws. To the great disturbance of the public peace and tranquillity of this kingdom. To the evil and pernicious example of all others in the like case offending. And also against the peace of our said lord the king his crown and dignity. Whereupon the said Attorney General of our said lord the king who for our said lord the king in this behalf prosecuteth for our said lord the king, prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said John Almon in this behalf, to make him answer to

our said lord the king touching and concerning the premises aforesaid.

To which Information the defendant pleaded Not Guilty.*

In Easter term following, a Special Jury, at the instance of the Attorney General, was struck in the Crown-office, before the master; and the trial was appointed for Saturday, the 2d day of June, 1770, being the sittings after term.

Counsel for the King.—The Attorney General, the Solicitor General, Mr. Morton, Mr. Wallace, Mr. Dunning, Mr. Walker.

Solicitors.—Messrs. Nuttall and Francis.

Counsel for the Defendant.—Mr. Serjeant Glynn, Mr. Davenport,

Solicitor.—Mr. Martyn.

In one of the public prints, the following observations were made on the Attorney-General's conduct in this trial, and the subsequent trial of Mr. Woodfall, the original publisher.

"It may seem extraordinary to some, that upon Mr. Woodfall's trial, Mr. Attorney-General should employ the greatest part of his harangue in a justification of his own conduct: what had the jury to do with his motives? and how ridiculous was it in Mr. Attorney, to desire to clear up his own intentions to the jury, whilst he was instructing them to pay no regard to, and to have no consideration of, the intentions of the defendant.

"Besides, Mr. Attorney does not tell us who had accused him, or of what he was accused. It is my business to supply his omission. His own conscience smote him for the trial of Mr. Almon. Mr. De Grey, member for Norfolk, the Attorney General's brother, had impudently and ignorantly branded the electors of Westminster, for their petition to his majesty, as seditious and base-born booksellers and mechanics. Mr. Serjeant Glynn defended the electors, and reproved Mr. De Grey for his insolence. [See 16 New Parliamentary History, 696.] The electors of Westminster publicly returned their thanks to the serjeant, and amongst them Mr. Almon was strenuous for these thanks, perhaps the most strenuous, because he must be sensible, from the part he had before taken in the petition to the throne, that the term 'base-born bookseller,' was especially aimed at him. This was Mr. Attorney General's motive for selecting Mr. Almon from the rest, though he only sold the letter, as every other bookseller had done, in a miscellaneous magazine, after it had appeared in all the newspapers. Mr. De Grey, member for Norfolk, under the shelter of privilege, pours out abuse upon an English elector, for exercising his franchise. If the man resents it only by telling the story, and returning thanks to those who defend him, his brother, Mr. Attorney General, by virtue of an unjust, assumed power, takes the first opportunity to ruin him, *ex officio*, by filing an Information. Mr. Attorney General, no doubt, had another motive for wishing to try the cause in Westminster first, before the original publisher was tried in London. The juries in Westminster, it is well known, are generally, for very good reasons, more complaisant to the court than the London juries: even the foreman of Mr. Almon's jury has a place in the War-office. On Mr. Almon's trial, the Attorney General declared, that he should certainly have tried the original publisher first; that he wished to have done so, and was only prevented by an affidavit of the sickness of the original publisher.* Mr. Attorney knew, that the original publisher had never pleaded sickness, and therefore expecting now that this falshood would be objected to him, pretended not to know the name of the man he was now trying, and against whom he had himself filed the information; he calls him Mr--what's his name? When the by-standers told him Woodfall,——"Aye, says he, Mr. Woodfall." This trick is too gross to be exposed farther than by relating it.

"Mr. Attorney General pretended, that, in the objects of prosecution, he endeavoured to make a distinction, and to pass by those who were poor, or had large families of children, &c. Monstrous declaration! The two first persons whom he brought to trial, Mr. Almon and Mr. Woodfall, are far from being rich, have families of very young children, the support of their families depends entirely on their own daily and unremitting industry in their trade, their places cannot be filled up by others, and imprisonment cutting off the only source of their supply, must make them poor indeed.

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* Informations for publishing the same paper were at the same time filed against Mr. Henry Woodfall (the original printer and publisher of it) in the Public Advertiser of the 19th of December, 1769; Mr. John Miller, for reprinting it in the London Evening Post, published in the evening of the same day; Mr. Charles Say, for reprinting it in the Gazetteer of the 20th of December, 1769; Mr. George Robinson, for reprinting it in the Independent Chronicle of the same day; and Mr. Henry Baldwin, for reprinting it in the St. James's Chronicle of the 21st of the said month. And although Mr. Almon did not sell the London Museum, (which is a monthly magazine) containing the said paper, till the 1st day of January, 1770, (according to the information) yet he was brought first to trial.

* Several persons present on the trial, think this part of the Attorney-General's speech more accurately stated here, than in the short-hand writer's notes. But the editor did not chuse to alter the manuscript. However, the obvious meaning is the same. And, if it is wrong, the Attorney-General may easily exculpate himself, by appealing to the notes of Mr. Gurney, who took this trial in short-hand for the Treasury. *Orig. Ed.*

SPECIAL JURY.

Leonard Morse, of Queen Anne-street, esq.
Herbert Mackworth, of Cavendish-square, esq.
John Anderson, of Henrietta-street, Cavendish-square, esq.
John Gould, of Hart-street, esq.
Josiah Holford, Southampton-row, esq.
Christopher Lethieulier, of the same, esq.
Robert Cary, of Hampstead, esq.
Gerrard Howard, of the same, esq.
Benjamin Booth, of Lincoln's Inn-fields, esq.
George Kent, of Teddington, esq.
Edward Lovibond, of Hampton, esq.

*Talesman.**

John Stillwell, corn-chandler, of Russell-street.

Mr. *Walker* opened by reading the record.

After him, Mr. *Attorney General* (De Grey) proceeded as follows:

May it please your lordship, and you gentlemen of the jury. I have thought it my duty to bring before you a publication of this libel, a publication which I believe would be permitted in no civilized country in the world, to pass unnoticed or unpunished. The laws of this country protect its inhabitants,—the character of every subject; the public peace requires it. In proportion as men's characters rise in the world, and are fixed with public government, the defamatory writings affecting their characters and conduct, tend still more to break the public peace, which is intimately connected with their conduct. But the great orders of the state, and the majesty of the throne, can never be the subject of detraction of libels, without injuring the public peace in the greatest degree, without breaking those bonds which tie men together, and exciting the subjects to sedition. The charge that is brought against the defendant with regard to this publication, contains two propositions: the one, that the publication concerns the king; his administration of government; of public affairs of the nation; the great officers employed in government; and the members of the House of Commons.—It likewise contains another proposition, that the defendant published this writing.—These are the two points, which it is necessary for those who support the information, to prove to your satisfaction, and that is all that is necessary for them to do. In this particular instance, there is perhaps less necessity to trouble you much, because the author of this paper has left very little to insinuation or suggestion: the mode and shape in which libels are written, don't in any instance vary the offence of figurative expression, which is as intelligible as a simple one.—Ironical expressions will describe and express the intention of the writer or speaker, as clearly and plainly as direct ones. Whether they do so or not, where they are ironical or figurative, depends upon your consideration, from the circumstances of the case, and the evidence that is laid before you. If there are asterisms, initial letters, or terminations, they may throw no disguise on the meaning; if they do, they disappoint the intention of the writer; nor are courts of justice so precariously formed, to mistake the meaning of what all the rest of the world would understand; and to shut their eyes against that, which is plain to every body else. All that I have to do at present, will be to shew, that the expressions used in this paper, do concern the king; his administration of government; the public affairs of the nation; the members of the House of Commons; and the public officers of state.—In order to shew this, it will be necessary to mention to you, some few of those passages, the whole of which you have heard already; and I think that it is impossible for any man to doubt a moment about the meaning of the writer, and the application of the expressions which he has used. That I may be sure I do not err, and put a stronger sense on the words than the writer himself has used, I will endeavour as far as I can, in the passages that are alluded to, to mention the very terms of the paper. Can any man doubt, what was the meaning of the writer of this paper, when he says, "I am speaking of the errors of his education, the pernicious lessons of his youth, the partiality of his understanding;" and which understanding in another place he says, "he has not in one moment of his life consulted; that he was never acquainted with the language of truth, till he heard it in the complaints of his people; that he had descended to take a share in the interest of particular persons, and in the fatal malignity of their passions: he calls upon him to bear with firmness his own passions and prejudices of personal resentment, with which he has directed his public conduct, and he openly

"Mr. Attorney General declared upon his honour as a man, that he had no motive to urge him against any particular publisher. Come forward, and tell the world, upon what motive Mr. Almon was singled out, and upon what principle of justice he was tried first,—for selling only.

"Mr. Attorney General said, as for who was the author of Junius, that he could by no means discover, that remained an impenetrable secret. Mr. Attorney General never demanded the name of the author. He does not wish to prosecute the author. He follows lord Mansfield's plan of prosecuting publishers and booksellers only. His lordship has frequently recommended this method, even from the bench. He knows that publishers and booksellers only exercise a trade, and have no other motives or intentions than to procure the emoluments arising from their trade. Multiply therefore prosecutions on the trade, and you will effectually stop publication." *Orig. Edit.*

* Only eleven of the Special Jury attending, the Court were obliged to have recourse to the Common Jury, and the name of the above Talesman was drawn out of the box. *Orig. Edition.*

charges him with a continual violation of the laws."

I will not take up your time to prove to you the application of these expressions to the king, because I will not do your understandings the discredit to suppose you have a moment's doubt upon that.—When he speaks of the great assembly of the nation, he says they are people who consider their duty to the crown, being representatives of the people, as their first obligation, and he arraigns them of venality. When he speaks of the public affairs of the kingdom, he says, "that England was sold to France, and that the king at the same time was betrayed; that he was sacrificed to the passions and prejudices of others; that the ministers have reduced him to such a situation, that he can neither do wrong without ruin, nor right without affliction; the Irish are plundered and oppressed; the king has united with his servants against the Americans, whose affections are all united; the English are actually contending for their rights, and are parties against him in the quarrel."—These are some of those public affairs which he thus reviles, traduces, and misrepresents: and, as if this were not enough, he endeavours to set in opposition, to dis-unite, and to irritate and set against each other, the different dominions belonging to the crown—different denominations and descriptions of men in the same dominions, and different parts of the same professions in the same nation; he bids a part of the army feel and resent that they are perishing in garrisons, or pining in quarters, neglected and forgotten. If one should ask one's self, what could be the motive of this man, and to what purpose was all this? could he thus mean to apply these expressions to the public affairs of the kingdom—to the House of Commons—to the king's ministers—to the sovereign himself? Why should he do it?—What the motive?—Who is he? produce him! perhaps we may guess!—but there is no country in the world, that does not at some times (and no country more likely in the world than a country of free liberty to) produce men who act from various motives; their motives are different to those who are to judge of their actions; their actions are what are to decide on their conduct.—Whether the anonymous writer of this paper, and those, who by publishing support him, act from any desperate situation of their fortune—from any malignity of heart—from any perverseness of understanding—from a low and contemptible ambition of being dishonourably distinguished—whatever the meaning may be, that is not now material for your consideration.—It is sufficient that there may be such men in the world—the question now before you is, whether there is now such a man? the present question is whether the man now complained of, has actually published this paper? but if his views are to be considered, if he had thus, as he hoped, dis-united every part of his majesty's dominions, and left them abandoned and deserted: what follows, (if it was not from the impossibility of any man's conceiving the least foundation for what was said) should rather be suppressed than repeated:—Say to what all this tends! see how undisguisedly, how expressly, and in words he has presumed, after he has disunited and provoked the people, to provoke and irritate the sovereign; he says, "the circumstances to which you are reduced, admit of no compromise with the English nation; all qualifying measures will disgrace you more than open violence; supposing it possible that no fatal struggle should ensue, you determine at once to be unhappy; for an English king hated or despised, must be unhappy."—This, said of a man, such a man, that there is not one among us, whose heart would not glow to think, that he had such a son, or such a father!—"It is barely possible that a fatal struggle should not ensue!" it is but a supposition! It is but a possibility! What is that fatal struggle but sedition, or a civil war? and if that does not happen, then you, a hated and despised king, must be unhappy;—"but if they should no longer confine their resentment to a submissive representation of wrongs; if, following the glorious example of their ancestors, they should no longer appeal to the creature of the constitution, but to that high being who gave them the rights of humanity, and whose gifts it were sacrilege to surrender;"—so, then, the subject has sustained wrongs; their rights have been violated; it was glorious in our ancestors to stand against the crown, when they had received wrongs, and their rights were violated! then, it is glorious not to appeal to the sovereign, the creature of the constitution, but to that high being, who gave them the rights of humanity—here he closes it; "it is not merely treachery, it is not perfidy, it is not—but, it is sacrilege, to surrender those rights which have been thus injured;"—but, as if this would not do, he reminds him of the Stuarts, and bids him remember, that as the crown was acquired by one revolution, it may be lost by another.—And as if that was not enough, having said that the rights of the subject were violated, and their wrongs thus neglected, he concludes the whole, by declaring, that the English dare openly assert their rights, and in a just cause—a just cause is, where they are sustaining public wrongs, and their rights are violated, then the English are to meet, and are ready to meet.

This is the language of this paper, this is the style of this desperate man—the defendant is charged with publishing it—What defence can be anticipated? What can we suggest to ourselves to be the ground upon which any defence can be made to this information? If it is said, that the defendant is not the author; is then the author only to be punished? Is a man who writes criminal, and he who disseminates the poison, innocent? What signifies all the writers in the world, if they are confined to their garrets, and can't find publishers? they may write to eternity, and notwithstanding all their malignity they will do no damage. I am

persuaded, that the man who introduces to the public the paper first written, is full as criminal as the writer. You will then affect the liberty of the press!—The liberty of the press is as sacred as the constitution itself, and is an essential part of it, so is my liberty to move as I please, to say what I think, and to act as I think; but I must not employ my tongue, my hand, nor sword, to the prejudice of another man; nor must you use your trade to the prejudice of another man; but he is not the first publisher perhaps! the first paper was published on the 19th of December—this was advertised a few days afterwards, and published and sold, I believe, on the 1st or 2nd of January, 1770. It is not in the power of any officer, whose duty it is to bring into execution the public laws, to impeach, or to arraign offences of this sort during the intervals of the terms: or when no grand jury,* or courts are sitting. I thought it my duty, and I think I should have deserved to have forfeited much more than my office, if I had been wanting in it. With as much dispatch and expedition as I could, I thought fit to take public notice of these publications.† I believe there is one person——Illness has been the occasion of his not being brought to a trial now—Others are now depending.* This person published this paper.—I would not aggravate on one side, or extenuate on the other: I only mean to explain. The paper had been published 10 or 11 days before this was published. I do verily believe there was not a man in the kingdom (I am sure not an honest man in the kingdom) who read it, that did not take offence at it,—the exclamation of mankind against it was general; yet in that situation it was published by the now publisher. I mention these circumstances to excuse, or rather to explain the conduct of those who have carried on these prosecutions. The facts I have mentioned will be proved—It remains then for you not to punish, for that is not the present subject, but to enquire whether the defendant has committed this crime or not.

William Bibbins sworn.

Examined by Mr. *Sol. Gen.* (Thurlow.)

Do you know Almon's shop in Piccadilly?—I do; a bookseller's shop.

Did you at any time buy any paper there or not?—I did.

* The Westminster grand jury, before whom this matter was properly cognizable (the defendant living in Westminster) sat on Wednesday the 3rd of January, and continued sitting the 4th, 5th, and 6th days of the same month, all which were within a few days after the publication. *Orig. Ed.*

† The whole of this assertion is utterly false. The paper was published, or rather the London Museum, containing the paper, was sold at Mr. Almon's, on the 1st day of January, 1770, and a bill of indictment might have been preferred against him to the grand jury of Westminster, by, and before whom this matter was properly cognizable, on the 3rd, 4th, 5th, or 6th days of that month, for upon each of those days that grand jury was sitting, which would have been "taking public notice with as much dispatch and expedition as he could," and would have been likewise the regular and legal mode of proceeding. But the fact is, Mr. Attorney-General did not chuse to prefer a bill of indictment to the grand jury. He knew very well that every syllable of the offensive paper was true, and he was afraid the grand jury would enquire into the motives of this particular prosecution, as well as into the contents and veracity of the paper itself. The grand jury are sworn 'to diligently enquire and true presentment make,' and not to find against any person for hatred or malice. And the paper being notoriously true and the prosecution apparently malicious, he durst not trust the charge with a grand jury. But he waited in secret till Hilary term, which did not begin till the 23rd day of January, 1770, and then filed an information, not in consequence of a motion made in open court, but privately, that is, *ex officio*, in the Crown-office. *Orig. Ed.*

* With an affected air of sincerity, there is great art in this passage, which indeed cannot be made appear so strongly upon paper, as it did by the emphasis in speaking. By the words 'one person,' and 'others are now depending,' Mr. Attorney could not possibly mean any thing but the original publisher, and the re-publishers. Now the fact is, that here again he must know, he was advancing a falshood in which he could have no other design but to deceive the jury; it being very natural for the jury to ask one another, Why is this man brought to trial before the original publisher? The Attorney-General, with great caution, takes care to satisfy them upon that head. He gives them to understand, that the original publisher is ill, and for that reason his trial has been postponed. The baseness of this part of the business would exceed the possibility of belief, were not many persons well acquainted with the notoriety of it. The real truth is, the original publisher was not ill. On the contrary, he was in perfect health, and attended upon this very trial, in consequence of a subpœna on the side of the prosecution, of which the Attorney General could not be ignorant; and the subpœna was so particular, that by a note on the back of it, he was ordered to bring with him the original copy of the advertisement of the London Museum, inserted in his paper. What purpose the original copy of the advertisement was intended to answer, it is impossible to say, as the printer was not examined. But the advertisement was shewn about to several persons, and it appeared by a note at the bottom of it, to have been inserted in his paper, by the order of Mr. J. Miller, the publisher of the London Museum. Like subpœnas were also sent to the publishers of the Gazetteer and St. James's Chronicle, but the Attorney General did not think proper to examine any of them. *Orig. Ed.*

What did you buy?—The London Museum. (Produced in court;)

Is that the very book you bought?—Yes; it is.

What day did you buy it?—On the first of January.

Serj. *Glynn.* Be so good as to let us know who you are?—*Bibbins.* I am a messenger to the press.

(The Paper was here read.)

Sol. Gen. I shall call a witness, in order to shew, that Almon was one of the original publishers; or, one of the persons to whom the attention of the public was called in that character.

Serj. *Glynn* to *Bibbins.* You are a messenger to the press, please to tell us what that office is?—It is my business to buy all political pamphlets.

Have you a salary for that purpose?—There is a salary annexed to that office.

Then without any direction whatever, when a political pamphlet comes out you are to buy it?—Yes.

You looked upon this as a political pamphlet?—Yes: I did.

Did you buy all the Museums that were published, or only this?—I bought them of the publisher mentioned in the advertisement: I have a standing order; and never wait for direction.

Do you buy all magazines and papers which come out?—If any thing particular is advertised to be published in them, then I buy them.

I believe Junius was advertised in all the magazines: did you buy all the magazines?—I believe you are mistaken.*

Then the fact is, you did not buy all the magazines?—I bought all that I knew were published by him.*

I would be glad to have it understood, whether what you do, is done from the idea you have of the duty of your office, or whether you are so directed?—From the idea of the duty of my office.

Have you kept them ever since?—I delivered them to Mr. Francis—and he delivered them to me again.

How did you know it again?—I marked it, and know it to be the same.

You have a salary for your office?—I am only an acting messenger.

Did you buy the London Magazine?†—I did not.

Whom did you buy it of?—The young man in the shop; I asked for the London Museum, and he delivered it to me.

Nathaniel Crowder sworn.

Examined by Mr. *Morton.*

Did you buy any London Museum, and when at the defendant's shop in Piccadilly?—I did, this is it—(producing it, and the newspaper produced)

Is that the advertisement of the London Museum?—It is.

Is it that which gave rise to your buying the paper?—Yes, it was.

Lord *Mansfield.* It is capable of proof, if the defendant put it in.

Mr. *Morton.* The last witness said that he bought all papers of the political kind.

Lord *Mansfield.* To that he has given a proper answer.

Mr. *Davenport.* What are you?—*Crowder.* I supply the gentlemen of the Treasury with all political daily publications.

Then you are a sort of messenger, employed

* The witness takes as great a latitude as the Attorney General. The letter of Junius, for the selling of which the witness informed against the defendant, was printed in most if not all the magazines, published in London on the 1st day of January, 1770. The fact of the publication of these periodical pamphlets is unquestionable. The publishers of them are not men who act in the dark, or who live as if they were afraid to be known. Their names and places of abode are affixed to their books. Sometimes it happens that other booksellers' names, besides the real publishers, are placed in the advertisements, but the first name is always that of the real publisher; if the word 'publisher' may be permitted to be understood in the usual and general accepted sense. Indeed, where there is no publisher's name to a book or pamphlet, or where the name is fictitious, it may be right to deem the first man a publisher, who may be found selling. But common sense revolts at the idea of prosecuting, and the first too! a seller only; when the real printer and publisher may be easily come at! *Orig. Ed.*

* There was a report, which this evidence seems to confirm, that informations were drawn against the defendant, for selling, on the first day of January, 1770, the Freeholder's Magazine, and the Town and Country Magazine, each containing Junius's letter; which, probably this evidence bought at his shop the same morning.—There is not a doubt, that some copies of almost every monthly magazine are sold at the shop of every bookseller in the kingdom; but can it be right, or is it reconcilable to any principle of justice, that a man should be prosecuted for only selling a book in the course of his trade, which has been printed and published with impunity, by another, whose name is mentioned upon the title page? If the principle upon which such a partial prosecution is instituted, be good, then the minister, or, which is the same thing, the king's Attorney General, who always acts by his directions, can at any time prevent any particular bookseller from following his trade, and by that means ruin him. *Orig. Ed.*

† Junius's letter was in the London Magazine. *Orig. Ed.*

by the Treasury to select all the papers they direct you to get?—Yes.

You don't know any thing of the bookselling trade?—No; I do not.

Did they direct you to go to any particular shop?—No.*

Who delivered that pamphlet to you at the shop?—A young man; I cannot tell who he was.

What did you ask for?—I asked for the London Museum, and somebody gave me one.

Serjeant *Glynn.* May it please your lordship, and you gentlemen of the jury, to favour me in the present cause in behalf of Mr. Almon: and gentlemen, out of the concern that I have for my client Mr. Almon, it gives me a peculiar satisfaction, that a cause of this nature, affecting him so greatly, comes to be tried by gentlemen of your character. Gentlemen, Mr. Almon is singled out for a prosecution, as the publisher of a paper, contained in a certain pamphlet that comes out monthly, and is called a Museum—for the publication of a paper that hath singly appeared in all newspapers that have been published. The original publisher well known, and avowing himself. I should have thought that Mr. Almon, upon the evidence of a man, who calls himself a messenger to the press (an office, that should have expired with that odious system of laws) —upon the evidence of that man, finding this book upon a stall, or delivered to him by a boy in the shop, that Mr. Almon should now struggle against being convicted of an offence, which would bring upon him, undoubtedly, very severe punishment.—Gentlemen, it is (in my opinion) a question that goes very far beyond the person of Mr. Almon. If the prosecutor had thought proper to bring before you the known and avowed publisher of this paper, in that case, the question of the guilt or innocence of the paper, would have been material for your consideration. As Mr. Almon is now circumstanced, if the paper was meritorious, the merit could not belong to him. If on the other hand, the paper is criminal, the criminality cannot be imputed to him. This offence has been described in the information, and represented afterwards by Mr. Attorney General, in the opening. Mr. Attorney General has said, that "it was published in the malevolence of the publisher's heart, to vilify and asperse the king upon the throne; that it was done with an intention to excite sedition and destruction in the kingdom, to divide one part of his majesty's subjects against the other; and pursuing that malevolent intention that prompted the author to excite disaffection to the king, has taken that odious and detestable part of exasperating the king against his subjects."—To whomsoever that imputation belongs, it is certainly the greatest offence that a subject of this kingdom (be he who he will) can possibly commit: gentlemen, whether that belongs to Mr. Almon, or to the writer, I must submit to your consideration.—Whether it belongs to the other, is not now the subject for your discussion.—Gentlemen, I should be very unwilling, as I have stated it to you, to have it totally immaterial; as I am uninstructed by Mr. Almon, who knows nothing of this paper, either to defend it, or to submit to the criminality of it. As I have no instructions, on the subject, I will not trouble you with many observations: whenever the real publisher comes to be tried, the jury then concerned will consider and decide on the question. It has been said, that this is "to vilify, and asperse the king himself."—The highest offence that the rancour of the most malevolent heart could ever conceive; but is it such? Is it to vilify and asperse the king? Was it the opinion of the drawers of the information that it was so? I am of opinion that it could not be so; I am of opinion, from a single omission, that that was not the construction the drawer of the information put upon it. I have always been led to observe, that the word 'false' has been inserted in these informations—every one of them.—How happened it to be omitted here? If this conveyed personal reflection on the king, would not the drawer of the information have been prompted, for the honour of the king, to say that it was false?—I do say it, that if there is a single word derogatory to the personal honour and virtues of his majesty, it is false in the highest degree.—I say, they should have said it was so.—They cannot now, with decency, contend that the king is personally reflected on, because they have not undertaken to falsify the matter of that.—There is another observation that I would submit to you; and I don't mean to submit it to you as at all preventing your going into the construction of this paper.—It was only given me to contend, that the publisher of this paper is innocent: but I must take some hints from what has been said, and some doctrines that have been laid down. I take notice of it, because on future occasions it will concern others, and because (in my opinion) it concerns the public. I do agree, that personal imputations on the king can never be defended; but, I do assert, that the freedom of political discussion is of the utmost consequence to all our liberties, and I do insist upon it, that the actions of this government may be canvassed, freely, and consistently with the duty of a good subject; and then ought always to be defended. —The king's hand must be employed to the act.—It is no imputation to the king to censure the acts of government.—In no sense is the

* This witness was the informer against Mr. J. Miller (who is the publisher of the London Museum) for printing and publishing Junius's letter in the London Evening Post. Is it not extraordinary that he should go to Mr. Miller's, near St. Paul's, for the London Evening Post; and then, of his own accord, go to Mr. Almon's in Piccadilly, (almost two miles distance!) for what he might have had at Mr. Miller's? *Orig. Ed.*

king to be censured when the conduct of government is only animadverted on. It would be idle to state, that there is a constitutional check, on the power of the crown, lodged in those hands, where ——— say that is criminal, and give them information. Having entered lately my protest against this doctrine, I shall not trouble you with any application of it to the present question. Let this imputation be what it will, Mr. Almon is not guilty of it: he is not the publisher.—Mr. Almon is a bookseller, lives I believe in Piccadilly, and you find the charge against him is, the having this book in his shop. I should really think, for the sake of the honour of the laws, for the safety of every man, that is by no means proper evidence to convict a man upon: I have always thought, that to the essence of a crime belongs intention. I could never conceive that any man could be guilty who was not criminal in his heart. I have always understood too, that whatever is necessary to constitute an offence, is incumbent on the prosecutor to prove.—Gentlemen, is there the least tittle of evidence before you to affect Mr. Almon? not only with a black malevolent intention, ascribed to him in the information, but with any ill intention at all?—from any mischief done, or to be done?—a paper contained in a miscellaneous tract; found only at that shop.—Gentlemen, if Mr. Almon was to be convicted as an offender in the publication of this paper, I think we should be —— what never will be allowed in this country I hope, and I believe what, in no civilized country ever was——that a man should be innocent in his intentions, and at the same time guilty.—It seems to me to be the greatest paradox, the greatest solecism that ever was attempted to be proved.—Gentlemen, therefore in behalf of Mr. Almon, we now insist upon it, that though the fact is, that this book was found in his shop, yet that Mr. Almon is in no sense the publisher; nor criminal; he never had it, or if he had, his mind never went with it.—After having observed to you upon what has been produced to you in support of the prosecution, it would be almost unnecessary to open to you the particular circumstances of Mr. Almon's case: but, gentlemen, we have not only that defect of evidence which we are to rely upon—we have not only to say that Mr. Almon has not been proved to be the intentional publisher of the paper (and this was absolutely necessary to be proved before he could be convicted) but we have it negatively to prove that this came to Mr. Almon's shop without his knowledge, and that he sent it back as soon as he knew it! Is that circumstance sufficient to prove Mr. Almon's guilt? Trifling indeed!—we know that advertisers will insert whatever they think proper! and Mr. Almon's name appearing to that advertisement, it ought not to be the occasion of any inference drawn against Mr. Almon. Gentlemen, you will be told, that among the trade, it is their constant custom to insert the names of such booksellers as are most conveniently situated for the circulation of such books—and this was inserted without his authority,—and the books returned unsold—the few that were sold, were without his knowledge or intention. If these circumstances appear before you, how can you say that Mr. Almon is guilty of publishing this paper? If publication is an offence, Mr. Almon cannot be said to have committed it. Mr. Almon was entirely innocent, entirely ignorant of it——and, if this is to be the law of the land,——if a law so contrary to natural justice is to prevail, how is any situation of men—any age to be safe?—The common excuse can never be admitted, because it is quite indifferent, if intention is immaterial—a man then is criminal in the highest degree, though, at the same time, he never knew what was doing.—I do most heartily subscribe to a doctrine laid down by the Attorney-General, as I build upon its authority a doctrine, which, I think, is highly wholesome and beneficial to the subjects of this kingdom. He has said, that in all cases whatever, the liberty of the press is the most sacred of all others. He has truly said, that that principle rests on the same principle, and the same security, and to be governed by the same law, as every other article of our liberty. It is most certainly so. Mr. Attorney-General has said, that the liberty of the press, is the liberty of writing what is just:—I, says he, have the liberty of acting and doing; but, if I abuse that liberty, I become criminal. Certainly so! no position can be clearer!—If there is an abuse of that liberty, undoubtedly it is the highest misdemeanor, in proportion to the value of the liberty he abuses; but apply that to any other liberty to the present case. I have the liberty of walking; (when I can, I have that liberty too) but supposing, that in the course of my walking, I abuse that by doing any mischief, then I abuse that liberty; or supposing, that in any other liberty that I have of acting, I act criminally, then I am punishable for it. Most certainly so!——Suppose I have the liberty of using my hands, if I use them to the assault, or to the annoyance of my neighbour, I am then criminal: but under what circumstances? If I do it desgnedly, then I am criminal; if not, I cannot be so; look into every liberty we enjoy, and you will find, that the exercise of it depends upon this principle, I will not abuse it. If a mischief arises to my neighbour, I am in some sense answerable in a civil act, but I can never be made a criminal, unless I am guilty of wilful abuse. Mr. Attorney-General has put in the very case: a man has the liberty of using his hands; if he uses them to the mischief of his neighbour, he is a criminal; but if by accident he hurt his neighbour, he is not criminal, he hath not offended against the peace. What means the distinction? Why, in the latter case, he is not criminal, because he had no intention to do the act he did; and to constitute criminality, it is necessary there should be a wicked intention.—To apply this to the case of Mr. Almon. Supposing now, for argument sake, that you are convinced that this paper is

criminal—Mr. Almon has, in the course of trade, published it; that it has been published at his shop; now, it does not appear that he had the least knowledge of it; indeed we will produce proof to you of the negative, that he had not the least knowledge of it. Stating the case thus, the same rules that extend to a man's answering for every act of wrong, where there is an intention, certainly the same rules must acquit, where there is no wicked intention. Gentlemen, I will therefore submit to you, upon all the circumstances of this case, that we are entitled to your verdict for Mr. Almon; that his conduct cannot be condemned, without violating one of the first principles of natural justice; and I do hope, that if I should be so unfortunate as to have that ever admitted to be violated, I hope it will be violated for some greater purpose, than merely to effect the ruin of a bookseller, who, in this part of his conduct, is not criminally guilty; and whom, in this case, gentlemen, I must submit to you, as an honest and an innocent man.

Mr. *Davenport*. We will call a witness to prove, that Mr. Almon is the mistaken object of this prosecution; that the books were sent to his house without his knowledge. (Call John Miller:)

John Miller sworn.

Serj. *Glynn*. I am not bound to prove the contrary of what they have not proved.

Court. Use your own judgment.

Mr. *Davenport*. I apprehend, in a cause of this sort, we need call no witnesses at all. I shall be very short upon it. This charge is a malicious and wilful publication of this libel, that has been read to you from the paper itself, and from the record. You will try whether that evidence satisfies you, that Mr. Almon is the real or the mistaken object of this prosecution? The parties who prove the supposed publication, prove the going into Mr. Almon's shop, in Piccadilly, and buying there a pamphlet that they asked for, under the title of the London or British Museum. That is the evidence. There is no letter produced to you; there is no specification of that sort of libel, that is contained upon the face of the record. The book, the pamphlet was sold there without the other's knowledge of the contents of it. It is usual, and I believe many of you know it, for booksellers, in different parts of the town, to send pamphlets and books published for themselves to other booksellers; and this appears to be by one John Miller, who stands forth, not only as the printer but the actual publisher of it. If that be the case, and, if it were possible, that this might be published for some other man, who avows the publication, it might be sent very honestly to Mr. Almon's, or any other shop in this town, and they would be equally the objects of this prosecution; if consent, if concurrence does not go with the crime, of that you are to be the judges; of that, no evidence has been given; nor is it possible to stamp a crime of so enormous a nature, as has been described by the Attorney-General, on a man, who himself has had no communication with the publisher. I advised my client to call no witnesses, and I do submit to you, that he is very clear of this charge: if they mean to try it again, they will get better evidence of his guilt.

Lord *Mansfield*. Gentlemen of the jury. There are two grounds in this trial for your consideration. The first is matter of fact, whether he did publish it. The second is, whether the construction put upon the paper by the information in those words where there are dashes, and not words at length, is the true construction; that is, whether the application is to be made to the king, to the administration of his government, to his ministers, to the members of the House of Commons, to England, Scotland, America, Ireland, as put upon it by the information; because, after your verdict, the sense so put upon it, will be taken to be the true sense: therefore, if you are of opinion, that that is materially the wrong sense, it will be a reason for not convicting him upon that sense.

In the first place, as to the publication, there is nothing more certain, more clear, nor more established, than that the publication--a sale at a man's shop—and a sale therein, by his servant, is evidence, and not contradicted, and explained, is evidence to convict the master of publication; because, whatever any man does by another, he does it himself. He is to take care of what he publishes; and, if what he publishes is unlawful,* it is at his peril. If an author is at liberty to write, he writes at his peril, if he writes or publishes that which is contrary to law; and, with the intention or view, with which a man writes, or publishes, that is in his own breast.' It is impossible for any man to know what the views are, but from the act itself: if the act itself is such, as infers, in point of law, a bad view, then the act itself proves the thing. And as to the terms 'malicious, seditious,' and a great many other words that are drawn in these informations, they are all inferences of law, arising out of the fact, in case it be illegal. If it is a legal writing,† and a man has published it, notwithstanding these epithets, he is guilty in no shape at all. And

* What is unlawful?—The only statutes against libels, viz. 3d Edw. 1, 2d and 12th Ric. 2, condemn or punish no other than false news. They say, "That whoever shall be so hardy to tell, or publish any false news or tales, whereby discord or slander may grow between the king and his people, or the great men of the realm, shall be taken and kept in prison, until he has brought him into court, which was the first author of the tale." Junius's letter does not fall within these statutes, for the Attorney General, in his information, does not call it false. *Orig. Ed.*

† How is any man to know what is a legal writing? *Orig. Ed.*

Mr. Serjeant Glynn told you what was true in libels formerly: they had more epithets of that kind, and, amongst the rest, they put in the word 'false;' but he is mistaken as to the time; it was left out many years ago; and the meaning of leaving this out is, that it is totally immaterial in point of proof, true or false: if it is true, there is, by the constitution, a legal method of prosecution, from the highest to the lowest—every man for his offences. It has been left out, and many others of the same nature, a great many years ago, in prosecutions of this kind:* but as to the two facts now before you. As to the publication, here are two witnesses that swear to the fact: Bibbins swears, that being led by an advertisement, that such a pamphlet was published and sold at the defendant's, in Piccadilly, that he went there, asked for it publicly; it was publicly exposed to sale, and sold to him by a lad in the shop, that acted as a servant at the defendant's. There is another witness, Crowder, who likewise swears, that he asked publicly for one, and that it was sold him by the defendant's man: thus it stands upon their evidence. If there had been any artifice, or trick, of sending a man privately into another man's shop, to sell it, in order to trap him, if he has such a thing; that is to be proved by the defendant. In this case, the defendant may call a servant of his to give evidence; but they have judged it wiser and prudenter not to call him; therefore it rests entirely upon this suggestion.

Serj. *Glynn.* We did not call the servant, we called Mr. Miller the publisher.

Lord *Mansfield.* It certainly rests singly upon the evidence of the two witnesses, with regard to the publication of this paper: if you believe these two witnesses, you will be satisfied as to the fact: if you believe that what they have sworn is false, and not true, you will not be satisfied.

As to the sense put on the words by the information, you will exercise your own judgment: but this certainly, in point of law, is against the defendant; and, if you are also satisfied with the sense put on the words by the information, you will find the defendant guilty. They severally prove their being bought there; but if you believe they were not bought there, or should not agree with the information, with regard to the sense there put on the words, in these parts of the paper; in either of these circumstances, you will acquit the defendant; and therefore, in order to guide your judgment the better, you will take the paper and the information with you.

The trial was over about twelve. The jury then went out, and staid out near two hours and a half. When they returned into court, Herbert Mackworth, esq. (one of the jury) said to lord Mansfield,

My lord, I am instructed to ask a question;

Whether selling in the shop by a servant, of a pamphlet, without the knowledge, privity, or concurrence of the master in the sale, or even without a knowledge of the contents of the libel or pamphlet so sold, be sufficient evidence to convict the master?

To which lord Mansfield answered,

I have always understood, and take it to be clearly settled, that evidence of a public sale, or public exposal to sale, in the shop, by the servant, or any body in the house or shop, is sufficient evidence to convict the master of the house or shop, though there was no privity or concurrence in him, unless he proves the contrary, or that there was some trick or collusion.

The jury then agreed among themselves; but before the verdict was given, lord Mansfield desired the Attorney General and Mr. Serjeant Glynn, to attend and take down his opinion; and here he repeated as above to the jury, except, that instead of saying it was sufficient evidence, he said it was *prima facie* evidence to charge him, unless he could shew it was by trick or collusion, and without his knowledge or privity; and then added, "If I am wrong, they may move the Court, and the trial will be set aside."

* How many years ago?—It was left out in the information against Mr. Wilkes, because all the crown lawyers know very well, that every word of that North-Briton was true. But does lord Mansfield mean, that it has been left out ever since he knew the court of King's-bench? He certainly does not, for he knows better. He cannot have forgot, (being solicitor-general at that time) that in the information against W. Owen, tried the 6th of July, 1752, for publishing the case of Alexander Murray, esq.; the words are, 'a wicked, false, scandalous, seditious, and malicious libel.' Therefore it is not a great many years ago, since the word 'false' was left out. But it seems to be omitted now, in conformity with, and perhaps the better to enforce that new and absurd doctrine, that any writing, true or false, against a minister, is a libel. It may be so, according to the imperial slavish civil law; but it is contradicted by natural reason, upon which is founded the mild and liberal law of England. Indeed, lord Mansfield's definition of the liberty of the press, warrants us in this supposition, for, upon Mr. Woodfall's trial, he said, "The liberty of the press consists in no more than this, a liberty to print now without a licence, what formerly could be printed only with one."—And, in the information against Richard Nutt, for printing and publishing in the London Evening Post, of Sept. 10, 1754, the paper is called a false, wicked, scandalous, seditious, and malicious libel. This information was filed by lord Mansfield himself when he was attorney-general. And, in the information against Dr. Shebbeare, tried by lord Mansfield in Trinity term 1758, for publishing the Sixth Letter to the People of England; that letter is called a false, wicked, scandalous, &c. libel. See Digest of the Law of Libels. *Orig. Ed.*

The jury being now agreed, the foreman, Leonard Morse, esq. said Guilty.

Previous to the beginning of the succeeding term, the defendant having had a consultation with his counsel, was advised to move for a new trial; which was accordingly done on the 27th of June, upon the ground of law, that the master is not answerable, in a criminal case, for the conduct of his servant, where his privity is not proved; but the Court did not think proper to grant a new trial.*

The following account of the Proceedings upon this occasion was given in the London Museum (of which N. B. Miller was the printer):

June 27.

This morning, about ten o'clock, came on to be debated in the court of King's-bench, Westminster, before lord chief justice Mansfield, the judges Aston, Willes, and Ashhurst, the arguments on the rule to shew cause, why Mr. Almon should not have a New Trial?

Lord Mansfield opened the cause by reciting the principal circumstances of the late trial. After which, the Solicitor-General, on the part of the crown, declared he was amazed at any hesitation, after a verdict on presumptive proof, which amounted to a conclusive evidence, as the defendant had not called any witnesses to disprove what the witnesses on the side of the plaintiff had advanced; and urged, "that Mr. Almon was both guilty of publication and intention—of publication," he said, "because it was sold publicly in his shop, and of intention, because his name appeared in the advertisement and title page, both which circumstances strongly implied his consent." He then entered into a recital of the several evidences that led to the former verdict, and was going on to prove the inutility of a new trial, when the Court requested that the defendant's counsel might be first heard; on which Mr. Serjeant Glynn at once entered into a general review of the fact.

He said, "that the fact of publication was not sufficiently proved; that the evidence examined had not swore to the identity of the person who sold the pamphlet, who might not be Mr. Almon's servant: and he particularly and repeatedly urged, that some criminal 'intention' was necessary to convict in a cause of this kind; declaring, he should never be ashamed to assert this, as he thought it highly becoming the mouth of a good lawyer, and he conceived no jury could conscientiously find any defendant guilty, unless the criminal and seditious 'intention' was fairly and demonstratively proved; whereas the counsel, on the side of the plaintiff, had not attempted to prove any of the criminal charges made in the words of the information, which they ought to have done, as a defendant is only to controvert their evidence, and make his own innocence appear, not to supply a proof of his own guilt."

He observed, "that the pamphlet in question, was bought in the shop of Mr. Almon, without either his privity, consent or concurrence, that they were sent there unknown to him, and that as soon as he knew them to be in his possession, he sent the remainder back to the publisher; that as to what Mr. Solicitor-General had observed in respect to Mr. Almon's name being advertised for the sale of this pamphlet, or in the title page, it was no more than the known and accustomed usage of booksellers to one another, who frequently, without consulting the parties, as thinking it immaterial, prefixed the names of those whose situations or characters, might most encourage the sale."

After thus pointing out the course and custom of trade, he shewed the utter impossibility, that a bookseller could carry on his trade under such circumstances. He stated the peculiar hardship of the case; and said, that a licenser was much better for booksellers, if they are rendered thus liable.

He observed, "that masters, in some cases, were not bound for the errors of their servants, particularly in matters of criminality; was the case otherwise, it would be in the power of a malicious servant to ruin his master.

"But, suppose, my lords, (says the Serjeant) the indictment was laid for high treason, should the bare evidence of this pamphlet's being bought in his shop, without its ever being proved he was his servant, or with his privity and consent; must that involve the master, so as to forfeit his life?—surely no! This would be acting both against reason and justice.—Where then is the line to be drawn?

"But, my lords, (continued the Serjeant), I believe it will be found that Mr. Almon is only convicted by eleven jurymen, Mr. Mackworth, one of the gentlemen, having mistaken your lordship (addressing himself to lord Mansfield) on a question he proposed to you, respecting the master's being involved for the act of the servant. Mr. Mackworth, though a gentleman extremely well acquainted with the general principles of law, did not precisely know from your lordship but that there was a positive rule, particularly applied to booksellers, which bound them, in all respects, to be answerable for what was sold in their shops; and, in consequence of understanding your lordship so, I am instructed to say, and I have an affidavit of Mr. Mackworth's to this purpose, that he thought himself bound in conscience to bring Mr. Almon in guilty; but if, my lord, he had been informed, that he himself was the constitutional judge of that matter, he declares he would have acquitted him. On these grounds, my lords, then I am warranted, both in justice and reason, to sue for a new trial."

The Court objected to the reading the affi-

* The real printers and publishers being tried at Guildhall, each by a jury of independent citizens of London, were all acquitted.

The law proceedings attending this trial, cost the defendant 139*l.* 0*s.* 11*d.* *Orig. Ed.*

davit; judge Aston declaring, that it would be a precedent of a most dangerous kind, as no trial would ever have an end, if the Court listened to affidavits made by jurymen after the verdict given on the trial.

Mr. Lee next began. He did not doubt but Mr. Mackworth had supposed, that in consequence of lord Mansfield's declaring the evidence, was *prima facie* evidence, he was obliged by law to find Mr. Almon guilty, as there were actually cases in the books of former times, where very strange precedents might be found, and immediately cited one from Fitz-Gibbons, where in a trial before lord chief justice Wright, Elizabeth Nut, an old bed-ridden woman, whose house was a mile from her shop, was convicted of publishing a libel, because her servant had accidentally sold a libellous pamphlet; and this upon mere evidence of its being bought at her shop, [The same is the case in Barnardiston's Reports] and added the case of the Seven Bishops in the reign of James 2. He then went further into the nature of the evidence, and asked the Court, whether in a trial for publishing a paper tending to levy war upon the king, and which came under the charge of high treason, such evidence would be thought sufficient to convict, and take away the defendant's life? Having pleaded for a considerable time with great ability, he concluded his speech; when Mr. Davenport got up, and began with reciting the question proposed by Mr. Mackworth, and the answer given by lord Mansfield. He then quoted two cases, one from Coke, and the other from Moore, where it is laid down as a maxim, that to render a man guilty of publishing a libel, it must be proved, that he published it *malo animo*, with bad and criminal 'intention:' Mr. Davenport went upon the same arguments which the Serjeant and Mr. Lee had gone upon.

The Solicitor General opened with declaring, that the question Mr. Mackworth had put, and lord Mansfield's answer, had not been accurately stated by the counsel for the defendant: he then read them, according to his notes, which he said he had taken on the trial, and compared since with those of several others, and particularly a short-hand writer present the whole trial: he spoke for a considerable time on the nature of evidence in general; talked much on the distinction of positive, ocularly demonstrative, presumptive, and violently presumptive, evidence; explained the nature of *prima facie* evidence; asserted that the evidence given was *prima facie*, and sufficient to convict on, therefore, he could see no reason, why a new trial should be granted.—Mr. Morton spoke next, and made use of arguments similar to those used by the Solicitor General: he said a thing might be criminal to day, and innocent to-morrow; criminal in one person, and innocent in another; criminal in this place, innocent in that; and this beautiful string of rhetoric he explained, by a very elegant simile, comparing libellous pamphlets to squibs and crackers, and a legal publication to a cartridge made for the artillery. Having finished his harangue, Serjeant Glynn presumed he had a right to reply; he declared he would not detain the Court long, but would confine his observations in as short a compass as possible: he observed, that his learned friends, Mr. Lee, and Mr. Davenport, had the misfortune to have had their arguments unfairly stated by the Solicitor General and Mr. Morton, and explained the different manners in which they had expressed themselves: he then again urged the evidence as insufficient, and declared that Mr. Mackworth, in his opinion, founded his question on the reasons which Mr. Lee had assigned; that Mr. Mackworth was a gentleman of great natural talents, improved by a very liberal education, but though he might know something of the common law, it must be impossible for him to be perfectly acquainted with the practice of that court, as he was not bred to the bar; that therefore he asked the question as a matter of law, and by founding his verdict on the reply, he had inadvertently given up his right as a juryman, who, he repeated, were the real judges in these cases; as the Court very well knew, upon a juryman's applying to the Court to inform him what verdict he ought to bring in, the Court would not answer him, as it would be acting in an extrajudicial manner, and take the power out of the juryman's hands; although they would certainly give an answer to any question of law. He again desired to read the affidavit, which lord Mansfield then consented to his giving the substance of; Mr. Mackworth being in court, begged to read it himself, but the Court forbidding it, as irregular, he put a paper into the Serjeant's hands, who read it to the Court: this was not the affidavit, but a paper containing Mr. Mackworth's sense of his lordship's answer, and which the Court were of opinion entirely confirmed the verdict. Mr. Mackworth next, with lord Mansfield's leave, addressed himself to the Court, and gave his opinion with regard to his question, and the reply, which he did in so judicious and sensible a manner, as reflected great honour and compliment on his character.

The arguments on both sides being now concluded (which took up about three hours and a half) lord Mansfield gave his opinion to the following purport:

"I am most exceeding happy for Mr. Mackworth's present declaration; I understood his question, as well as he did my reply. In regard to what I had then charged the jury with, I was so particular that I took notes of it, not long after their going out; and though I cannot be so particular in respect to the very words I made use of, yet I am clear as to the substance. I told them that books sold in any shop, or warehouse, though not immediately by the master, but by his servant, or one entrusted with the sale of such books, is *prima facie* evidence, and conclusive to all intent and purpose, if not contradicted; the question ask-

ed me by Mr. Mackworth, as I understood him then, and I find I was not mistaken, was, whether the evidence (which he believed) of the pamphlet's being bought in the shop of Mr. Almon, criminated him, though not sold by him. I answered him, "most certainly;" and I repeat it, that juries are only judges of evidence, the inferences from points of law, not properly coming before them. This is what I never knew to be disputed; and these are my reasons for not thinking a second trial necessary. However, I am still open to change my opinion upon better information, though I am at present as clear in it, as I am in an eldest son's title for enjoying his father's estate."

The other three judges concurring in the same opinion, lord Mansfield forbad Serjeant Glynn to move for an arrest of judgment, saying, You need not do it, I'll hear no more; and his lordship accordingly ordered the rule to be discharged.

On the 28th of November the defendant was brought up for judgment. Of the proceedings upon that occasion the following account was published at the time:

(From Lloyd's Chronicle, Nov. 30, 1770.)

Substance of what passed in Westminster-hall yesterday (Nov. 28) when Mr. Almon received sentence for selling Number I. of the London Museum, containing Junius's Letter to the K——.

About two o'clock Mr. Almon was brought into the court of King's-bench. Lord Mansfield told the Court there were six affidavits which were strong in alienating [qu. alleviating] the criminality, and extenuating the degree of guilt in the defendant; and it was necessary they should be read in open court. The two first by Mr. Miller, printer, deposing that he is the printer, publisher, and principal proprietor of the London Museum; that he inserted therein the letter of Junius, without the privity, consent or knowledge of Mr. Almon, or any kind of communication with him; that he put Mr. Almon's name upon the blue cover of the work, in like manner, without his privity, consent or knowledge; that Mr. Almon, as soon as he discovered his name at the foot of the wrapper, immediately sent Mr. Miller a note, expressing his dislike, and desiring that it might not appear there in future; this note was accidentally destroyed, as Mr. Miller did not conceive it would ever be of consequence enough to be preserved. The third affidavit was made by the defendant himself, who declared that he was not at home when the London Museums came into his shop; that as soon as he came in, which was in the afternoon of Jan. 1, he observed his name at the bottom of the cover, and immediately sent a note to Mr. Miller, expressing his disapprobation of it; and the first time in the same day that he had leisure, he perused the monthly publications, and directly gave orders to stop the sale of such as contained Junius's letter; among others was the London Museum; the number sent him by Mr. Miller was 300, and about 67 or 68 were sold before he ordered the sale to be stopt; the next morning he ordered what remained to be carried up to his garret, and the earliest opportunity returned them to Mr. Miller. The fourth affidavit was the deposition of Mr. Dilly, bookseller, proving, that it was the customary practice of the trade to affix, in the title page of any book or pamphlet, the names of such booksellers, who, from the conveniency of their situation or the reputation of their trade, might tend most to encrease the sale. The fifth affidavit was made by Robert Morris, esq. of Lincoln's-Inn, barrister, who deposed, that he had called at Mr. Almon's a day or two after the publication of the London Museum, and asked him for it; but Mr. Almon answered him he had it not; this deponent further declared, that while he was in the shop a stranger also came in to buy one, but was refused it in the same manner; that he had himself since bought it elsewhere, had perused it, and conceived it was no libel. The sixth affidavit was made by —— Adams, shopman to Mr. Almon, who fully corroborated and strengthened what his master had previously deposed.

The Attorney General opened with declaring, that had not the defendant produced the six affidavits, he should have been extremely urgent with the Court for as severe a punishment as could be inflicted, as he considered the offence Mr. Almon was convicted of, as one of the most heinous that could possibly be imagined; that, as far as his ideas carried him, a publisher was not at all less criminal because he was not the original publisher; in his mind he was infinitely more so; the author, as the founder of the mischief, had the greatest guilt; the person who first printed it, without having heard any opinion but his own, was not near so criminal as he who, after the general idea of the public was known concerning it, gave it to the world a second, a third, or a tenth time; all that remained now for him was to point out such objections as arose in his breast, tending to lessen the effect of the affidavits in alienating the criminality of the defendant: he observed first, that what Mr. Miller had deposed might have been given as evidence on the trial, that deponent having been then called, if not sworn, but was prevented from examination by the counsel for Mr. Almon; that in that case, he and his brethren would have been afforded an opportunity of cross-examining the witnesses, and have put such questions to them as might have lessened the weight of what they advanced. Lord Mansfield here desired to set the Attorney General right, informing him that the affidavits were not now received as impeaching or invalidating the recorded verdict; if they had been offered in that light, the Court could not have heard them; that the counsel for the defendant had wisely stopped the evidence on their side from being examined, thereby preventing any thing

coming out that might injure their client: that the affidavits were now merely to lessen and fix the degree of punishment the defendant merited; and, therefore, the Attorney General went upon wrong grounds in considering them as evidence for Mr. Almon. The Attorney General next urged, the want of preciseness in the affidavits, particularly in that of the defendant, which, he said, did not point out the difference of time between his sending the letter to Mr. Miller, and stopping the sale of the pamphlet, and was curiously defining the inaccuracy, when judge Aston interrupted him with observing, that that was rather a nice argument; that the Court understood, and he dared say Mr. Almon meant it, in the afternoon of the day of the publication; that if it was any way equivocal, the matter was direct perjury. The Attorney General declared, he did not mean by nice, or subtle arguments, to hurt any man, but went upon the honest grounds the affidavit afforded; that as it was wholly in the defendant's power to produce all he could in favour of himself, he only wondered he had not been more full and conclusive, reciting the tenor of the affidavit in words rather more expressive and concise than Almon's: he said, he was more particularly urgent upon this occasion, that too great a precedent might not be opened for delinquents to evade punishment, by lessening and impeaching the verdict when brought to receive judgment, and that it might not be laid down as a rule of the Court, to afford a shelter for criminals to escape under, upon a plea of ignorance, or of a libel being sold inadvertently without the knowledge of the vendor; [Lord Mansfield informed him, he need not be under apprehensions that any such would be laid down by that court; and then asked the counsel for the crown, if they had any affidavits to produce on their side; and being answered in the negative, he informed the Court that he was obliged to leave them, but desired the matter might go on.] The Attorney General next distinguished between a man's selling a pamphlet as long as he could sell, and stopping while he yet had it in his power to sell, calling Mr. Almon's the middle degree of guilt, but yet aggravating, as much as possible, every circumstance that could tell against the defendant, or increase the punishment. The Solicitor General seconded what the Attorney General had just advanced, observing, that Mr. Almon's affidavit was very vague and inconclusive; that the Court should have been informed where Mr. Almon was when from home, why he went from home, whether into the country, or to what place, the business that detained him, and the precise time he staid; that Mr. Almon had wrote to Miller about his name, why he did not also then return the books? The same cover in which his name was printed, expressed the contents of the pamphlet, at the head of which stood Junius's Letter to the K—: Could he not see that? But he sold 67, and then stopped, when as his affidavit said, he looked over the monthly publications. It was not therefore unknowingly, or against Mr. Almon's will, to sell what he knew to be a criminal paper; but it was the fear of punishment alone that induced him to stop the sale; Mr. Almon had, on his trial, been legally convicted of selling a libel of the most infamous kind; the affidavits produced were with him of no weight, they were extraneous to the verdict, nor should they at all affect the punishment. Mr. Morton got up, as third counsel for the crown, spoke a few words, which scarce any body heard, and then sat down again; when serjeant Glynn arose, and began with observing, that what his learned brethren had said, as to the affidavits now produced not impeaching or lessening the verdict, they were certainly right; the verdict of a jury was solemn, and ought to be considered as a sacred finding; in consequence of the verdict, he was under the necessity of considering Mr. Almon as in some measure guilty, but it was but right the guilt should be regarded only in its just and proper degree; Mr. Almon's, in his opinion, was almost merely nominal, and was indeed, with all due deference to the verdict, next to nothing; the affidavits were strong, and ought to lessen the idea of criminality the verdict necessarily involved the defendant in; the Attorney General might indeed have drawn them up with more accuracy; Mr. Almon, as an honest man, (a character in which he had never been impeached) had only given the necessary strong lights, which he had not done altogether without the assistance of the Attorney General; for it was in consequence of the objections made by that gentleman, when Mr. Almon was brought up for judgment last term, that the affidavits bore their present face; the bench, as well as the bar, had pointed it out as necessary, that it should be ascertained when Mr. Almon stopped the sale, how many he sold, and when they were returned; these questions were now answered; that as to the 'Where was he? What did he? and, When returned he?' so loudly and strenuously called for by the learned Solicitor General, they were not necessary to the point, nor were they before demanded; Mr. Almon, of all the publishers of this paper, many avowedly so, stood alone likely to receive punishment, and certainly with the slightest degree of criminality; his crime was merely nominal; and his punishment, if any, should be merely nominal; the affidavits might be called extraneous from the verdict, but they were, of the kind, of weight and consequence sufficient to alleviate, and almost wholly exculpate the defendant. As to talking of being induced to do right through fear of punishment, it was an argument that might, with equal propriety, be alledged against every man, for every good and just action; a severe punishment was never, under such circumstances, inflicted in that, or any other court, or legislature; he hoped, therefore, the Court would properly consider the degree of extenuation enforced by the affidavits, and give judgment accordingly.

Mr. Lee spoke next for the defendant; he observed, that if Mr. Almon's affidavits were equivocal or false, they were not only the grossest prejudices, but the grossest insults upon that court that ever had been offered; but that there did not appear to him the most distant reason to doubt the validity or truth of any of them; the affidavit of Mr. Morris, an independent gentleman, was the most incontrovertible proof of their being founded on fact that could possibly be produced; and that established, the whole was a strong alleviation of the defendant's criminality; he declared he was amazed to hear the gentlemen of the other side prosecuting this affair with so much ardour; he imagined that Mr. Almon had been all along considered as scarcely at all guilty; that every circumstance told for him; and he hoped the Court would be as lenient as possible in the punishment.

Judge Aston then began giving judgment, which he prefaced with observing, that Mr. Almon had been found guilty of publishing a most wicked, seditious, and malignant libel; a libel on the person of the king, a prince remarkable for the excellency of his public conduct, his private and religious virtues, and his steady attention to the welfare of his people; as admirable in himself as his libeller was despicable; notwithstanding the opinion of one Morris, the defendant had been fully, fairly and legally convicted of selling, in the London Museum, a libel filled with defamation and falshood, abusive of the sovereign, and the great officers of state, charging both Houses of Parliament with adopting arbitrary measures to the injury of the public, and, in contempt to the laws, tending to disturb the public peace, to destroy order, and create anarchy and confusion; the crime deserved the severest punishment that could possibly be inflicted; but the king wanted not to oppress his subjects with cruelty, he meant only to correct their ill-sprung errors. The Court were of opinion the affidavits of Mr. Miller and Mr. Almon lessened the guilt of the latter; they did not attend to one of the others, as they would not pay any regard to the affidavit of Morris, who could declare (thoughonly in a parenthesis) that Junius's letter was not a libel; but that the booksellers in future times, might not screen themselves by pleading ignorance of what they sold, it was necessary to repeat, that the bare fact of publication was sufficient conviction. The Court conceived that the affidavits were not designedly equivocal; if they were, the defendant must know he was guilty of perjury: and notwithstanding what had been said by gentlemen of the other side, judge Aston declared he could not help defending the Attorney General for pushing his prayer for judgment in this cause. Had he done otherwise, he would have neglected the duties of his office, a matter he never had yet been guilty of. The sentence was, a fine of ten marks, and to be bound over to his good behaviour for two years, the defendant in 400*l.* and two sureties in 200*l.* each.

N. B. Copies of these affidavits were given to the Solicitor of the Treasury last Trinity term, before the long vacation, and three of them had been read in court. After this second reading was finished, the counsel were heard, and then Mr. J. Aston read from a paper, what the Court thought good to pronounce upon the matter.

The reason given, for throwing out of the consideration, a material affidavit made by Mr. Morris, a witness totally disinterested, is really curious. He is a young barrister, and swears that he bought Junius's letter, not thinking it a libel. The judge thinks it is; and the point upon which these two lawyers differ, is agreed unanimously by the whole Court to be matter of law. Because, therefore, Mr. Morris is wrong in his legal notions, he is not to be credited as to matter of fact. How this might sound in the four courts, I know not; but, in my opinion, it will not pass in Westminster-hall for fair inference, good logic, or pure justice.*

The following account was given in the London Museum:

"June 30. This day, on a motion made by his own counsel, Mr. Almon appeared in the court of King's-bench at Westminster-hall, a little after one, before lord chief justice Mansfield, Mr. Justice Willes, and Mr. Justice Ashhurst, to receive judgment. Serjeant Glynn opened with explaining the nature of Mr. Almon's offence; and beginning to touch on the evidence that convicted him, lord Mansfield told him, that if he had any thing to say in extenuation of Mr. Almon, he had not the least objection to hear it, but that he could not allow him to enter into the evidence. The Serjeant informed his lordship, that he had much to say in extenuation of his client; so much, that if he had any guilt at all, it was of the lightest nature. He repeated to the Court the circumstance of Mr. Almon's having stopped the sale of the pamphlets as soon as he discovered they contained Junius's letter; that his name was inserted on the wrapper without his privity or consent, and that it was accidentally sold, in the common course of his business; as a proof of which, he had very strong affidavits to produce, the one Mr. Almon's own, a second Mr. Miller's, (the original publisher) a third by Mr. Dilly, a bookseller in the Poultry, and a fourth by Robert Morris, esq. of Lincoln's-Inn, each severally and essentially tending to clear Mr. Almon of any criminal intention. He said he hoped the Court would not think of a severe punishment, as if that was to be the consequence of a prosecution and conviction of this kind, when the guilt was attended with such

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* What Mr. Justice Aston in pronouncing sentence said of Morris (see the case between him and Miss Harford, see also the trial of the Rev. Bennett Allen, A. D. 1782; for the murder of Mr. Dulany) was sharply reprehended by Junius, and also in "A Summary of the Law of libel in four letters signed Philelutherus Anglicanus," Lett. 4.

alleviating circumstances, the exercising the trade of bookseller would be extremely hazardous; and if more than a nominal punishment was inflicted, the best advice he could give the booksellers and publishers would be to shut up their shops. Lord Mansfield desiring the affidavits might be read, the clerk of the court immediately read them.

Mr. Almon's (which was first read) deposed, that he did not cause that letter of Junius to be inserted in the London Museum.

Mr. Miller's deposition was, that Mr. Almon had no concern whatsoever in inserting, or causing to be inserted, that letter of Junius in the London Museum: that he put Mr. Almon's name to the pamphlet, as a seller only, because he knew many people of fashion, and numbers of the nobility resorted to his shop; and that it is usual for the booksellers to add to their books, &c. the names of such other booksellers as appear most likely to sell them: that he put Mr. Almon's name to the London Museum, agreeably to this custom, without asking his leave; and that he also sent the books to him.

The affidavit of Mr. Edward Dilly was next read: he deposed, that the above practice of putting other booksellers' names to, and sending them books or pamphlets to sell, was common and usual in the trade.

Lastly the deposition of Robert Morris, esq. was read, which declared, that he called a few days after the day of publication, (which was January 1,) at Mr. Almon's shop, in order to purchase one of the numbers of the Museum, containing Junius's letter, and that Mr. Almon said he had it not.

Mr. Serjeant Glynn mentioned, as a farther proof of his client's innocence, that Mr. Morris was a friend of Mr. Almon's, and that Mr. Almon could not suppose a gentleman of Mr. Morris's rank and character came to his shop with a design to inform against him, his refusing to sell him the Museum therefore was a plain proof he had returned them.

Lord Mansfield observed, that there was some defect in the affidavits, none of them mentioning the precise time of Mr. Almon's returning the pamphlets to Mr. Miller, or stopping the sale of them at his shop; he recommended this therefore to be supplied, as blinking would only create suspicion, and leave more room for a suspicion of guilt than it was possible for the real truth to imply: he declared he mentioned this solely for the sake of clearing Mr. Almon; who directly informed the Court, that when the magazines, &c. came into his shop, he was not at home; but on his return, he, from motives of curiosity, looked over each, and ordered his servant not to sell any which contained Junius's letter; and that to the best of his memory, the sale of the London Museum was stopped some time on the first day of publication. Lord Mansfield then recommended to Serjeant Glynn to amend the affidavits, and bring the defendant up again.

His lordship asked the Solicitor General if there was any prosecution against Mr. Miller, and being answered in the affirmative, he said the defendant had done right, in not examining Mr. Miller upon his trial; and then declared he wondered at bringing Mr. Almon up for judgment before the other informations were tried, and advised it to be postponed, pending the issue of the intended prosecutions, as no man should be punished farther than his peculiar degree of guilt, and some one might be found more immediately criminal than Mr. Almon; that if the counsel for Mr. Almon chose it, the Court would not consider him as being brought for judgment that day, but would give judgment any future time that the counsel on both sides should appoint.

Mr. Lee also spoke for Mr. Almon; but as no arguments were entered into, it was not in the power of the counsel on either side to exert their abilities, exclusive of the opening speech of Mr. Serjeant Glynn, in which all the use of ability that could be made on such an occasion was exerted by the very able Serjeant.

The following is Burrow's Report concerning the application for a New Trial, (see p. 839.)

The defendant having been convicted of publishing a libel, (Junius's Letter,) in one of the magazines called the London Museum; which was bought at his shop, and even professed to be "printed for him;"

His counsel moved, on Tuesday 19th June 1770, for a new trial; upon the foot of the evidence being insufficient to prove any criminal intention in Mr. Almon, or even the least knowledge of their being sold at his shop. And they had affidavits to prove, that it was a frequent practice in the trade, for one publisher to put another publisher's name to a pamphlet, as printed for that other, when in fact it was published for himself. That this was the fact in the present case; Mr. Miller being the real publisher of this Museum, but having advertised it and published it, as printed for Mr. Almon, without consulting Mr. Almon, or having his consent or approbation. That, on the contrary, as soon as he saw his name put to it as being printed for him, he immediately sent a note to Mr. Miller, expressing his disapprobation and dissatisfaction. That he himself had no concern whatever in this London Museum. That he was not at home when they were sent to his shop. That the whole number sent to his shop was 300. That about 67 of them had been sold there, by a boy in the shop, but without Mr. Almon's own knowledge, privity, or approbation. That as soon as he discovered it, he stopt the sale, ordered the remainder to be carried up into his garret, and took the first opportunity to return them to Mr. Miller. That it was not proved, that the person who sold them was Mr. Almon's servant, or employed by him; or that Mr. Almon was at all privy to the sale. [Qu. this *arguendo*, and not in affidavit?]

On Wednesday 27th June 1770, it came on again; and, serjeant Glynn argued that the

proof against Mr. Almon appeared therefore to be defective: there was nothing to constitute criminality, or induce punishment.

That after the jury had been out about two hours, one of them (Mr. Mackworth) proposed a doubt "whether the bare proof of the sale in Mr. Almon's shop, without any proof of privity, knowledge, consent, approbation, or *malus animus*, in Mr. Almon himself, was sufficient in law to convict him criminally of publishing a libel."

Mr. Mackworth understood his lordship's answer to this doubt to be this—"That this was conclusive evidence." Otherwise, Mr. Mackworth was convinced in his own mind, that the defendant ought not to be found guilty, upon this evidence; nor would he have found him guilty. He certainly gave his verdict under a mistake. If he had apprehended that the jury were at liberty to exercise their own judgment, he would have acquitted the defendant. The Serjeant prayed that Mr. Mackworth's affidavit might be read.

Lord *Mansfield*—You know, it can't be read.

Mr. Justice *Aston*—A juryman's affidavit with regard to his sentiments in point of law, at the trial, ought not to be admitted; whatever may be the case of his affidavit tending to rectify a mistake in fact.

Lord *Mansfield*, in reporting the evidence, said he had told the jury that there was evidence of the publication, if they believed the witnesses. And he said, he had directed them, (as he always had done, and as he took the law to be,) that if they were not satisfied that the blanks were filled up in the information, in the true sense and meaning of the writer, they ought to acquit the defendant: and that the epithets used in the information were inferences of law, drawn from the paper itself; and not facts to be proved.

The Court were of opinion, that none of the matters urged on behalf of the defendant, nor all of them added together, were reasons for granting a new trial; whatever weight they might have in extenuation of his offence, and in consequence lessening his punishment. For, they were exceedingly clear and unanimous in opinion, that this pamphlet being bought in the shop of a common known bookseller and publisher, importing by its title-page to be printed for him, is a sufficient *primâ facie* evidence of its being published by him: not indeed conclusive, because he might have contradicted it, if the facts would have borne it, by contrary evidence. But as he did not offer any evidence to repel it, it must (if believed to be true) stand good till answered, and be considered as conclusive till contradicted.

Lord Mansfield said and repeated, that Mr. Mackworth had understood him perfectly right: and he was very glad to find that there was no doubt of what he had said. The substance of it was, that in point of law, the buying the pamphlet in the public open shop of a known professed bookseller and publisher of pamphlets, of a person acting in the shop, *primâ facie* is evidence of a publication by the master himself: but that it is liable to be contradicted, where the fact will bear it, by contrary evidence tending to exculpate the master, and to shew that he was not privy nor assenting to it, nor encouraging it. That this being *primâ facie* evidence of a publication by the master himself, it stands good till answered by him: and if not answered at all, it thereby becomes conclusive so far as to be sufficient to convict him. That proof of a public exposing to sale and selling, at his shop, by his servant, was *primâ facie* sufficient; and must stand till contradicted or explained or exculpated by some other evidence; and if not contradicted, explained, or exculpated, would be in point of evidence sufficient or tantamount to conclusive. Mr. Mackworth's doubt seemed to be, "whether the evidence was sufficient to convict the defendant in case he believed it to be true." And in this sense I answered it. *Primâ facie*, 'tis good; and remains so, till answered. If it is believed, and remains unanswered, it becomes conclusive. If it be sufficient in point of law, and the juryman believes it, he is bound in conscience to give his verdict according to it.

In practice, in experience, in history, in the memory of all persons living, this is (I believe) the first time that it was ever doubted "that this is good evidence against a bookseller or publisher of pamphlets." The constant practice is, to read the libel, as soon as ever it has been proved to be bought at the defendant's shop. This practice shews that it is considered as already proved upon the defendant: for, it could not be read against him, before it had been proved upon him.

If I am mistaken, I am entirely open to alter my opinion, upon being convinced that it is a wrong one: but, at present, I take this point to be as much established, as that an eldest son is, (in general) heir to his father. And being evidence *primâ facie*, it stands, (if believed) till contrary proof is brought to repel it.

Mr. Justice *Aston* laid down the same maxim, as being fully and clearly established, "that this *primâ facie* evidence (if believed) is binding till contrary evidence be produced." Being bought in a bookseller's shop, of a person acting in it as his servant, is such *primâ facie* evidence of its being published by the bookseller himself: he has the profits of the shop, and is answerable for the consequences. And here is a corroborating circumstance; namely, that it professes to be printed for him. It is as strong a case as could be put. The sale in his shop is sufficiently proved: and he is answerable for what is done in his shop. And here is no sort of proof produced in contradiction or exculpation. This *primâ facie* evidence, not answered, is sufficient to ground a verdict upon: and there appears no reason for granting a new trial. If he had a sufficient excuse, he might have shewn and proved it. But he has not attempted to prove exculpation or excuse: therefore the evidence of his publishing what was thus bought in his shop must stand till the con-

trary appears. There may indeed be circumstances of extenuation, or even of exculpation; and if it were a surprise upon him, the court would have regard to such circumstances, as far as they merited their regard: but here was no kind of proof, of any such sort.

He cited Harris's Case, [*ante*, v. 7, p. 925]; Rex *v.* Strahan, Hil. 3 G. 1. and Rex *v.* Eliz. Nutt, Hil. 2 G. 2, Fitz-Gibbon, 47.

Mr. Just. *Willes* was also of opinion that there was no foundation for the motion for a new trial; and that, upon all the circumstances of this case, Mr. Almon was answerable as publisher of the libel. He is a common known bookseller and publisher; and it imports, upon the face of it, to be printed for him; and it was bought in his shop. This is sufficient *primâ facie* evidence of his privity: and no contrary evidence was produced by him. It was liable to be refuted or explained: but as it never was, nor any excuse shewn, it stands good to convict him.

Mr. Just. *Ashhurst* entirely concurred with his lordship and the rest of his brethren, in the doctrine they had laid down; and in holding that there was not any foundation for granting a new trial: and he particularly expressed his approbation of lord Mansfield's answer to Mr. Mackworth, the juryman.

The Court therefore unanimously discharged the rule to shew cause why there should not be a new trial.

The defendant's counsel declined making any use of the liberty which had been reserved to them, of moving in arrest of judgment.

The following article appeared in the London Museum for December 1770:

As the conversation of the public will very soon turn upon the Attorney-General's assumed power to file informations against whom, and for what he pleases; you cannot do better, at this time, than print the following Case and Argument of Mr. Earbery,* which is very little known, even among the lawyers.

Nov. 9, 1732. Mr. Earbery was seized by a warrant from the duke of Newcastle, under pretence of being author of the Royal Oak Journals. He was carried before Charles de la Faye, under-secretary, and ordered to give bail. After having been put to a great deal of trouble and expence, (not much unlike the late trial of Mr. Almon) and not being able to obtain a fair trial, he determined to move the Court of King's-bench for the discharge of his bail, on the 13th of February 1737. He applied to several counsel to open his cause, but they unanimously refused to do it, alleging, that it would be ridiculous to move against the course of the Court, which course was, that the king had a prerogative to call on a trial upon an information at his own pleasure.

This was the judgment of the court of King's-bench, about four years since, when Mr. Jocelyn moved the Court, that Mr. Earbery might be either tried or discharged; at which motion lord Hardwicke sat as lord chief justice.

When the Attorney General came into the court, he exhibited Mr. Earbery's notice to the Court.

The Court called for Mr. Earbery's counsel; Mr. Earbery said, he had applied to counsel, but could get none. He prayed therefore the Court that he might be heard in person; which the Court, with great indulgence and lenity, granted. The following argument ensued:

Mr. *Earbery*. Sir, I have heard much this day from the gentlemen learned in the law, on my right hand, about the course of the Court. I am very confident there are no Ciceros there, though there is a Roscius here. I would not be understood to make the least reflection upon the honour and dignity of the Court, yet I must allege, that the course of the Court cannot be against the fundamental laws and liberties of the English nation. There are three things before this Court to consider upon. First, The discharge from all prosecutions in this cause. Secondly, The discharge of the bail. Thirdly, What you design to do with me. If you commit me, it follows, from this pretended course of the Court, that a prince, when he prosecutes upon informations, has a power of perpetual imprisonment, without a trial.

Mr. Just. *Page*. Sir, you may walk about wherever you please, we don't detain you.

Earbery. Sir, if my bail surrender me up, how can I walk about? It was the opinion of the lord chief justice Hardwicke, that the prince had a prerogative to suspend a trial during pleasure. Prerogative, they say, is above law; granting that, it must nevertheless be coeval with law. I can easily prove informations, as to their origin, to be against law. Where then did this prerogative begin? from whence could that possibly take its rise? Prerogative is very terrible. This is more frightful to me than all the rest; as it has taken such room in your bench, we cannot be too zealous to tear it up by the roots, and cast it away. If the Court will give me leave, I shall proceed to shew the illegality of informations. I know they are rooted in your bench, and have had so much time to grow, that I cannot presume to pluck them up, and I know you will not part with them; nevertheless, though they are established by custom, they may have had a very wicked rise. It is against the scope of Magna Charta, and of all our laws of liberty; nay, and all the designs of our ancestors, that a prince should prosecute a subject after a civil manner for criminal actions; for informations are declarations at the king's suit. The 29th chapter of Magna Charta is the foundation of our liberties; the famous explanatory statute, 42 Ed. 3, c. 3, makes the

* See vol. 19, pp. 1016. 1080: Burrow's report of the case has not, I apprehend, been published.

29th chapter plain and clear. The words are, "No man shall be put to answer without presentment before justices, or matter of record, or by due process and writ original;" and that act is well known to all of you.

Mr. Just. *Page.* Writ original! (he seemed startled) I will not suffer informations to be disputed here.

Earbery. I only desire to observe, that informations are no process, for, if the Court gives leave, it will appear by mine, in my bosom, that the attorney prays process.

Mr. Just. *Page.* Have you got any affidavit that you ever demanded a trial?

Earbery. Mr. Jocelyn moved for me, when lord chief justice Hardwicke gave that opinion of the king's prerogative, and for that reason I am detained here still. I have had numerous notices of trial; it appears by the affidavits how I have been harassed; I rode all night from the city of Bath to London, in cold frosty weather, that almost perished my limbs; my lodgings were watched, to know whether I was come home or not, in hopes to surprise me with a verdict, without a defence. When I came to Guildhall, nobody appeared: I moved the lord chief justice Hardwicke to have a proclamation made for me to come in, or a Ne Recipiatur entered to exclude them: he promised it should be done, but it was not done. On the second day, it was said by one in court, whose name I forbear to mention, that I had no notice of trial at all, though I had an affidavit of notice in my pocket.

If we proceed to consider the nature of the informations, if the Court will permit them to be read, there is not the least face of a libel in either. Particularly the first is so far from having the face of a defamatory libel, that it is a panegyric.

Mr. Just. *Page.* We cannot permit that: as you have pleaded, the merits must be left to a jury; we cannot have the informations read now.

Earbery. If they had been read before, which my counsel insisted upon, these absurdities could not have happened. The Court would have rejected them as frivolous; there was indeed, one reason, why the reading was opposed, viz. the framers were ashamed they should come to light.

Mr. Just. *Page.* I remember the motion to have the informations read very well.

Earbery. By this method of not having the informations read, the machinery is carried on by the clerk and Mr. Attorney, to impose what they please for a libel, and make the Court give a sanction to it, who are kept out of the secret. I know a great man, who told me, after perusing the copies of the informations, that he could not conceive, if he had not seen them, that such stuff should be composed.

Mr. Just. *Probyn.* Do you assert, and will you stand by it, if called in question, that the lord chief justice Hardwicke said, the king had a prerogative to defer trials upon informations during pleasure?

Earbery. I will insist upon it, that he said, that the Court had no power to discharge, nor any power at any time to bring on a trial.

Mr. Just. *Page.* Look you there, now he falls back again. We have an undoubted right, if applied to, upon delay of trial, to order a trial: Mr. Attorney, will you try the cause next term?

Attorney General. To tell you the truth, we designed to have tried it this term, but we just wanted a little evidence, which we shall prepare against next term. [Note, they have had time from Michaelmas term 1733, to this present term, 1737-8.]

Earbery. Sir, I do not acknowledge that I ought to be tried at all; I move for a discharge.

Mr. Just. *Page.* Do you see now, before you wanted a trial, now you would have no trial.

Earbery. Sir, I move for a discharge, if I can't have that, I desire my recognizance may be withdrawn.

Mr. Just. *Page.* No, that cannot be done.

Then Mr. Attorney broke in with a cause of the King against Sloan, and the argument ended.

The ARGUMENT intended for the Court of King's-Bench, Feb. 13, 1737, by Mr. Earbery, concerning Informations.

As Mr. Earbery found the course of the Court a very formidable objection in his way, he was obliged to change his method, and to begin with that.

The following arguments were what he proposed to use, if he had not been interrupted by the Court.

My lord; my first proposition is, that informations are against law.

I confine myself here to informations at the king's suit merely, when a bill is drawn up by the Attorney General, and found by himself, for an injury concerning which a grand jury ought to enquire.

These injuries are supposed to give the king a right to damages, which are given partly in fine, and the rest in corporal punishment.

An information therefore is a declaration at the king's suit, and is prosecuting the subject after a civil manner for criminal actions.

This is contrary to the scope of all our laws of liberty; to the whole view of our ancestors; to the sense of the 29th chapter of Magna Charta, and the explanatory statutes which were calculated to confine all these matters to grand juries.

If the crown is allowed to engross common injuries, it may with greater reason take in treason and felony; for the king receives greater damages by them than by common misdemeanours.

Our laws of liberty are express, That the crown shall not go upon any actions that affect the liberty, possessions, or corporal ease of the defendant. The words of the 29th chapter of Magna Charta are, 'nullus liber homo ca-

pietur,' shall be taken, 'aut imprisonetur,' or be imprisoned, 'aut dissesietur de libero tenemento suo,' or have his freehold taken from him, 'vel de liberis consuetudinibus,' nor his rights and privileges, 'aut exulet,' nor shall he be banished, 'aut utlegatur,' or out-lawed, 'aut alio modo destruatur,' or by any other means demolished, 'nec super eum ibimus aut mittemus.' (The lord chief justice Coke's explanation is, we will neither proceed upon him 'coram nobis,' in the King's-bench, nor by commission;) nor will we go, or send upon him, 'nisi per legale judicium parium suorum,' unless it be by the lawful judgment of his peers, 'aut per legem terræ,' or by the law of the land. 28 Ed. 1. Your lordship may please to observe, that all the penalties then in being, are here mentioned, as the known rules of law.

But lest any dispute should arise, what was meant by 'lex terræ et legale judicium parium suorum,' we have the expianatory statute, 42 Ed. 3, c. 3, which makes the whole as clear as the sun at noon-day.

No man shall be put to answer without presentment before justices or matter of record, or by due process and writ original.

Now, my lord, the course of the Court is, That if a person is upon his recognizance, and charged with an information, he shall be put to answer instantaneously, without presentment by justices, without matter of record, without process, and without writ original.

That an information is no process is plain, from the common form of concluding, praying process of the Court, as mine runs; "Whereupon the said Attorney General of our now said lord the king, prays the consideration of the Court in the premises, and that due process of law issue against him the said Matthias Earbery."

If we look farther backwards to the preamble of this act, we shall find it was levelled to exclude informations, or proceedings equally as bad. The words are,

"At the request of the Commons, by their petition put forth, in this parliament, to eschew the mischief and damage done to divers of his Commons by false accusers, which oftentimes have made their accusations more for revenge, and singular benefit, than for the profit of the king, or of his people, which accused persons sometimes have been taken, and sometimes caused to come before the king's council, by writ or otherwise, upon grievous pains against the law, it is accorded, for the good governance of the Commons, that no man be put to answer, &c."

We must observe this method is said originally to be against law, that Magna Charta was eluded, that this act was contrived to give it new vigour by those restringent lines which bound up all its bleeding wounds.

I observe, my lord, that this, and several other acts were pointed against bringing people to answer by suggestion, which is only another word for information. I do not imagine at that time of day, when the acts were fresh, and in their full vigour, that any minister of a prince would prefer a suggestion to the King's-bench. That Court ever acted by the known maxims of common law, by rules, certainty and oaths: the method then was, to send ministerial pursuivants to snatch the obnoxious man away, and to convey him by back stairs up to the privy council. The grievous pains mentioned in the act, I suppose, were the motherly admonitions of the rack, that engine of tyranny, still to be seen, though not used amongst us.

But as often as the Commons met, and found out these secret practices, so often were they blasted by these memorable acts of our constitution.

If we view the preamble of our modern informations, my lord, we shall find they differ not in the least from suggestion. Thus,

"Be it remembered, that sir Philip Yorke, knt. Attorney General of our sovereign lord the king, who for our said lord the king, in his behalf, prosecutes in his proper person, comes here into the court of our said lord the king, before the king himself in Westminster, &c. and for our said lord the king gives the Court here to understand and be informed, &c."

I think this very information is no more than a suggestion of a minister of the king, not supported even by oath. If Mr. Attorney's word is so strong, so magical as to render his single faith the strongest testimony, I think we may submit to a bow-string.

I shall now, my lord, introduce another act previous to this, which blasts at once the root, the branches and the blossoms of informations, at one puff. This act was 25 Ed. 3, c. 4.

"Whereas it is contained in the great franchises of Magna Charta of England, that none shall be imprisoned, or put out of his freehold, nor of his franchises, nor free customs, unless it be by law, it is accorded and assented, and established, that from henceforth none shall be taken by petition, or suggestion made to our lord the king, or to his council, unless it be upon indictment, or presentment of his good and lawful people of the same neighbourhood: and where such deeds be done, in due manner, or by process made."

When we compare this act with the Attorney-General's coming before the king in Westminster, with his information in his hand, my lord, he stares the act full in the face.

I could proceed to the other explanatory statutes, all to the same purpose, particularly 18 Ed. 3, c. 3; 28 Ed. 3, c. 3.

In the face of all these acts, we find only the bare suggestion of an attorney-general stand instead of a process, and instead of that certainty the defendant has an undoubted right to, as our ancient courts of judicature always require. In these acts, certainty is provided for, before the defendant is brought to a trial, by a bill found by a grand jury. By the modern practice the subject comes to no certainty, no evidence till he comes to a trial. I desire your lordship to observe, that very near five years have passed since I pleaded, and am arrived at no certainty yet.

The reason appears very plain to me why a process was so vehemently insisted upon by our ancestors: it was because it issued from courts of justice upon evidence, independently of ministers of state.

But, my lord, the defendant finds no process now till he is summoned by the Court to plead, if that can be called a summons. He is obliged to answer by being demanded to appear before any summons is sent out: how different is this from the nature of a process? It is only a summons to plead to the suggestion of an attorney-general. The charge does not come from the court, and from evidence, but from a charge foreign to the court, without any evidence at all.

A process is always attended with a certain charge expressed in the body thereof; an attachment runs thus, 'Attachiatur pro con-'temptu.' I have seen one thus, 'Attachiatur 'pro contemptu,' commonly called a forgery: but a summons to attend an attorney-general's suggestion, as a bill, is setting aside the whole intent and scope of those acts our wise forefathers made, to fence us from the power of the crown.

But as we see, my lord, these practices (so opposite to Magna Charta, and the explanatory statutes) rivetted by custom in this court, I shall beg leave to say something to that part; only I shall previously premise, that the frequent statutes, all to the same purpose, crowded together in Ed. 3d's reign, were owing to the encroachments of the privy council, who were continually breaking in upon those sacred laws, by bringing subjects before them, and playing a thousand tyrannical tricks, in the wildness of their power. The wakeful Commons drove the sea back, and mended the breaches made upon us by those inundations: whereas we were all safe in the king's courts, which moved with gravity, by legal precedents in the steps of law.

From whence did informations insinuate into your bench?

The first formal act of our constitution, which favoured the proceedings of the council, was made 31 Hen. 6, quoted by sir Edward Coke, title Star Chamber.

This does indeed give a power to the council, very inconsistent with these acts. See the Roll, 31 H. 6, c. 2. But if we consider this was passed in very troublesome times, after the civil wars, which were just skinned over, and Hen. 6, was in effect deposed, and the duke of York, under the title of Protector, governed every thing, no great stress can be laid upon this act; and, as it stands, it was only temporary, to continue for seven years.

It seems calculated to serve the ends of the duke, to bring his enemies into his power; for it is aimed chiefly at the nobility and great peers of the realm: but if we view an exception towards the latter end, omitted by sir Edward Coke, we shall find, that though the council had a power to call them by suggestion, they were remitted to be tried in the common courts, according to the old law. This is no proof that informations were by that act introduced into your bench, nor any new forms allowed. Informations, as sir Francis Winnington observes in Prynne's case, 2 Will. & Mary, were introduced in Henry 7th's reign. This gentleman undertook to shake informations by a very learned argument, to which I think he had not very learned answers.

Permit me then, my lord, to make a few observations upon that reign.

We have got the evidences of sir Edward Coke and the lord Bacon—We have got the Courts of Assize which hanged Empson and Dudley, that no reign was so tyrannical since the Conquest to the subject: there were two acts then passed, that finished our slavery; the one was the act of Star Chamber; the other was to empower justices of the peace, acting only by commission from the crown, to inquire without grand juries; a third act was passed to secure the contriver's brains from being knocked out by the people.

As to the first, there does not, in the preamble, appear the least reason to conclude, that the king could proceed to informations by his attorney, without a grand jury.* The words are,

"By unlawful maintenance, giving of liveries, signs and tokens, and retainders by indentures, promises, oaths, writings, or otherwise; embraceries of his subjects, untrue demeanings of sheriffs in making panels, and other untrue returns, by taking of money, by injuries, by great riots, and unlawful assemblies, &c. and for the punishing of these inconveniences little or nothing may be found by enquiry," &c. The court of Star-chamber was erected upon a supposed defect in grand juries, to find out crimes by bill and evidence.

Surely if the king could then proceed by information, it must have had a place in the preamble. Your lordship may see through the mask. The parliament could have no notice of previous informations in the King's-bench, when they passed this act.

I desire to observe to your lordship, that informations in the King's-bench differ widely from the Star-chamber ones. The judges who sat there were the greatest officers in the kingdom, and the churchmen of the first rank. When a bill was brought by the Attorney, it was read, and the persons were summoned in to answer; nor was the bill found before a full examination was taken. What I have said before, my lord, shews that in your bench the defendant, if he is upon recognizance, answers *instanter*, nor does your bench take any cognizance of the information before the defendant comes to his trial.

I shall proceed now to the second act, worse than the first: bear my lord chief justice Coke;† "Against this antient and fundamental

* 3 Hen. 7, c. 1.

† Coke 2 Inst. p. 51. 11 Hen. 7, c. 3. Repealed 1 Hen. 8, c. 6.

law (Magna Charta, cap. 29) and in the face thereof, I find an act of parliament made, that as well justices of assize as justices of the peace (without any finding or presentment by the verdict of twelve men) upon bare information for the king before them made, should have full power and authority, by their discretion, to hear and determine all offences and contempts committed or done, by any person or persons, against the form, ordinance, and effect of any statute made, and not repealed, &c. By colour of which act, shaking this fundamental law, it is not credible what horrid oppressions and exactions, to the undoing infinite numbers of people, were committed by sir Richard Empson, knt. and Edmund Dudley, being justices of peace throughout all England; and upon this unjust and injurious act (as commonly in like cases it falleth out) a new office was erected, and they made themselves masters of the king's forfeitures."

Let us hear the lord Verulam.

"They did not insist upon justice; indictments were become burthensome and unnecessary records. They sent forth their warrants to take men, and without crowding Westminster-Hall, would convene them to their own houses, and without juries determine upon their estates and fortunes."

It is not doubted but that they extended their infant jurisdiction beyond the limits of the act, for, as the lord Verulam farther says, "They used to charge the subjects' lands with false tenures *in capite*, by finding false offices, refusing to admit men to traverse those false offices by law. If any were outlawed, the law was strained to its rigour, to amount to the forfeiture of goods and lands."

After this terrible preamble, in which we find informations solemnly condemned by the two greatest lawyers in England, I am now come to the origin of them in your bench.

In the report of the committee of the House of Commons appointed to view the Cottonian library, and other records in this kingdom, Jan. 1732, I find the report of the coroner in the Crown-office, William Bellamy, whose interest it was to stand tooth and nail by informations, they being the source of the greatest part of his wealth: he says, the early records begin 1 Ed. 3. If so, we may surely expect to find the antiquity of informations, because he says the bag rolls contain an abstract of every prosecution by indictment, appeal, information, &c. He says, with regard to informations, they were very frequent in Henry 7th, and Henry 8th's time, and long before.

As to their being in Henry 7th's time, I believe him, but that there were any before I cannot believe, because I am very well assured of the contrary; it looks moreover very suspicious, that the gentleman should begin at the middle of his antiquity.

I can easily account how informations came into the King's-bench in Henry 7th's reign. The act above mentioned gives power to courts of assize, to enquire without grand juries; the court of King's-bench, being a court of Oyer and Terminer to Middlesex, it was included in the act. Sir Francis Winnington dates informations no higher, nor is there the least shadow of proof they were ever heard of before.

Thus, my lord, we are sufficiently clear as to the origin of your informations. I shall next pursue them to their present growth.

Sir Francis Winnington observes, that in Rastal's and Coke's Entries, there are no informations, but only upon penal statutes; and in Rastal, says he, there is hardly one information. See Prynne's Case, Modern Reports, p. 5.*

Thus informations, in the manner I stated them before, slept, after the repeal of the act (1 Hen. 8, c. 6,) to the 5 Car. 1. I suppose the case was thus: [See the Case, vol. 3, p. 293.]

Hollis, Elliot, and some others, had been very troublesome in the House of Commons. The clamour being against the severity of the Star Chamber, a lawyer finding these precedents of informations in Henry 7th's reign, mentioned since in Mr. Bellamy's Report, a prosecution was formed by way of information in the King's-bench. This was the first link, and a pretty long one, from Henry 7 to Charles 1. After this, as sir Francis Winnington observes, they slept to king Charles 2. "After which (says he) they were sometimes made use of, but very rarely neither." He says moreover, he remembers very well, lord chief justice Hale often said, "That if ever informations came into dispute, they could not stand, but must necessarily fall to the ground." He says moreover, "informations at first were never questioned, because they were so very rare, but of late times they have been more frequent than ever." Sir William Williams replied in a very weak manner; Dolben and Holt were judges, yet none touched upon informations, as stated before. I conclude, that informations merely at the king's suit, for matters concerning which a grand jury may enquire, are directly contrary to the scope of Magna Charta, and all our fundamental laws of liberty.

I observe, my lord, that Magna Charta, and all those laws of liberty were confirmed, 12 Will. 3, c. 3, which makes them laws, *de novo*, as they were before, in the Petition of Right; and that no prescription can deprive us of the benefit of them, even though an act of parliament could be produced before that confirmation.

Thus, my lord, I have traced informations to their spring-head, and a very dirty, muddy spring it is; sir Francis Winnington has informed us, how they swarmed after the Revolution. Since I came to act a public part as a writer, indictments for libels have entirely ceased. I can remember none after one against

* The Report is in 5 Mod. 459. See also, Holt, 362. See also Rex v. Abraham, Comb. 141, 1 Shower, 45. Rex v. Berchet, 1 Shower 106.

myself, nineteen years ago; so that by excises and informations the dominions of grand juries are so narrowed, that they bear the same proportion as Portugal does to Spain; one slip of land is Britannia's jointure. My lord chief chief justice Holt said, informations were common law, that is, the custom of your court is common law. If that sort of common law can prescribe to Magna Charta, and all our statutes of liberty; if the suggestion of the plaintiff against the defendant is absolute proof, my lord, I will go to Constantinople, and kiss the grand seignior's patent for a bow-string.

In the case of Kendal and Roe,* the same lord chief justice said, the secretary of state's power to commit was common law. I have heard it likewise said, that the practice of 45 years is above Magna Charta, and an hundred acts of parliament. I am confident your lordship abhors this doctrine. Common law, at this rate, is more tyrannical than all our kings since William the Conqueror breathed his last.

My lord, I have felt in my own person the power of informations. I was bound over to answer to one, and to good behaviour six years in the last reign, and five in this. I am told, the scheme is to keep me under these circumstances during this reign. I hope this day, from the candour and justice of your lordship, better things; that you will lift up Britannia's drooping head, and tell her, Magna Charta shall live.

The preceding article I take to relate to the following Case, which is extracted from Barnardiston's Reports, vol. 2, pp. 293, 346.

"The King and Dr. Earbery.

"Trin. Term, 6 G. 2, 1733.

"The defendant had given notice to the Attorney General, that he should move the Court, that his recognizance should be taken off the file and discharged, for certain errors appearing upon the face of it. He said he had been taken up by a warrant from one of the secretaries of state, signed De la Faye; and he conceived that this warrant ought to have been signed with the name of the secretary of state himself, and not with the name of one who was but an officer under him. When he was brought before the secretary of state upon this warrant, the secretary of state committed him; and since a private justice of peace has taken upon himself to bail him, requiring him to enter into this recognizance. No man, he submitted it, has authority to bail another, unless he is equal to the person committing. A justice of peace is an officer inferior to a secretary of state; and therefore he conceived that this recognizance must be illegal. He observed farther, that the terms of this recognizance are, that he shall keep the peace; and likewise that he shall appear in the court of King's-bench, to answer such matters as shall be objected against him. He did agree that a justice of peace has authority to bind over to the sessions; but this was the first time that he ever heard that they had authority to bind over to this court. And to shew that they could not have such an authority, he appealed to the statute of 18 Edw. 3; 37 Edw. 3, 18; 49 Edw. 3; and 1 & 2 Phil. & Ma. He took notice farther, that he had entered into this recognizance so long ago as Mich. term last; and no information has been filed against him, nor has he had one single charge during all this time. The Court said that they believed it was usual for the secretaries of state not to sign these warrants themselves. To the second objection they could not enquire into it upon this motion; because the notice is, that the Court will be moved to discharge the recognizance, for errors appearing upon the face of it. To the third they said, these recognizances are very frequent in this court; and therefore they should certainly not order the present one to be taken off the file upon motion. If the recognizance is illegal, the defendant has his remedy another way. To the last objection, they did agree that if there had been a year passed from the time that this recognizance was given, and no prosecution against the defendant, he would have been intitled to be discharged. But till then, by the rules of the court, he cannot; accordingly the motion was refused."

"Mich. 7 Geo. 2, 1733.

"Mr. Josling moved, that a certain recognizance, by which the defendant was bound to appear in this court, might be taken off the file; that so much of a rule of this court, as related to the defendant's appearing to this recognizance, might be discharged; that the defendant's papers, seized by virtue of a warrant from one of the secretaries of state, might be restored to him; and that a satisfaction might be awarded to him for the imprisonment he suffered under this warrant. He took notice that some time before the beginning of last Michaelmas term a warrant was issued forth in the name of the duke of Newcastle, one of the secretaries of state; which was directed to two of the king's messengers, requiring them, taking a constable to their assistance, to make diligent search in the house of the defendant, the author of a treasonable paper, intitled 'The Royal Oak Journal,' for all papers of what kind soever, in his custody, and to bring the said defendant with the said papers before him. The messengers, without taking a constable to their assistance, entered into the defendant's house, seized his papers, and brought them, together with the defendant, before Mr. De la Faye, who was the duke of Newcastle's secretary, and a justice of peace. No one was examined by Mr. De la Faye, to prove the defendant to be the author of this paper; nor did the defendant confess it. However, Mr. De la Faye told the defendant he must commit him, if he did not enter into a recognizance in the

* See vol. 12, p. 1299.

sum of 100*l.* with two sufficient bail, conditioned for his appearance in the court of King's-bench the first day of last Michaelmas term, and not depart the court without license. To avoid being committed, the defendant with two sufficient bail entered into such recognizance; and the recognizance was signed 'Ch. De la Faye.' The defendant appeared in the court of King's-bench on the first and last day of last Michaelmas term, and on the first and last day of the three following terms; but on the last day of Trinity term last, as soon as he had moved to have his appearance recorded, he prayed to be discharged. Upon this the Attorney-General exhibited two informations against him in open court, and moved that he might be charged with them. Mr. Masterman accordingly demanded of the defendant, whether he appeared to them. The defendant did not by any open act either assent or dissent to the question demanded of him; but insisted, that the recognizance by which he was bound over to this court, was illegal, and that he ought to be discharged from it. The Court told him that they could not discharge his recognizance. Upon that he went out of court, and the officer recorded his appearance to the informations. This Mr. Jeeling said was the state of the fact; and upon this state of it he apprehended that his motion was regular. He said he should not contend but it has been resolved, that a secretary of state's warrant to seize a person suspected of treasonable practices, was legal. But this resolution was but a late one, founded only upon precedents, and not one ancient resolution in the books to justify it. However it never was yet resolved, that a secretary of state could grant a warrant to seize a person's papers, and it manifestly is against the rights and liberties of the subject. As the warrant itself was illegal, so was the execution of it likewise. For it was done without the assistance of a constable, and the defendant not brought before the secretary of state himself, as the warrant directed, but a secretary under him. He then objected to the recognizance; he said he should not contend but there were precedents to justify a justice of peace in binding a man over to this court: but there was not one resolution in the books ancient or modern to justify such a practice. A justice of peace has a jurisdiction which is confined within the bounds of his county. And it would be a matter very inconvenient to the subject, if it should once be settled for law, that a justice of peace in Cumberland might bind a man over to this court sitting at Westminster. The manner of taking the present recognizance was illegal too, in as much as there was the oath of no one, nor the confession of the party, at the time it was required of him. The form of it is likewise bad; for the defendant is bound over to appear at the court of King's-bench at Westminster; whereas the stile of this court is 'coram rege ubicunque;' it is not inserted in the recognizance for what cause he is to appear; the recognizance is signed too, Ch. de la Faye; so that the Christian name of de la Faye is imperfectly set out; and it no where appears in the recognizance, that he was a justice of peace. Mr. Jeeling then spoke to the appearance of the defendant; and submitted in the first place, that the defendant in fact did not appear to these informations; and in the next place that he legally could not. He did agree that when the question was asked the defendant, whether he appeared, he did not in words directly refuse it; but he contended that the recognizance by which he was brought into court was illegal; which was the same thing as if he had in words directly contended that he was not obliged to appear. He submitted it therefore, that when the officer of the court demands of the party whether he appears, the party insists that he is not bound to appear; the Court tells him that he is bound to appear, and if he does not his recognizance will be forfeited; the party upon that goes out of court, that may as well be construed a departure without license, as an appearance; for which reason with regard to the fact he submitted it, the officer did wrong in recording that the defendant did appear to these informations. But supposing the fact to be that he did submit to appear; yet as the recognizance, which is in the nature of a process, to bring the party in to appear, was illegal, for the reasons he had before given, he conceived that the appearance could not be legal neither; and for authorities to support the several parts of his argument he cited Godb. 118, 147. 39 H. 6, 27. Archbishop of Canterbury's case, 4 Jac. 2. Sid. 32. Lut. 951. 11 H. 4, 7. Lamb. 89. Cr. 3, 646.

"The Chief Justice said that in the case of Kendal and Roe, it was settled upon solemn debate, that a secretary of state might issue out his warrant to apprehend the person of any man on suspicion of treasonable practices; and therefore did not think that that part of the present warrant would have been disputed at this day. As to the other part of it, with regard to seizing the defendant's papers, he would not give an opinion, whether it was legal, or not. This Court could not make a rule upon the messenger, that did seize them, to restore them; and therefore that question was not properly before the Court for their determination. There was no occasion to determine neither, whether in general justices of peace have authority to bind over to this court. The person that did this in the present case, was a justice of peace for the county of Middlesex, and undoubtedly he might bind over to this court; this court having a jurisdiction of Oyer and Terminer for that county. However he had before him several precedents of justices of peace of other counties binding over to this court likewise. He had likewise before him several precedents of recognizances taken by judges of this court and justices of peace, wherein the stile of their authority was not inserted. He had seen several too, which are only in this general form *ad respondendum*, &c. And as to the other ex-

ceptions, with regard to the form of this recognizance, if there was any weight in them, the defendant might have taken advantage of them, if a Scire Facias had been brought upon it. But what the defendant has done, has in judgment of law amounted to an appearance; and as that is so, all defects in the recognizance are thereby cured; for this purpose the chief justice mentioned the case of Widrington and Charlton, Trin. 11 Anne. That was an appeal of murder; the defendant did not appear till the Exigent; and when he did appear, his appearance was entered in the most cautious manner that could be, for it was in these words, 'Et prædictus defendens, salvis sibi omnibus 'advantagiis et exceptionibus tam ad breve 'originale quam ad processum, venit;' and thereupon for faults in the Exigent he demurred. Lord Macclesfield, Mr. Justice Eyres, and Mr. Justice Powis held, that all defects in process were cured by the party's appearance. Mr. Justice Powel indeed was of another opinion, as this was a Writ of Appeal; but agreed such defect would have been cured by appearance in every other action.

"The rest of the Court agreed with the Chief Justice in the present case; accordingly the motion was disallowed of."

See, also, another report of the same case in W. Kelyng, p. 161. In 8 Mod. p. 177, Fortesc. 37, are two reports of the King *v.* Earbery, which I suppose relate to this same person, though the points are not the same. Fortescue says, "Earbery was a worthy honest clergyman, and a good divine, but was drawn in by some of his party to write a pamphlet, in which the ministry thought there were some scandalous reflections upon the government."

In the preceding Report of Almon's Case are some incorrectnesses which I have not ventured to alter.

As to the proceeding for an attachment against Almon, in respect of the publication of the 'Letter concerning Libels, Warrants, Seizure of Papers, &c.' see Vol. 19, p. 1082, and lord chief justice Wilmot's Notes of Opinions and Judgments as there cited.

Concerning the non-examination of Miller, p. 835, see what Mr. Dunning said in the House of Commons, reported 16 New Parl. Hist. p. 1279.

Of the conversation which passed between Mr. Mackworth and lord Mansfield, p. 838, see Mr. Mackworth's account, 16 New Parl. Hist. pp. 1149. 1189.

Mr. Burke, in the debate upon a motion of the late lord Mulgrave, respecting the Information *ex officio*, animadverted upon this case of Almon, see 16 New Parl. Hist. pp. 1152, 1153. 1192. See, also, the Reply of the Attorney-General De Grey, pp. 1155. 1194, of the same volume.

To the words "they had affidavits," p. 850, l. 38, Mr. Serjeant Hill had written in his copy of Burrow the following Note:

"The facts in the affidavits ought to have been proved at the Trial: as they were not, nor any reason given why they were not, they could not by the known course of the court, nor ought in reason to have any weight, on a motion for a new trial; therefore there must be some mistake in this report; perhaps they might be read in extenuation of the punishment, but certainly could not be for a new trial; unless as above intimated, the affidavits had gone further, and given some good reason why the facts in the affidavits were not proved, such as sudden illness in defendant's witnesses, or non-attendance, though served with subpœnas, for sickness of the witnesses, if not sudden, would not be sufficient, but the defendants should have moved to put off the trial."

See, also, *supr.* pp. 844, 845.

554. The Trial of JOHN MILLER, Printer, before Lord Mansfield, and a Special Jury of Citizens of London, at Guildhall, for re-printing Junius's Letter to the King, in the London Evening Post, of the 19th of December, 1769: 10 GEORGE III. A. D. 1770. [Taken in Short-hand.*]

SPECIAL JURY.†

Samuel Athawes, of Martin's-lane.
Henry Voysey, Clement's-lane.
Joseph Lancaster, Green Lettice-lane.
William Gill, Abchurch-lane.
John Whitmore, Lawrence Poultney-lane.
Joshua Redshaw, St. Peter le Poor.
William Devisme, Bartholomew-lane.

Talesmen.

William Cave, of Farringdon Without.
William Washer, Bishopsgate Within.
George More, Farringdon.
Joshua Woodward, Bell-yard, Gracechurch-street.
Richard Ayres, Bishopsgate-street.

July 18, 1770.

THE case was opened by Mr. Walker.—The record stated, that the defendant, John Miller, did unlawfully print and publish, or cause to be printed and published, a certain seditious paper, entitled, The London Evening Post, Saturday, December 16th, to Tuesday, December 19th, in which was contained a certain libel, reflecting upon the King, the administration of government, his principal officers of state, and the members of the hon. House of Commons, in these words, [The paper read.]‡ The defendant pleaded Not Guilty.

Sol. General (Thurlow). Please your lordship, and you gentlemen of the jury, I am likewise of counsel for the crown in this prosecution, which is brought by the Attorney General against John Miller. I have very seldom found myself more puzzled how to state a question to a court, and in what manner to adapt it to a court, than I am upon the present occasion. Because in reading over the paper itself, and in consideration of the proofs that are to be laid before you, I should have thought it a case so plain, and in so ordinary a course of justice, that it would absolutely be impossible to have mistaken, either the application of the proofs of the charges that are laid, or the conclusion to be made from them. I have not of myself been able to imagine, nor have I learnt from the conversation of any one man, that there is a serious man of the profession in the kingdom, who has the smallest doubt whether this ought to be deemed a libel or not: my memory deserts me exceedingly, if the learned gentlemen who spoke of this subject before, did any time venture to say, in so many plain words, that the contents of that paper were legal and innocent. I am mistaken if they did. It seems to me impossible that such an idea can be formed; but instead of it, if I remember it right, from the general and loose discourse of them, concerning the liberty of the press, it was a large and undefined subject, concerning the right of individuals to speak, to write, to publish with freedom, their own free thoughts, upon all manner of subjects; these topics were pretty largely, but at the same time pretty generally handled. Now, it does not appear to me they were or could, in the nature of it, be applied to the present case. For I neither do, nor ever will, attempt to lay before a jury, a cause, in which I was under the necessity of stating a single principle that went to intrench, in the smallest degree, upon the avowed and acknowledged liberty of the subjects of this country, even with regard to the press. The complaint I have to lay before you, is, that that liberty has been so abused, so turned to licentiousness, in the manner in which it has been exercised upon the present occasion, that under the notion of arrogating liberty to one man, that is, the writer, printer, and publisher of this paper, they do, in effect and consequence, annihilate and destroy the liberty of all men, more or less. Undoubtedly the man that has indulged the liberty of robbing upon the highway, has a very considerable portion of it allotted to him. But where is the liberty of the man that is robbed? Where is the liberty of the man that is injured? Liberty consists in a fair and equal, public and general enjoyment of every man's person, fortune, and reputation, under the protection of the law; and the moment the law is silent or inattentive to protect any man's reputation whatsoever, his reputation is taken away from

* Published in the London Museum (of which Miller was the publisher) for October 1770.

† Owing to a neglect of the summoning officer, only seven of the Special Jury attended, upon which Mr. Beardmore, the defendant's attorney, complained to the Court of the summonses for the Special Jury not being issued in proper time, and that to his certain knowledge, no summonses were delivered the day before at twelve o'clock. The Court allowed the complaint to be just, but took no further notice of it. Five Talesmen were then drawn. *Orig. Edit.*

‡ See it, p. 805, of this volume.

him, and tyranny of the vilest sort is expected, and an opportunity is given to hired and venal writers, to vent their malice for money, against the best characters in the country, and against every character which they can be hired to insult for money. All I desire is, that the line may be fairly drawn, and justice so administered, as to protect the general liberty of mankind; and not under the notion of protecting the liberty of those that do wrong, encourage them in licentiousness and destruction of all laws human and divine, of all countries as well as this, which all people will agree, upon the principle of common sense, ought to be protected and defended. Gentlemen; these are the only principles upon which this prosecution depends; and if the prosecution is not to be supported upon these principles, I desire it may be rejected, and abandoned, and I ought to be ashamed to maintain it at all. With regard to the present libel, the business of those that maintain this prosecution, is to prove these facts. The man that is charged with having printed and published this paper, has printed and has published a paper, in which concerning the king, concerning the House of Commons, concerning the great officers of state, concerning the public affairs of the realm, there are uttered things of such tendency and application, as ought to be punished. Now, gentlemen, when I state the proposition so, it will be very manifestly and obviously understood I am proceeding, not only to prove the fact of the present defendant having printed and published that paper, but to go so far into the particular parts of that paper, as to prove it does apply as the charges of the information express. To prove that it does apply, or to consider it as a subject liable to discussion and doubt, is, when I come to consider it, but an insult upon your understanding; for you have no one reproachful epithet, which is not, in the various shapes which a long jingle of words could be turned into, put upon the person of the king. He has been reviled throughout the history of his life, from his birth to the present moment. His education has been represented, as converted to the most frivolous, to the most malignant purpose; his heart is represented, to be corrupt to such a degree, to be abandoned so, that all the sacred duties of the great trust reposed in him, have been violated: thus the possible business of private contention, with a character, for the purpose of making a king more contemptible, he is represented as the most contemptible character upon earth. You have been told, in consequence of that, he has set upon edge against him the minds of all his subjects; and in conclusion after that, the king is threatened with another revolution, in the stile of manifest rebellion, like new proclaiming war. When we are come to that situation, when it shall be lawful for any man in this country to speak of the sovereign in terms attempting to fix upon him such contempt, abhorrence, and hatred, there is an end of all government whatsoever, and then liberty is indeed to shift for itself. Now, gentlemen, I have stated to you in general, what I look upon to be the import of this libel. If I was to mention even the passages, is there one of them would fall short of the representation I have given them? In the first place, the king is supposed utterly ignorant of the duty of his office; in the next place, he is looked upon to have a fixed prejudice against the character of an honest man. "Supposing him (says the libel) made sensible at last of the great duty he owes to his people."

Is it fit that any magistrate should be talked of in that manner, much less is it fit, that the king should "that he should be made sensible of his own disgraceful situation"—is that the language for the first magistrate in this country? No matter how improbable thus the best of characters of honest meaning men, is removed by such writers; but to be sure, that is a very unfair and unjust idea to give the person of a king, and yet they would have you suppose, that is no libel at all. "It is the misfortune of your life, and originally the cause of every reproach and distress which has attended your government, that you should never have been acquainted with the language of truth, till you found it in the complaints of your subjects." Can a man be branded with a more odious and disgraceful representation of him, than that he had been so educated from the beginning to the end of his life, as to be utterly ignorant of the language of truth. The stile, the insolent manner of it, is what will occur to any body. He desires him to distinguish between the permanent dignity of a king, and that which serves only to promote the temporary interest and miserable ambition of a minister. "You ascended the throne with a declared, and, I doubt not, a sincere resolution of giving universal satisfaction to your subjects. You found them pleased with the novelty of a young prince, whose countenance promised even more than his words, and loyal to you, not only from principle, but passion. It was not a cold profession of allegiance to the first magistrate, but a partial, animated attachment to a favourite prince, the native of their country. They did not wait to examine your conduct, nor to be determined by experience, but gave you a generous credit for the future blessings of your reign, and paid you in advance the dearest tribute of their affections. Such, Sir, was once the disposition of a people, who now surround your throne with reproaches and complaints. Do justice to yourself, banish from your mind those unworthy opinions, with which some interested persons have laboured to possess you. Distrust the men who tell you the English are naturally light and inconstant, that they complain without a cause. Withdraw your confidence equally from all parties, from ministers, favourites, and relations, and let there be one moment in your life in which you have consulted your own understanding."

Gentlemen; is it fit that the first magistrate of this country should be represented to his

people in the way in which I have now stated to you, as never having once consulted his own understanding? I do not even dwell upon the epithets, which are the natural consequences of treating the person of the king in that manner.

The next charge upon him, is, that he takes a share in the narrow views, and fatal malignity of some individuals, and to sacrifice, consequently, private objects under the government, for the private purposes of gratifying pique and resentment; then it mentions [that by the peace] England was sold to France, and his majesty was deserted and betrayed in it. But the next article, the king is charged with, is what I mentioned to you before, which is, he has put himself into the condition of an enemy, a private enemy to an individual man. For God's sake, why? What man could, without offending the laws, put himself in a situation, either to deserve, or actually to meet the private enmity of the king; and, as I told you before, in order to lessen the king the more in your esteem, this gentleman is represented to you, who, in the former part of his life had acted upon a settled opinion, that there were few excesses to which the character of an English gentleman might not be reconciled, and that he could take the same latitude in the choice of political principles as he had in the conduct of his private life. With regard to the former, it seems to be somewhat singular. I have always understood that principles, either moral or political, were fixed upon the consciences of men, and an honest man was not at liberty to choose different principles. But this is all said with a view of lessening the character of that gentleman, to make the conclusion afterwards, that it is an unworthy contention, (and it is represented as unworthy) and giving an air of ridicule to the difficulties, in which the king has been betrayed; and making it a principle of government; that he had not only stretched every nerve of government, but violated the constitution by an ill-advised personal resentment. Is this language to tell a king? If you were to tell a common justice of peace, that in the administration of the duty of his office, he had sacrificed his duty to his resentment, I apprehend my lord will agree with me, and I lay it down as a proposition of law, you would be liable to be prosecuted; and if such a thing was published, it would be a libel if wrote upon him. And here we are come seriously to debate, whether telling the king he has not only sacrificed the duties of his office, but betrayed the trust reposed in him, and his articles were not performed—and all that to gratify ill-humour and resentment—if that is not a libel, I own my imagination cannot reach to what is a libel, and I do not understand the subject the least in the world, if it is not to be so understood. After that, he is pleased to go to the House of Commons: with regard to them, he says he can readily believe there is influence enough to recall what they look upon as a pernicious vote. The House of Commons consider their duty to the crown as paramount to all other obligations whatsoever. To us, says the anonymous writer, to us they are indebted for an accidental existence. I wonder of what member he happens to be the elector! it would be more honest if he was to shew himself, that we might know who he is. To us they are indebted for an accidental existence, and they have justly transferred their gratitude from parents to benefactors, meaning from the electors to the ministers; from those who gave them birth, to the minister, is the very expression. Now, whatever may be the flippancy of some men's manner of telling things, all orders of government, where the form of government subsists, as well as in this country; no man of sense can admit that it ought to exist, and at the same time it ought to be subjected to reproaches, at the pleasure of every man that thinks proper to put reproach upon them, by publishing a libel. I only wish to have those two propositions examined. That two great bodies, whose whole benefit and existence, nay their authority, is to govern the whole nation; and are they to be in the power of every man whatsoever to revile them with what personal insolence of language he pleases? Does this come at all to the idea, that an honest man would allow his own opinion, under the pretence of discussing public subjects? Will any man of honour say you may revile, with imputations of reviling, the persons of men, without going any further? Is that a colour to cover this libel? After having treated the House of Commons thus, he returns again to the king, and is pleased to threaten the king with an universal revolt of all his injured subjects. He begins with the kingdom of Ireland, which he is pleased to call a plundered and oppressed kingdom, with no more regard to truth than understanding and knowledge enough of the subject to keep up the probability; for of all quarters of the world, he should not have looked there for that sort of imputation, as he is pleased to put it. And here he is introducing another character upon the stage, merely for the sake of traducing the king afterwards; that is lord Townshend. "The people of Ireland every day give you fresh marks of their resentment. (speaking of the king) They despise the miserable governor you have sent them, because he is the creature of lord Bute; nor is it from any natural confusion in their ideas;" no, they are right enough in that, he supposes "that they are so ready to confound the original of a king, with the disgraceful representation of him." This is the manner of talking to the king. I have had the honour to converse and live with lord Townshend, as long as any body. All I have to say of him, is, he is very far from deserving such a character. But I hope that will not be taken as a very gross observation, that a man who has lived with him, dare to say so. But I desire but one word concerning the immorality of that sort of conduct, that under the cover of anonymous publication, men are to bespatter in this kind of way, and in that

way reflect upon the condition of officers in this situation. If he should apply to a court of law, and submit it to a jury, if they were not deaf to his complaints he would be relieved, unless they were not disposed to protect his character, and, upon the contrary, were to take the part of a man, who under cover of an anonymous publication, attacks his character in this manner, with this method of tacking to it at the end, that he was a proper representative of the king.

The next article is: "He has taken a decisive personal part against the subjects of America, and those subjects know how to distinguish the sovereign and a venal parliament upon one side, from the real sentiments of the English nation upon the other." For God's sake, is that no libel? To talk of the king, as taking a part of an hostile sort against one branch of his subjects, and at the same time to connect him in the article of acting in this manner with that parliament, which he calls a venal parliament; is that no libel? I beg leave to observe, concerning what parts apply to him, that England he has represented as being engaged in a quarrel against the king; and consequently, that he stands against them with a few unhappy people, who are not at liberty to choose their principles; but fancy themselves bound to unhappy principles; those few men, he desired to be understood, were the whole support, and the whole attachment to the king. Then he goes to the partiality of his understanding to the soldiers. Now it is worth your attention, gentlemen, to see how very malignant the object of that man must be who wishes to set this party against the other; and tells the king he might learn to dread the undisguised resentment of people that are ready to meet their sovereign in the field. Then you see how malignant that must be, and how it applies, when you read that part with respect to the guards, where he says, "when the distant legions took the alarm, they marched to Rome and gave away the empire." This is the representation of the occasion, upon which the guards had preferments lavished upon them, and the cruelty with which the marching regiments had been treated, in order to raise a quarrel, in short, between them. Now, gentlemen, there are an hundred different passages, in which the king is told he has no good quality, but every bad one upon earth. He is bid to discard his little personal resentments, which have so long directed his public conduct. Is it not shameful to talk in that manner? and in a thousand instances, too long and too disagreeable to repeat, the king has been treated thus, from the beginning to the end; and in conclusion, he is told what he is to expect next, unless he conforms to this anonymous writer; that is, another revolution; and that the prince who imitates the conduct of the Stuarts, should be warned by their example, and while he plumes himself upon the security of his title to the crown, should remember, that as it was acquired by one revolution, it may be lost by another. If you have any difficulty of imagining what that crown is, what his title is, who is in possession of that title, acquired by one revolution, and what it is that is meant by another; they are difficulties that have not yet occurred in any one coffee-house in this great metropolis, nor one place in the country, from one end to the other, wherever this libel has been published; such is the nature of the libel, with respect to that. After having stated to you, what I look upon to be the application of the paper, to the several articles mentioned more particularly than all to the king; and having laid before you what will be the general form of the evidence, in order to prove the present defendant guilty of printing and publishing this paper, it will be for you to determine, if I may use a word that looks so like doubting the determining upon such a question as this. If you have, any of you, any serious thoughts, whether the author of this paper did mean the king; and whether he did mean the great officers, the lord lieutenant of Ireland, or any other; and whether he did mean concerning the officers of this country, and endeavouring to set one party of the country against another; if you have any doubts upon that among yourselves, that will admit you to acquit him. If you have no doubts, and do return a verdict of acquittal without such doubts, or that you return a verdict which the Court must understand in a different way, which the Court must construe different from what you intend, then you find a false verdict. For it lies upon you, to find a conclusion from the evidence; or to say, whatever we think of the evidence, and however we are convinced of the conclusion, we are determined to reject that evidence, and to deny that conclusion, and to betray the sense of our own minds, rather than to execute the laws. But, gentlemen, upon the contrary, you will proceed in the administration of justice and the law, without adopting the part of the author, who has set himself up for the accuser of his king, and as yet has not had the face to shew himself, though he has been the rancorous enemy of so many people.

Daniel Crowder sworn.

Examined by Mr. *Morton.*

Crowder, what is your business?—I am an assistant to the messenger of the press, Sir.

Very well. Do you know the defendant John Miller?—I believe I know him, I believe he is in that quarter.

Now, Sir, give my lord and the jury an account, whether at any time, and when, you bought the paper, which I believe you have in your hand.—[No answer. The paper produced.]

What is Miller? What business does he follow?—He is the publisher of the London Evening Post.

Now give an account where you bought that paper.—I bought it at Mr. Miller's; it was served to me by his publisher.

What is his name?—His name is Phipps, I believe.

Where did he serve you with it?——In Queen's-Head Passage.

Is that the place where his business of printing is carried on?—I never saw them print there.

Is that the place where they are sold?—It is the place where they are published.

Have you frequently bought that paper at that shop?—I have.

What name do you call his shop where you bought it?—The publishing room; I do not know whether that is proper, but that is what they call it.

At any time have you been there, and have you seen the defendant?—[No answer.]

Whom did you buy it of?—I bought it of a lad, who is servant to Mr. Miller, they call him Frank, and I think Phipps, I won't be certain as to that; he was always called Frank by every body.

Have you at other times been at that place called the publishing room, for the paper that bears the name of the London Evening Post, and have you bought them there?—Yes, Sir, every time they were published; either I, or one belonging to me; I can't say always that I have been there myself.

Have you frequently?—I have frequently.

Have you waited at any time till the papers have been ready to be delivered?—Very rarely. I have seen people wait and go up stairs, but they are generally the readiest of any body.

They are the most diligent of any others?—They are in general the most forward.

A Juryman. You bought that paper?—*Crowder.* Yes, gentlemen, I bought that paper.

Mr. *Morton.* How long have you known Frank Phipps, the lad you bought it of?—*Crowder.* I have known him ever since he began to publish that paper.

How long is that?—About three quarters of a year.

The London Evening Post read in court, N°. 26,572, that part of it signed Junius.

Robert Harris sworn.

Examined by Mr. *Wallace.*

In what business are you? What office do you belong to?—The Stamp-office.

What office do you hold there?—The register of pamphlets and news-papers.

Pray, Sir, are news-papers brought to your office to be stampt?—Yes, Sir.

Do you receive the duty for advertisements in news-papers?—Yes, Sir, I do.

Pray, Sir, do you know who the printer is of the London Evening Post?—I have it here. [Looking at a large parcel of news-papers bound together in a book.]

Do you know the defendant Miller?—Yes, I do.

Are papers brought to your office for printing the London Evening Post on?—They are first brought to be stampt, and sent out blank, and when printed, brought into the office to be charged for the duty, one of each paper every day.

Whose servants bring them to be stampt?—Mr. Miller's. After they are stampt, the money is sent, it may be by himself, or his servants; the money for 15,000 may be brought together, then they are returned to the office after they are printed, for the number of advertisements to be found out and charged with the duty.

Who pays for the advertisements?—Mr. Miller. It does happen sometimes that the number of papers may not be sold, then the money is returned.

You say, the duty is returned?—For the unsold, the duty is returned.

How do you verify that?—They are returned, and they make an affidavit that they made no profit of the papers, and then the stamps are returned again, and the duty is returned.

Who makes that affidavit?—Mr. Miller.

How is the account of the advertisements settled?—We settle it every month.

Who comes to settle with you?—We charge them.

Whom do you charge the London Evening Post to?—To Mr. Miller.

Who comes to pay you at the end of the month?—It may be two months, or it may be three months before they are paid.

Who comes?—May be Mr. Miller, may be his porter.

Does he come himself frequently?—Yes, sometimes.

Does he settle and pay for the advertisements?—Yes.

Have you the paper of Saturday December 16, to Tuesday December 19, 1769?

[The witness looks at his volume of papers and turns to that paper.]

This is the paper sent from Mr. Miller to your office?—Yes, Sir, they are brought into our office.

Mr. *Wallace.* The paper is of the same date, and number 26,572.

Mr. *Thurlow* to the defendant's counsel. Do you ask this witness any questions?

Defendant's Counsel. No.

Sol. Gen. Then we have done.

Serj. *Glynn.* Please your lordship, and you gentlemen of the jury, to favour me in this cause, in behalf of Mr. Miller, the defendant. Gentlemen, the learned gentleman who opened the cause in support of the information, has told you, that of this publication, no lawyer, not a man of the profession in the kingdom, he thinks will seriously avow,—the learned gentleman who appears in support of the information, has said, no man will seriously avow a defence and justification of the publication now under your consideration. Gentlemen, I have had the misfortune to be very much misunderstood, if I gave any inference of myself, or any

admission of the least degree of guilt or criminality in a similar publication to this. I entered into a defence as seriously, and as ardently wished, that such weak arguments as my understanding might furnish me with, might be prevalent in that case, with that anxiety that always will attend questions of the most important nature, and expecting an instant decision. I appear now, as then, avowedly defending the publication of the paper. I approach with the same anxiety, and have some relief to that anxiety, finding the determination of this important question in the hands of a jury of the principal citizens of London. Gentlemen, I made no objection to that neglect and remissness, in convening a full jury here, persuaded as I am, that collect the jury where they will, among the inhabitants of this metropolis, it is impossible to find men with hearts so foreign to the ideas they owe to liberty and public justice as to allow the conviction of the present defendant. Gentlemen, my learned friend has said, that upon the last trial, no particular passages were pointed out to which we thought proper to apply a particular vindication. The charge was general; the answer, I allow, was as general; and I think it seems as proper and becoming to leave the construction of a paper to a jury of citizens, who are the most competent judges of what sense and construction belongs to a paper, unassisted by counsel. And if I did not enter into a defence of particular passages, it was because a general charge was exhibited, and no particular passages pointed out, as bearing an unjustifiable construction. My learned friend says, he knows no party so dangerous, as mercenary writers employing their pens in the aspersion of private characters, or the misrepresentation of public measures. I do most heartily agree with the gentleman, in a detestation of those men who can be procured by any emoluments coming from any quarter, to prostitute their pen to the calumniation, slander, and depreciating of the best characters in the kingdom. I do most heartily agree with him in despising and contemning the authors; but I do look further, and I bestow the higher measure of indignation and condemnation on that fountain from whence flows the encouragement to such pernicious prostitution. None of that sort has, however, been thought proper to be brought before you, with regard to the great and respectable characters that have been attacked, as they say they have acted with impropriety in leaving the publisher to the punishment that a just and indignant public jury will always inflict upon indignant writers; and if that is to be pursued, it should be of those writers there should be a reparation sought for, to the constitution; and those characters that you see every day in daily publications, publicly libelled and traduced, there might be reparation sought for to those great characters, though they cannot be protected from the scurrility of malignant pens. But gentlemen, none of them are brought before you; it is a case of a different sort; and I am at a loss to guess how the word 'mercenary' can bear any application to the present charge. I have always in my own thoughts distinguished between those that prostitute their own pens, and become the stipendiary instruments of parties and ministers, and those pens which are called forth in the defence of particular opinions, and only offer the discussions of those opinions to the public. I have always thought it of the utmost importance, that the latter should be protected and encouraged. If in the paper here before you, you see no more than I profess I see, a writer called forth by ardent zeal, for the safety of that sovereign which he thinks in danger, and for the safety of that country whose rights are involved in the same danger, called out to deliver his opinion of that in this publication; I am so far from thinking that paper obnoxious to any degree of censure and condemnation, that I think the author must have been said to have acted a justifiable part, to have obeyed the call on a good citizen, in conveying the alarm, and giving notice where he thought it necessary. My learned friend has the same idea of the matter now to be determined, upon the grounds on which you are to form your decision, that I entertain; it lies entirely in your own breasts to determine it; and I would not insinuate any thing that I think they ought to adhere to, as I know you to be a jury so well acquainted with your duty, that no instructions are necessary. For we all know, that in all times, the honest, intrepid, upright conduct of a jury must be the refuge of the people of this kingdom. That has been their security, when all other securities have been taken away, and their liberties likewise. They must and will, in the natural course and evolution of things, flee again to the same asylum; and upon that account, gentlemen that are called to exercise that important duty, do not want to be informed of that line of jurisdiction that falls to them; that jurisdiction that they are to keep inviolable, and that jurisdiction upon which depends the security of every subject of this kingdom: and that jurisdiction, if once broke in upon, makes juries useless; and the practice and insult upon that substantial benefit, the constitution boasts of in it, and the public have constantly reaped from it; that line of distinction the jury have to determine of the full matters before them, and I believe I shall be in no degree contradicted, when I shortly state the question you are to determine. Gentlemen, Mr. Miller is a citizen of London, and is charged with having seditiously published a paper reflecting upon the person of the king; vilifying his subjects, and wrote with a view of exciting a sedition; vilifying the person of the king; wrote with a view of exciting sedition, with intent to alienate the affections of the subjects from his majesty. That is the general description of the charge against him before you. It is alleged in the information, that it is a seditious libel, reflecting upon the king, his administration of

government, and his principal officers of state, and the hon. House of Commons; and in the words and dashes contained in the specification of the letter itself; and if those words were admitted, it is incumbent upon you, and you must give satisfaction, and convict the defendant; and if that is not wanting, you are called upon by your duty, to convict the defendant. Gentlemen, I would not be understood here to be making a cavil of defence, as if I insisted literally upon a proof of every part of it. This I insist upon, that in all cases whatsoever, the principle of the crime is the malignant mind, the bad design and intention in the writer; and you must be satisfied of the proof and the nature of the subject before you, that there was that malignant disposition in the writer. You must be convinced here, that there was sedition in the intention; and if that proof is wanting, that charge is not made out; it is like all the other cases of criminal prosecutions, whether for felony, perjury, or treason; you must find the intention; it must be proved wilful and corrupt, in case of perjury; and if they were to say they found the word false, without wilful and corrupt, they have in effect, acquitted the defendant. They would do better, if in explicit words, they would speak in the language of the law, in saying, the defendant is not guilty. There is danger in not being explicit, where the facts justify an explicit explanation; and I do submit, gentlemen, that in the present case, you must be convinced there is a seditious meaning and intention running though the whole of this publication, though I don't see it is necessary to give proof of the whole, but you must be convinced of the seditious intention, so as to affect the defendant with a proof of the seditious intention at the time he published it. Gentlemen, my learned friend, knowing that to be the case, knowing the necessity of such proofs to support the present charge, he has entered into an examination of the paper, and he has laboured to convince you, that this is a direct personal libel and invective against the king. Gentlemen, if a subject of this kingdom so far forgets his duty, as to traduce and calumniate the person of the king, in that case it would cut off a serious defence; but it is necessary to the present prosecution, you should understand it so; the learned gentleman has, for that reason, so laboured it, and you will judge of the success of his labours. You will judge how well warranted by the paper before you, are the constructions the learned gentleman has put upon it. In the first place, says the learned gentleman, every bad quality is imputed to the king; every good quality denied him. Gentlemen, I submit to your own consideration, upon reading the paper, whether the obvious meaning of the author is not quite contrary to the meaning put upon it by my learned friend; and whether he has not repeatedly borne testimony of the royal virtues of the king. Is that application just? Is it just to say, this is a paper containing the imputation of all bad qualifications to the king himself, and denying those virtues which all the world know him to be possessed of? Through the whole of the paper, there is not an imputation of any bad quality in the king. On the contrary, those bad qualities are imputed to others. The learned gentleman, in his further prosecution of that design, to make you assent to his propositions, if subtilty can draw it from the line of truth, and give it that aspersion he says it contained; he has told you his education is libelled; his condition, his situation, and the whole is a libel upon him in the supposed difficulties in the access of an honest man to his closet, to tell him he is surrounded by flatterers, and that truth don't find easy access; and that is an aspersion upon the king. It has been the case of the best of kings; and no good qualities in the mind of a sovereign can guard against it. The most active and vigilant kings, have, in some part of their lives, suffered in the administration of government, from the difficulty there is to convey the truth to their ear. It is not the person of the king, it is the misfortune of a throne that it cannot be accessible to people of all denominations. If their servants are corrupt, they are surrounded, and a barrier is formed against the approach of all others, that would convey any useful caution to the ear of the king. If he is in the hands of bad servants, the most wholesome steps are to be taken to deliver himself from those servants. Has that construction contended for by my learned friend, and ingeniously stated to you, has it been well warranted by the paper before you? Let us consider the other ground upon which it has been contended. It has been said, the lord lieutenant of Ireland has been treated wrongfully, and he don't deserve that title; and my learned friend said, he himself would defend him, as he has known his conduct, and been acquainted with him. The lord lieutenant—with regard to what it said of him, and to make it apply, it has been said it infers an insult upon the king, because he is told, after the disgraceful picture has been drawn of the viceroy and deputy, that he is a fit or worthy representative of the person that sent him. Read that passage, gentlemen; I desire that passage may be fairly read. The import is, as I am warranted by the words—and I expect to find no credit with this, or any jury, if I wilfully misrepresent any thing—the import, as I take it, is, that a disgraceful viceroy has been sent to a neighbouring kingdom; and the import of the paper is, it was that viceroy that has drawn discredit upon the person that sent him. Who sent him? that person is not named that sent him, nor is there a word said, nay, it is so far from being said, that representative is a worthy, becoming, or similar representative of his sovereign, the contrary is, in direct words, said—his sovereign is disgraced by him. This is the third ground by which it is represented, there must be a personal application of this to the king. Then my learned friend says, the next charge upon him is, that he takes a share in the narrow

views and fatal malignity of some individuals, to sacrifice a private object; and that he had stretched every nerve of government, and violated the constitution, by an ill-advised personal resentment. Is it criminal to say, every ministerial power has been employed to crush that man? if it is criminal, Mr. Miller makes one amongst millions of guilty gentlemen. Does that, however, in the least degree, apply to the person of the king? Are you not then, by reading the paper itself, convinced, that this has no application, in any degree, of that kind, to the person of the king? It contains no insinuation to his disgrace, no reflection, no personal resentment upon him; and, is it criminal in a man to say, if he thinks so, that discontents prevail in this kingdom? is it criminal to state the grounds of it? is it criminal, if he thinks it, to say there are discontents between one party and another? is it criminal for a man who thinks there are evil counsellors about the king, to express his wishes, that they may be removed? In direct terms, these are the words, that they may be removed, and the parliament dissolved, and every cause of complaint removed from his government. And those who wish for the prosperity of the king, and content and happiness, may form such a wish; and, if justifiable in making it, certainly are justifiable in expressing it; and it can be no imputation upon the person of the king throughout. But the measures of government have been freely censured, from one end of this paper to the other, as the cause of the discontents, and that has been lamented; and an invidious interpretation has been given it, as if it was a menace to the sovereign. Gentlemen, you all know, that whoever gives a picture of a distracted and discontented people, if he means to convey honest advice, would name those consequences, which, in the course of things, are likely to follow; the more he dreads and apprehends, and wishes to avert them, the more freely will he name them, because that is the means often to prevent them; and the author may say, I fear, in course of time, they may happen, and he may point out the means by which they may be averted. The fears, and not the menace of the writer is conveyed to the crown. Then, gentlemen, I submit to you, upon a full consideration of the paper before you, there are no reflections upon the person of the king; but the measures of government are canvassed with that freedom, I hope I shall always see them treated with in this kingdom. I hope I shall never see them meet with any discouragement from juries, to say the person of the king is surrounded with evil counsellors; upon an examination of it, if that should be the case, and they should meet with discouragement, it is shutting their mouths to any enquiry at all, and they must rest contented at every act that is done by the king's servants, though that is virtually a distinction in law from the king. We do not consider that it is the king makes war or peace, and, it is not only justifiable to say, that war is not begun properly, but peace is not made properly: for, it has been frequently the case of this kingdom, to exercise the royal prerogative of the seal to a peace, which has been declared to be ignominious and dishonourable at the same time. At the same time we guard the person of the king; it is not his peace, but the ministers, and they should be punished for it. The ministers have then made use of this argument, it is the king's; unfaithful to their sovereign, if they have drawn reproach upon themselves, they will shelter themselves behind the curtain, and will produce him. Whenever measures are freely wrote of, whoever should introduce the name of the king as the author of it, he is the person who acts unworthy of that duty he owes to the king, and he has libelled the king, and brought his person into danger: those that take from the officers of the crown, and throw that upon the king which belongs to them, treat the person of the king ill, and make a libel upon him: but the jury will put a right construction upon this paper. The jury will consider the necessity of a free examination of measures, and they will not suffer an expedient to take place, which would be at once unfaithful to the crown, and dangerous to the subject, to shut our mouths to all sorts of discontent, and to reduce this nation, like all others, where oppressions cannot be expressed, where discontents are not known, till they break out in events too dangerous, and too melancholy to be mentioned. And, as their discontents are known, they may be removed; if well or ill-founded, they may be answered by argument; if they are ill-measures, it is the happiness of this kingdom, that we owe to the freedom and liberty, which is a security to the throne and people.

Gentlemen, I have troubled you thus largely in this cause, in answer to my learned friend's arguments, and I hope my endeavours will not be needless; for, you are the constitutional judges of the question. You have the paper before you. If you see upon examination of this paper, that there are none of those seditious designs, nothing of that tendency, nothing that conveys a proof of such a malevolent disposition, either in the writer or the defendant, which is charged in the information, I am persuaded you will do your duty, and will, by an explicit verdict, not to be misunderstood, declare the defendant not guilty. I trust you will, gentlemen, and, for that reason, I don't trouble you with comments upon the evidence produced before you. It is left to you, whether you will say, a citizen of London shall, for any paper published in such a way, be so far affected with the contents and knowledge of it, that he should be said to have formed horrible and seditious machinations against the king and the subjects of this country. Gentlemen, I shall not trouble you with any more questions of this sort, because I conceive the defendant to be safe in your hands. I have taken the liberty to submit that to you,

and you will seriously consider upon what you are to decide. You will consider whether he is guilty in the manner, form, and charge in this information, and whether he is guilty in every part, which must be added to make up the whole of this charge. And, if you say he is guilty, you in your own consciences, pronounce him guilty of every particular, specified offence. If you, upon the other hand, should not suffer the defendant to be non-suited upon the paper before you, and that you will give an example which one day or another will do honour to the names of the jury, and the nation will derive that benefit which it has always derived from a jury, and I hope it ever will; I am persuaded you will not disapprove of that freedom which is made use of in that paper, when you see there is no intention of doing ill in it, which must be left to the wisdom and integrity of those gentlemen, who are now the great judges of that, and I trust I have nothing to fear in the behalf of my client.

Mr. *Davenport.* Please your lordship, and you gentlemen of the jury, I am of counsel likewise for the defendant; and, after so very able a speech, by my learned leader, I should have sat down very contented indeed, if I had thought what the learned gentleman had said upon the other side, deserved to pass without notice. But it has alarmed me; and I will give you the reason, why I think it ought not to pass in silence. The gentleman, when he first opened it, took it for granted it was a libel, which he presumed, without asserting the guilt. It was a charge he would have thrown upon others, but it was a measure he himself adopted; and, I did expect from his ability, and from the situation he fills, that you would have had a clear line of precision drawn, without a possibility of error, where the libel began, and where it stopped. He has not ventured into a particular explanation of the whole of what he calls the libel: he has commented, indeed, and in a way, of which I shall take notice bye-and-bye to you, upon broken, disjointed members of sentences, without reading the fair and open sentence to you. Is there any book, either in sacred or profane history, that would admit of such a tearing and dismembering as that has been, without leaving the book absurd, and possibly criminal. Gentlemen, I will now state to you the manner in which this prosecution comes before you; because I shall, by that, wipe off from your minds any impression, if possible any could have been made, of a supposition that this information has gone through any consideration, much less received the sanction of any one person, or any court, but comes merely from the hand of him who has taken the liberty to bring it before you. Gentlemen, the power of exhibiting these informations has fatally enough been left in the Attorney General: it is a claim of office, and he uses it now. When the court of Star Chamber was abolished; when the licenser of the press was taken away; when the master of the Crown-office was restrained from preferring any information, without leave of the court, some how or other, this power remained in the Attorney General. Gentlemen, if this libel be so clear and so notorious, why was it not left in the ordinary mode of indictment, and why not left to a grand jury, to pass their sentiments upon it? why was not the Court moved, whether the matter might have been heard, that it might be determined in some measure, on its first appearance? The leave of the Court would have been obtained, if they had seen proper ground; an answer would have been given by affidavit, and by that an opportunity of exculpation; but it comes in that naked state of it, in the information of that arbitrary creature, the Attorney General, who has the power to exhibit, in the way and manner that the luxuriance of his fancy, and the intemperance of his zeal may suggest. Gentlemen, you will take it, divested of all that circle of epithets with which it is surrounded, and clear it from all that imputation of office. I will now, gentlemen, consider the nature of this question that comes before you, and the full and the absolute power which you have over it; for no power in this kingdom has the least control over you; nor have they the least power entrusted to them of deciding upon the subject, but what you refer to them: it is in your hands, and it is solely there. Gentlemen, the learned gentleman, taking, as I said before, the broken parts of sentences, has, in my mind, introduced more real reviling against the sacred character of that person, whom he supposes here to be introduced, than from any part of the pamphlet it is possible to collect. You will observe, that in the very first opening of the writing, the writer states as a maxim of this constitution, and it is the happiness of it, that the king can do no wrong. He says, that he will separate the private virtues of the man, from the vices of his government; the amiable prince, from the folly and treachery of his servants; that, instead of friends, persons in that situation, are too liable to meet with the imputation of favourites. It is in that manner he introduces that very abuse that is supposed to be thrown upon his majesty. Gentlemen, you cannot be ignorant, how many controversial pamphlets and papers of every sort, of Juniuses and Anti-Juniuses, there have been published, by every man who thought he had a right; and, I hope, you will be of opinion, every man has a right to submit his doubts to the public, provided he confines himself to a free, open, public, and able discussion of those grievances, which, we conceive, scarcely affects the mere imagination, without a ground; and this author must, most sensibly have felt it as, I think, is manifest from the strength and energy with which the paper itself is couched. Gentlemen, you will find, through the whole of this pamphlet, the maxims with which he sets out. I presume you will see, that the minister has found himself, with all his tribe of writers, unable to defend

views and fatal malignity of some individuals, to sacrifice a private object; and that he had stretched every nerve of government, and violated the constitution, by an ill-advised personal resentment. Is it criminal to say, every ministerial power has been employed to crush that man? if it is criminal, Mr. Miller makes one amongst millions of guilty gentlemen. Does that, however, in the least degree, apply to the person of the king? Are you not then, by reading the paper itself, convinced, that this has no application, in any degree, of that kind, to the person of the king? It contains no insinuation to his disgrace, no reflection, no personal resentment upon him; and, is it criminal in a man to say, if he thinks so, that discontents prevail in this kingdom? is it criminal to state the grounds of it? is it criminal, if he thinks it, to say there are discontents between one party and another? it criminal for a man who thinks there evil counsellors about the king, to expre wishes, that they may be removed? terms, these are the words, that the removed, and the parliament dis every cause of complaint remo government. And those wh prosperity of the king, and piness, may form such a fiable in making it, cert expressing it; and tion upon the pers out. But the me been freely cen paper to the c tents, and th vidious in if it was men, yc of a mean tho th a

and, it is not only justifiable to say, not begun properly, but peace is n perly: for, it has been frequen this kingdom, to exercise the of the seal to a peace, w cared to be ignominious the same time. At th the person of the kin the ministers, and it. The ministe argument, it is sovereign, if themselve hind th When ever my conduct, which has th situation in which I have ought perhaps as well to betray the business, as the principles of law which I stand in this prosecution, though do not think it of exceeding great consequence to the issue of this cause, whether these principles be actually settled one way or the other, because there are no points of law upon this subject, that in my mind require particular strength of argument or great abstruseness of reasoning, in order to come at them. They lie open and upon a level to common understanding, to that obvious moral observation of all mankind, do no wrong to another; but you are desired to understand, the justice of this cause has been, in fact, entangled in the former; and that it is necessary for you to go through all that is called the inducement of the information; to find the party guilty according to the extent of every epithet: where is that law to be found?

Serj. *Glynn.* I must beg leave to interrupt you. it was the substantial proofs, not of the epithets.

Sol. Gen. It is a matter of no kind of consequence to this business, whether the gentlemen spoke it expressly in the extent I really understood them to speak, or whether they left it to be collected and inferred to extend farther by construction, than they really ventured; that is of no consequence to this business. All I meant was to introduce that idea. I should have taken the freedom to state, as a proposition of law; that is to say, the substantial allegations; let it be worded by epithet, or not, the accusation is of the part the defendant has published in writing or printing, concerning the character and person of another, which is injurious to his person and character; and that the offence is considerably enhanced, when applied to the person of magistrates, and particularly to the highest magistrates whatsoever. That is the ground which I go upon; and

* See vol. 12, p. 183.

* Concerning the right in crown prosecutions to a reply on the part of the crown though no witness have been examined on the other side, see Mr. Horne's Case, p. 651 of this volume.

though I did understand the doctrine of another effect stated in the outset, I am well content if we are agreed in law, and will proceed upon it just in the manner in which I think it stands. I did understand, when the learned gentleman spoke first of it, when he entered into a defence of the paper, and embarked in it, that it was upon the same line, and same notion of law I have gone upon. The learned gentleman who spoke second, thought proper to go a little wider, and give a more general discussion than my learned friend who spoke first; and he thought it necessary to tell you, that this information came under no sanction, no kind of authority whatsoever. I refer to your own memory, gentlemen, whether I relied in the opening of this cause at all upon the authority under which this information is filed; not the least upon earth; did not I? and yet at the same time, if that should come to be called in question, I am to inform you it is filed by an officer of the crown, and whom the constitution of this country has, in all ages, intrusted to his duty and his knowledge, a discretionary power of filing these informations; and the very statute alluded to by the gentlemen, was after the Revolution, and at a time when the constitution was well considered, and the liberty of the subject supposed to be established. At that time, and for the sake of the constitution, under which we live now, it was expressed to be in that officer of the crown to file informations for the sake of the preservation of public order and peace. This is the law of the country firmly settled at the time of the Revolution; and yet now, when the law comes to be put in execution, juries are entertained with an idea of the oppressive qualities existing in that law, which the wisdom of ages, and the best correction possible, applied to that, have established what it is that officer is entrusted with, a matter of duty and honour not to file informations, which in his judgment and discretion, do not call for the extraordinary interposition of his office. Whenever they do, it is his duty to file them, unless something had been said to impeach his proceedings in that part of the execution of his duty. But I can say, myself, it was filed by an officer of great judgment, and unimpeached honour; and it was his opinion, and it was accordingly done, not to proceed by indictment, but information in the court of King's-bench. The Court would not have heard a motion at the instance of the Attorney General to file that which is his duty to file. The very circumstance of his being to file it, would have prevented the Court from hearing the motion; they would have called to him to do his duty in the course of information.* And is the Attorney General, when he plainly sees it with the same eyes the rest of mankind have seen, and the same view in which they have talked of it, when he sees a direct malignant attack made upon the person of the king himself, is he to wait till a grand jury finds it such attack, and presents him what is his office? and is he not to interpose upon such subjects as this, where it is his duty? and, gentlemen, these are the grounds upon which it is to be determined by you. To speak properly of the gentleman that spoke first, they are not his grounds; though the second, he has endeavoured to mislead you upon the subject, by telling you, that in his opinion, this is not a libel; but he has withal given you his reason why he offers to argue it is no libel, because he says, it does not apply to the person of the king. Now I agree perfectly, that as far as this information goes, it charges, that this libel does affect the person of the king; and if he has made out to your satisfaction that no part of the libel does so affect him, then that part of the charge will fall to the ground, as well as that part that affects the great officers of state. If the defendant has made out there are no passages that apply to those persons, then he is discharged from that part of the information; so, with regard to that part affecting the House of Commons, if he has made out that the House of Commons are not directly and personally reviled and taxed with the grossest corruption, even with being bought by the ministry; if he has made out that proposition, then that will fall to the ground. I do not mean, (because you have the paper before you,) to go over those passages, at the outset of which it appears, the person of the king has been directly meant, though some have been taken up, and others omitted, by my learned friend in the defence. I will confine myself to those that have been taken up. He tells you, there is a great acknowledgment of the royal virtues. What a wretched misery is that in the obvious sense of those that are to determine upon it. If he does acknowledge those royal virtues, he taxes the king with those that are directly opposite to those qualities, and the taxing of them, I will point out to you immediately. In the first place, my learned friend says, what is said of the king, is but the ordinary accident of thrones, and the most active of kings have, in some part of their lives, suffered in the administration of government. And therefore it might be as well said of all kings whatsoever, or at least the greatest number of kings, and no harm could come from the zeal that is expressed to the present king. Observe the language of the paper itself. "It is the misfortune of your life, and the cause of your reproach and distress." Is this the language that may be said of all kings? and his being unacquainted with the language of truth. This is only dropping ideas concerning the application to the king, and very far from fact; and therefore the officers of the crown, are they who want to make that a libel upon the king, that was no libel. Were it only about in coffee-houses, that the king was unacquainted with the language of truth, and constantly erring, and that he had not discovered his prejudices; were

* See the Case of *Rex v.* Phillips, cited p. 678, of this volume.

that laid about upon tables in taverns and coffee-houses, nobody understood it to be a libel. But it becomes a libel, when the officers of the crown, for the vindication of the character of the king, thought proper to bring it before a court to be justified there. With regard to the lord lieutenant of Ireland, my learned friend says, there is no application to the king. 'Certainly there is no application to the king whatsoever.' Now let us see a little whether there is not.

"The people of Ireland give you every day fresh marks of their resentment;" so that it is introduced to the king. "They despise the miserable governor you have sent them, because he is a creature of lord Bute." This is the abuse upon lord Townshend; for what reason is best known to the author himself; but if they are masters of men's characters to treat them just as they please, there is an end of all law and justice. But when it concerns the person of a king, it is not from the natural ideas they are so ready to confound the person of a king in the person of his representative, as he states the people of Ireland, every day giving fresh marks of their resentment, because they understand there is no difference between the original of a king, and their representative. It is not owing to a confusion of their ideas they do in that manner confound it. What does he say in the next part after Ireland? He then proceeds to state America, of which he first of all says, "they were ready enough to distinguish between the king and his ministers, and to throw the fault upon them;" and that I suppose is not to be applied to the king. But afterwards he says, "the decisive, personal part you took against them;"—is this charging the ministry? "that decisive, personal part you took against them, has effectually banished that first distinction from their minds; they consider you as united with your servants against America, they knowing how to distinguish the sovereign and a venal parliament on one side, from the real sentiments of the English people on the other." Has this no application to the king? It certainly has. I have stated these few instances, merely because they were those that have been taken up, in order to shew they have no application to the king. Gentlemen, I have stated them to you, imagining we are so far upon a just ground, and that you can imagine no other but that the king is as plainly distinguished from every body else, as any thing in the world can be distinguished.

They are right in saying, that if you find it is meant so, what avails all that has been said. But they go beyond that; and very properly say you are the refuge of liberty. You are so. You are the refuge of those who find themselves wronged contrary to the laws of this country, and apply to the laws of this country for redress. And if you, who are the refuge of liberty, in that sense, should either by such delusion, or influence of prejudice and warmth in favour of such strange ideas, endeavoured to be put upon them, deny that justice to those that apply for justice, there consequently is neither liberty nor property, nor reputation, nor any thing which this country has hitherto thought worth protection, and the laws would not be able to protect them. I protest to God, it appears to me in a reasoning way, too strange a proposition, to say liberty is concerned in protecting a man in writing injuriously and opprobriously against the character of a man, which is the same as if it was concerned in protecting a man in robbing upon the highways. Gentlemen, you may as well have the question put for your discussion, whether you would have ten or fifteen guineas privately stolen from your person, by which the party would be liable to be condemned, or whether you would have your name hung out to the public, as a man who is disgraceful, dishonest, and unworthy of any post you held. Which would you choose? And in the name of common sense, which can any man expect you should choose? And how can you find your verdict when you are desired to withhold, contrary to all evidence, and every necessary conclusion, that justice which those conclusions do call for? You are not desired to believe they are not published by the defendant; that is given up here; you are desired to believe, that they do not talk of the king in the paper. That argument is not what I expected to have been proved. You are desired to think it would be a derogation from your authority, should you be obliged to find, according to the evidence. To be sure you are bound, if we could not make out the truth that belongs to the charge, which, if we do, without you can find reasons to deny that very truth which your reasons and consciences cannot resist; to be sure, that is one of the inferior situations of a jury. But that is an inferiority which don't belong to your situations alone. Judges are likewise sworn to pronounce according to law; and that is all the constraint upon the office you now hold; and if you find the facts are as I stated in the outset, notwithstanding what has been said in the defence, it will be too plain an absurdity to say he is not guilty.

Lord *Mansfield*. Gentlemen of the jury, if the direction that I am going to give you, as to the object of your consideration, and the rule and ground upon which your verdict ought to be founded, according to the law and constitution of this kingdom, and that oath that is taken by each of you; I say, if that direction should be mistaken, I have this comfort in my own mind, that it will not be final, but upon application to the Court for a mis-direction, it can be set right. The direction I am going to give you, is, with a full conviction and confidence, that it is the language of the law. This is an information that is brought against the defendant for printing this letter, which you have heard read, of the tenor set forth, and of the meaning put upon those parts of it, which are blanks in the original, by the in-

formation, and concerning the persons charged by the information, to be the persons concerning whom it was wrote. This is the charge. Now the question for you to try upon the evidence, is, whether the defendant did print or publish, or both, a paper of the tenor, and of the meaning, so charged by the information? As to its being of the tenor, the paper has been read to you, and if it had not been of the tenor, there would have been an objection made during the course of the reading; and there would have been an end of the information, if the charges were wrong, for they could not have gone on; therefore there is no objection as to the tenor.

The next thing is the meaning; and the meaning is what is put upon it by the information, in those places where there are blanks in the original, as k dash g for king, m dash y for majesty, and so on, as you heard it read. As to that, there has been no particular objection made by the counsel, that in any one instance the blank is ill filled up. If that could have been made, their ingenuity would have found it out. If you say they are not well filled, and the paper is not of the meaning set forth in the information, then you must, to be sure, acquit him. But, if it is of the tenor and meaning, set out in the information, the next consideration is, whether he did print and publish it? Now, as to that, the evidence stands uncontradicted, and without any observations. It is proved to be bought of his servant, at his house: that dropt from the counsel without any observation. If you by your verdict find the defendant not guilty, the fact established by that verdict, is, he did not publish a paper of that meaning; that fact is established, and there is an end of the prosecution. You are to try that fact, because your verdict establishes that fact, that he did not publish it. If you find that, according to your judgment, your verdict is final; and if you find it otherwise, it is between God and your consciences, for that is the basis upon which all verdicts ought to be founded; then the fact finally established by your verdict, if you find him guilty, is, that he printed and published a paper, of the tenor, and of the meaning, set forth in the information; that is the only fact finally established by your verdict; and whatever fact is finally established, never can be controverted, in any shape whatsoever. But you do not, by that verdict, give an opinion, or establish whether it is or not, lawful to print or publish a paper, of the tenor and meaning in the information; for supposing the defendant is found guilty, and the paper is such a paper, as by the law of the land may be printed and published, the defendant has a right to have judgment respited, and to have it carried to the highest court of judicature. There is nothing upon the fact: if in point of law it is innocent, it would be an innocent thing, appearing so upon the record. Neither is it found established upon your verdict, that he did it with any degree of malignity or guilt in the bare act of printing and publishing. If he prints that which is unlawful, it follows in course, whether it is with a degree of greater or less malignity. For there is no one act, that may be attended with a greater variety of circumstances (almost infinite) than the manner in which a man might print and publish; it might be from the lowest to the highest degree of guilt, even to a very venial degree of guilt. Now that is not established by your verdict, all those epithets being a mere form in informations, and they are inferences of law, which are drawn upon the printing and publishing a libel, if it comes out upon the face of it to be a libel. It is very true, I am used to speeches made to juries, to captivate them, and carry them away from the point of enquiry. Mr. Serjeant Glynn did admit, the inducement was not to be proved; not so much proved, as is set forth, as malice of forethought, in cases of murder, or the instigation of the devil, and yet the form is kept up. As to the other epithets, he did admit of them, as his candor made him do. After arguing upon the epithets of seditious and malicious, he did say at last, I do not see it is necessary to give proof of the whole; therefore that is not the fact to be found by your verdict, that is inference of law; and many instances shew when the jury have found him guilty, before the defendant comes up for judgment, he is at liberty to extenuate his crime, and even his own affidavit will do it; and if the fact had been found by the verdict, it is impossible that can ever be controverted, nor ever further looked into. These are the grounds, therefore, which I leave to you for your consideration. If you are not satisfied that the paper proved, is of the meaning put upon it by the information, where the blanks are filled up, and the persons concerning whom it is spoken of, you must acquit the defendant. If you doubt of the evidence, as to its being proper evidence, you must acquit the defendant. If you are satisfied, as to both those, that is the matter to be established; by both those, and according to right, you ought to find it. And, indeed, if you were for having the power of pronouncing a verdict of not guilty, as to the fact; to be sure the jury, in every cause, may make an end of the question, whether they have not a right to find that verdict.* If you take upon you to determine the law, you must, for the sake of your own consciences, be sure to determine according to law, and you must be sure that the law is,† that such a paper may be printed and published, of the tenor you find it; the consequence of which is very obvious to be seen upon this occasion. If the law was to be determined in every particular cause, what a miserable condition would this country be in with regard to that part of it, as it is said there cannot be a greater curse than uncertainty

* See vol. 6, pp. 1013, *et seq.*

† As to this method of address to a jury in such a case, see 'Another Letter to Mr. Almon,' p. 58.

in the law; for one jury in Middlesex find one way, and a jury in London another way. A jury in Middlesex has found a verdict, and convicted one person * for the publication of this same paper, but you are not bound by that. If juries were to find according to the different impressions the different points of law have upon them, there might be no law at all upon the subject. You will consider of it, and I will repeat to you again, you must be satisfied as to the meanings laid down in the information, and concerning the persons, and you must be satisfied with regard to the publication; if you are satisfied you will find him guilty; if not you will find him not guilty.†

The Trial began about nine o'clock in the morning, and was finished about twelve. The jury retired into a private room, and continued locked up, till half an hour past seven in the evening, at which time they were agreed in their verdict; and the Court being broke up, they carried it to lord Mansfield, at his house in Bloomsbury-square. His lordship met them at his parlour door, in the passage, and the foreman having pronounced their verdict Not Guilty, his lordship went away without saying a word. But there being a vast concourse of people in the square, who had followed the jury from Guildhall, they, as soon as the verdict was known, testified their joy, by the loudest huzzas.

* See Almon's Case, p. 868, of this volume.
† But now see stat. 32 G. 3, c. 60.

Several inaccuracies in the preceding reports of the cases of Almon and Miller I have not ventured to alter.

As to the proceeding for an attachment against Almon in respect of the publication of the 'Letter concerning Libels, Warrants, Seizure of Papers,' &c. see vol. 19, p. 1082; and Lord Chief Justice Wilmot's 'Notes of Opinions and Judgments' as there cited.

Concerning the non-examination of Miller, p. 835, see what Mr. Dunning said in the House of Commons, reported 16 New Parl. Hist. p. 1279.

Of the conversation which passed between Mr. Mackworth and lord Mansfield, p. 838, see Mr. Mackworth's account, 16 New Parl. Hist. 1149, 1189.

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555. The Case of HENRY SAMPSON WOODFALL, on an Information filed by the Attorney General for publishing Junius's Letter to the King: 10 GEORGE III. A. D. 1770.* [London Museum.]

June 13.

THIS day came on at Guildhall, before lord chief justice Mansfield, the trial of an information filed by Mr. Attorney General *ex officio*, against Henry Sampson Woodfall, for printing and publishing a letter signed Junius, in the Public Advertiser, of the 19th of Dec. 1769.

* The report here given, is the fullest which I have seen of this Trial. I have therefore inserted it, notwithstanding the flippancy and partiality of its manner. In Mr. G. Woodfall's recently published edition of Junius's Letters (in which edition is exhibited various illustration of that work, and consequently of the history of these prosecutions) is inserted in a note to the author's preface, a very abridged account of this Trial, from which I shall print below the report of lord Mansfield's charge to the jury.

The following passage from a note to vol. 2, p. 62, of Mr. Woodfall's publication, is not impertinent in this place:

"The address to the king through the medium of this Letter, made a very great impression upon the public mind at the moment of its appearance, and though 500 copies of the Public Advertiser were printed in addition to the usual numbers, not a single copy was to be procured in a few hours after its publication. The author himself, indeed, seemed to entertain a very favourable opinion of it; as in Private Letter, No. 15, speaking of this Letter, he says, 'I am now meditating a capital, and, 'I hope, a final piece.' It was for this production that the printer was prosecuted, and obtained the celebrated verdict of 'guilty of printing and publishing only,' the consequence of which, as already observed in note to vol. 1, p. 99, was, that two distinct motions were made in court; one by the counsel for the defendant in arrest of judgment, grounded on its ambiguity, and another by the counsel for the crown, to compel the defendant to shew cause why the verdict should not be entered up according to the legal import. The case being argued, the court of King's-bench ultimately decided, that a new trial should be granted. This accordingly commenced, when the Attorney General observing to the Chief Justice, that he had not the original newspaper by which he could prove the publication; his lordship laconically replied, 'That's not my 'fault, Mr. Attorney:' and in this manner terminated the second trial. The fact is, that the foreman of the jury upon the first trial had pocketed the paper, upon its being handed to the jury box for inspection, and had afterwards destroyed it. The expence the defendant was

Only seven of the Special Jury attended, as follows:

William Bond, of Walbrook.
Peter Cazalet, Swithin's-lane.
Alexander Peter Allan, Mark-lane.
Frederick Cumerell, Mincing-lane.
Haman Meyer, ditto.
John Thomas, ditto.
Barnington Buggin, Philpot-lane.

To which were added the following five talesmen:

William Halyard.
Paul Varges, carpenter, Distaff-lane.
William Sibley.
William Willet, plaisterer, Distaff-lane.
William Davis.

After Mr. Walker had opened the cause, by reading the letter signed Junius, &c. with the innendoes of the information,

Mr. *Attorney General* (De Grey) began, exactly at ten o'clock, by saying, that nothing had ever raised a juster indignation in the mind of every man who wishes the continuance of our excellent constitution, than this letter of Junius. He then addressed himself to the passions and interest of the jurors, by telling them that they were more than any other men concerned to bring such offenders to justice, because any thing that tended to public confusion, was more especially fatal to commerce, and to those who hazard large fortunes in trade. He said, that this letter of Junius tended to public confusion. He then harangued with great seeming zeal on the glorious liberty of the press, which he acknowledged ought to be encouraged and exercised, as far as could possibly consist with the very being of society. But he said, that the abuse of the liberty of the press is more fatal than any other; and therefore entreated them not to suffer that liberty, intended for our salvation, to be turned to sedition, to our perdition. He said, the jury would be instructed from the bench,—that is,—a—a—he must believe they would be, instructed from the bench; that the only two things for their consideration were, 1. Whether the blanks in the printed paper were fairly filled up in the information: and 2. Whether there were sufficient evidence for the publication of the paper by Woodfall.

Mr. Attorney General then said, he thought it proper to explain his own conduct; because he was not merely an advocate in these matters, but officially answerable. This letter of Junius, he assured the jury, had given universal offence. He had therefore in hand six other prosecutions of different publishers for the same offence. He thought it his duty to prosecute them, and had therefore demanded the names of the publishers, because he, Mr. Attorney General, does not read news-papers. In the objects of prosecution, he endeavoured to make a distinction, and to pass by those who were poor or had large families of children, &c. He declared upon his honour, as a man, that he had no motive to urge him against any particular publisher, but merely the execution of his office. That he could have wished to have tried Mr. what's his name?—Woodfall, aye, Mr. Woodfall, the original publisher, first: because as for who was the author of Junius, that he could by no means discover, that remained an impenetrable secret.

After this defence of himself, Mr. Attorney General returned again to the cause in hand; by repeating to the jury that if, 1st, the blanks in the Public Advertiser were fairly filled up by the innendoes of the information; and if, 2dly, the publication was proved, the jury must find Mr. Woodfall guilty.

Crowder, the first witness, was then called at twenty minutes after ten, and examined by Mr. Thurlow, (Solicitor General.)

Crowder deposed, That it is his office and employment to buy up the publications of every day for the Treasury (on Almon's trial, this same witness, Crowder, called himself, an assistant to the Messenger of the Press) that he bought the Public Advertiser in question, of one Colford, whom he supposes to be Mr. Woodfall's man; he bought it in Mr. Woodfall's publishing room; he bought twelve of them. He had bought the Public Advertiser every day at Mr. Woodfall's for a year past.

The Letter of Junius was then read from the paper.

The second witness, *Robert Harris*, was sworn, and examined by Mr. Morton. He said he was the register of the stamps. He produced his book, in which the news-paper of each day is kept, for an account of the advertisements which are paid for: he said, the account for the Public Advertiser is kept in the name of Mr. Woodfall; that receipts are made out to him; that his servant generally attends monthly to settle accounts for the duty on the advertisements in that paper, but that sometimes Mr. Woodfall had attended in person.

The third witness, [*Lee*] was sworn and examined by Mr. Wallace. He said he was a servant to sir John Fielding; that he had often carried advertisements from his master to Mr. Woodfall; had sometimes seen Mr. Woodfall and delivered them to him, but very rarely; that he had one receipt for advertisements in the Public Advertiser, signed by Mr. Woodfall.

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put to in this prosecution, as stated in Private Letter, No. 19, amounted to about 120*l*. The late Mr. Almon, who was also prosecuted for selling a reprint of this Letter, asserts, in a note to another edition of this work, that the legal expence incurred in defending his own action, which could not exceed that of the original printer, amounted to between 5 and 600*l*.! An exaggeration which proves the necessity of exercising no small degree of caution, in estimating whatever other facts he has attempted to advance, with a view of elucidating the general history of the times."

Here ended the evidence and pleading on the side of the prosecution.

Mr. Serjeant *Glynn* said, He agreed with Mr. Attorney General as to the excellence of a London jury, and doubted not the liberties of the people were sufficiently safe, while there were trials by jury. He told the jury, that if they were of opinion, that the sense put upon Junius's Letter in the information, was the true sense; if it was clear, that it was a false, scandalous, and seditious libel; if they thought his client published it with a professed intention, a premeditated design, of abusing and aspersing the king; if the defendant meant or wished to alienate the affections of his majesty's subjects; if it appeared to them that his end in printing it was to stir up rebellion and commotion; as honest men they ought, and undoubtedly would, bring his client in guilty: but—if, on the contrary, the temper of the times was such, that the people needed that kind of information contained in the letter; if the facts could be proved; if the acts of government, in which the king, as a part of government, was necessarily and virtually concerned, highly demanded public reprehension; and the printer published it with the truly laudable motive of informing his fellow-subjects; if, so far from containing any personal abuse of the king, it was written with an honest but guarded freedom; the author and publisher would, by all worthy, all sensible men, be considered as having acted the parts of good subjects, and good citizens. He informed the jury, that the counsel for the crown had not gone upon the subject-matter of the Letter; they did not even attempt to prove it a libel, notwithstanding the epithets bestowed upon it in the information; and that the paper in which it was first printed, was not by any means set apart solely to canvass for party or faction, but was equally open to all: he admitted, that private personal abuse was wrong, but the public acts of government often demanded public scrutiny; that many, very many of the highest rank, as well as from the highest to the lowest in the opposition, had been scandalously traduced and vilified in the public papers with impunity; that if the defendant was brought in guilty, the hands of every publisher would be tied, and the gentlemen not in office might, by the ministerial scribblers, be abused to the grossest degree, as it would be dangerous to answer them, if, upon the appearance of every free answer, informations were to be filed, and the printers convicted and punished; the liberty of the press was immediately concerned; the stroke was levelled at it in this prosecution: but he did not doubt the jury would maturely, deliberately, and attentively consider the matter, read over the Letter with care and circumspection; and if they found it was not written with intent to vilify the person of the king, but freely to canvass the acts of government, they would consider the publisher as having done his fellow-subjects essential service, and acquit him.

Mr. *Lee*, the other counsel for the defendant, then got up, and began with observing, that after the very learned and able speech made by Mr. Serjeant Glynn, little remained for him to say, but he particularly urged the jury to consider the intention of the printer in publishing it, and to remember how peculiarly necessary it was, at this juncture, that the press should be open to all political discussion. He defended the paper on the same principles as Mr. Glynn, and made a very eloquent and judicious harangue, concluding with declaring, that as no intention could be proved, they ought not to find his client guilty.

Mr. *Attorney General* affected a kind of surprise; he said, the counsel for the defendant had stated points of law to the jury; that he believed he had a right to reply, notwithstanding they had not examined witnesses; and he believed so, he said, because they had stated points of law which he did not allow.

Lord *Mansfield* told him, that, as Attorney General, he might reply, notwithstanding the defendant had not examined witnesses: that the Solicitor General indeed, or any other counsel, could not; but that the Attorney General might. [See p. 762, and vol. 19, p. 1378.]

Mr. *Attorney General* doubted about his right to reply; said, however, he believed he had a right; but that he would not be particular, that he would not reply (yet all the while he still kept making a reply, such as it was) at length finished with saying, The bench will reply on those points to the defendant's counsel, and instruct the jury properly.

Mr. Attorney General was not mistaken in his former belief, and in his latter declaration of what the bench would do and say: for lord Mansfield then gave his charge to the jury according to Mr. Attorney General's anticipation.

Lord *Mansfield* told the jury,* that there

* The following is the report of lord Mansfield's direction to the jury, given in the preface to Mr. G. Woodfall's edition of Junius:

"Lord Mansfield, in his charge, told the jury, That there were only two points for their consideration: the first the printing and publishing the paper in question; the second, the sense and meaning of it: that as to the charges of its being malicious, seditious, &c. they were inferences in law about which no evidence need be given, any more than that part of an indictment need be proved by evidence, which charges a man with being moved by the instigation of the devil: that therefore the printing and sense of the paper were alone what the jury had to consider of; and that if the paper should really contain no breach of the law, that was a matter which might afterwards be moved in arrest of judgment: that he had no evidence to sum up to them, as the defendant's counsel admitted the printing and publication to be well proved: that as to the sense, they had not called in doubt the manner in which

were only two points on which they were sworn to give their verdict: there were only two points on which, according to their oath, they must determine. That as for the intention, the malice, sedition, or any other still harder words which might be given in informations for libels, whether public or private, they were mere formal words; mere words of course; mere inference of law, with which the jury were not to concern themselves; that they were words which signify nothing; just as when it is said in bills of indictment for murder, "instigated by the devil*," &c. that the two points mentioned were the only things for the consideration of the jury. That if there was indeed nothing criminal in Junius's Letter, their verdict of guilty would do no harm, would be attended with no consequences. The Court would consider of that; the Court were the only judges of that. If that is made appear to the Court, the Court will arrest judgment. He said, my brother Glynn has admitted that the truth or falshood of a libel, whether public or private, however prosecuted, is out of the question.

At this assertion of lord Mansfield every man in court was shocked. Serjeant Glynn was astonished, and, on application made to him instantly by several of the counsel and his friends, to contradict lord Mansfield's assertion, Mr. Glynn, with that honest diffidence natural to him, asked them, "Good God! Did I admit any thing like what lord Mansfield says? Did I, by any incorrectness in the expression, or by any mistake, use words that could be so misunderstood or misinterpreted?" Every gentleman near him assured him that he had not. Whereupon Serjeant Glynn rose, and very modestly assured his lordship that he had never admitted what his lordship supposed.—Lord Mansfield begged Mr. Glynn's pardon, and turned it off with great dexterity, just saying slightly, "Oh! I find I was mistaken; well then, my brother Glynn is of a different opinion:" and then instantly proceeded:—As you have been told these are the only two points for your decision; if, indeed, you think that the blanks in Junius's Letter can have another application than that put upon them by the information, that is a matter for your judgment; but you must observe, that even the counsel for the defendant have not pretended to put any other meaning to the blanks. If you think the evidence for the publication not sufficient, that is likewise a matter for your consideration; but you must observe, that even the counsel for the defendant have admitted the publication. Lord Mansfield then observed that the laws and proceedings in regard to libels were perfectly equal, equally advantageous to high and to low: for that the low might prosecute for a libel, if they were defamed, as well as the rich, and would be sure to have justice done them by the law. He

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the dashes in the paper were filled up in the record, by giving any other sense to the passages; if they had, the jury would have been to consider which application was the true one, that charged in the information, or suggested by the defendant. That the jury might now compare the paper with the information: that if they did not find the application wrong, they must find the defendant guilty; and if they did find it wrong, they must acquit him: that this was not the time for alleviation or aggravation, that being for future consideration: that every subject was under the controul of the law, and had a right to expect from it protection for his person, his property, and his good name: that if any man offended the laws, he was amenable to them, and was not to be censured or punished, but in a legal course: that any person libelled had a right either to bring a civil or a criminal prosecution: that in the latter, which is by information or indictment, it is immaterial whether the publication be false or true: that it is no defence to say it is true, because it is a breach of the peace, and therefore criminal; but in a civil prosecution, it is a defence to say the charges in the publication are true; because the plaintiff there sues only for a pecuniary satisfaction to himself; and that this is the distinction as to that nature of defence.—His lordship said, he was afraid it was too true that few characters in the kingdom escaped libels: that many were very injuriously treated—and if so, that the best way to prevent it was by an application to the law, which is open to every man: that the liberty of the press consisted in every man having the power to publish his sentiments without first applying for a licence to any one; but if any man published what was against law, he did it at his peril, and was answerable for it in the same manner as he who suffers his hand to commit an assault, or his tongue to utter blasphemy."

* In the 'Letter from Candour to the Public Advertiser,' it is mentioned, that in the trial of the printers of the North Briton, No. 45, in 1764, lord Mansfield, in a very masterly manner, interrupted the counsel, and informed them, and afterwards in an elaborate discourse clearly instructed the jury, that the words in the information, charging the paper to have been published with the most wicked intent, in order to excite his majesty's dutiful subjects to sedition, and charging it to be a false, scandalous, and seditious libel, were words of course; like 'corrupt' in an indictment for perjury, or like those in an indictment for murder, charging the murder to have been committed at the instigation of the devil, and that the jury ought not to regard them at all. The author of the letter, after making this statement, and comparing the language so ascribed to lord Mansfield with that of Jeffreys in the case of sir Samuel Barnardiston, see vol. 9, pp. 1349, 1351, 1355, remarks upon the concurrence of the two chief justices not only in sentiment but in expression.

said, that it was not then the proper time for aggravation or alleviation, or consideration of the matter of the Letter, or of Mr. Woodfall's intention; to be sure the Court would consider all that, when they should come to pass sentence. As for the liberty of the press, (said he) I will tell you what that is; the liberty of the press is, that a man may print what he pleases without a licenser: as long as it remains so, the liberty of the press is not restrained. It is the same thing as in all other actions: a man may use his arm; but he must not strike his neighbour: a man may use his tongue, but he must not speak blasphemy.——At the word 'blasphemy' so lugged in, there was a general whisper ran through the Court: for every one perceived the aim of it, Mr. Wilkes sitting so very near the Chief Justice.

About twelve the jury withdrew. At half an hour after three lord Mansfield began to whisper with serj. Davy, who had been out of court and returned, with the Attorney General, with Mr. Wallace, and the other crown lawyers. In the space of a quarter of an hour he sent three times to the jury to know if they were not agreed in their verdict. He said he would not sit longer than four, if the other business of the Court should be over. The jury not returning, lord Mansfield proposed to Mr. Lee that he should sign an agreement with Mr. Attorney General, that the jury might give their verdict to lord Mansfield privately at lord Mansfield's house. After some time and persuasion from lord Mansfield, Mr. Lee consented, and signed such agreement; after which lord Mansfield pulled off his hat, and said, Mr. Lee, you have done right to consent. Lord Mansfield then adjourned the Court, and retired. The jury continued undetermined till near ten at night, when they agreed upon their verdict, and went in hackney coaches from Guildhall to lord Mansfield's house in Bloomsbury-square, and gave their verdict in these words: "Guilty of printing and publishing only."

Lord Mansfield stood at his parlour door, and made the jury give their verdict in his hall where the footmen were, and when they had given it, he withdrew, without saying a word.

July 3, 1770.

The KING against HENRY SAMPSON WOODFALL.

Since the verdict of the jury in this cause, two motions had been made, which were this day brought to receive the decision of the Court. The first was upon the part of the crown, Why the verdict should not be entered up according to the legal import of the words*; the other, Why the defendant should not be discharged from any judgment on this verdict.

Mr. Serjeant *Glynn*, of counsel with the defendant, first observed slightly upon the absurd motion for amendment, that was made on the side of the crown, which, if carried, would still require itself to be amended, or leave the matter as much at large as ever; since the clerk must be thereby reduced to make another application to the Court, to be informed, what that legal import is: after this he proceeded in the following manner, taking up the argument upon both the motions united:

My lords; this is an information for a seditious printing and publishing of a paper signed Junius: the jury have found Mr. Woodfall guilty of printing and publishing only.

1. I shall first contend that this is an acquittal. The charge brought before the jury, is grounded upon the defendant's evil and seditious design in publishing. The jury find the publishing only. This then is not convicting him of the charge; which is, the seditious intention. It is first necessary to prove upon the trial, the fact of publication; next the construction put upon the paper in the information. These are the points which are to be given in charge to the jury; and the jury must be convinced of both. By the general word of 'guilty,' the jury find the whole charge to be true. They have not done so. They have found the fact of publication merely; but they have added negative words, to exclude every thing else. To what the jury do not say, there is by law a negative.* But here the jury have themselves taken care, that their silence shall not be misinterpreted. Had they been silent, whether the paper was a libel or not, and not referred it to the opinion of the Court, their silence must have acquitted; but here they have used the word 'only,' expressly to exclude every idea of a crime.

If juries may be justly said to negative every thing they do not find, in a question of civil property, much more must they be said to do so now, where the criminal motive makes the offence they have in charge. I do not say, that a strict and literal proof must be brought of every part of the information; but I do say, that criminal intention is the essence of a crime, and must enter into every idea of guilt. Of this criminal intention the jury are the judges; and if they exclude that, the defendant is acquitted.

To support a general verdict of guilty, it must appear that the jury believed the paper libellous. Whether libellous or not depends only upon the construction put in the information. This construction they have excluded; therefore, though they have not said in as many words, that the paper is not a libel, they have negatived the libelling construction, and said as much, in consequence by legal inference. Where the subject-matter before the jury are not mere legal words, or words of legal import, it is, in my opinion, the province

* The motion was thus worded at the special direction of lord Mansfield; who in these causes is always of counsel with the crown.—*Lond. Mus.*

* So determined by all the judges in the Exchequer-chamber, Withers v. lord Jersey.—*Lond. Mus.*

of a jury to find, whether they are criminal or not. Juries are judges both of law and fact; I mean, as far as the former is involved in the latter. The jury therefore had a right to consider the paper charged as a libel before them. They might take it upon them if they pleased, or they might resort to the judges for advice. Here they have, by their word of exclusion, gone as far as to determine, that there is no guilt in the paper; whether they have determined wrong or right is another question.

They may, no doubt, determine generally; and where they so determine against the clear proof of the fact, and letter of the law, (both of which constitute the crime) they determine at the peril of their conscience. Yet a matter may be clearly libellous, and a man not incur guilt by the mere publication. As in the case of a friendly admonition from a father upon a supposed misconduct of his son; or of giving testimony in a court of justice; the same of giving the character of a servant, and other cases that might be mentioned. Here the intention becomes material, and properly inquirable by a jury; though this is not capable of direct proof, it is, however, to be discovered by inference, of which the jury are the judges.

2. Upon the second head, I am to contend, that if the verdict is uncertain or insufficient, there must be a new jury summoned to try the cause afresh. If I am not authorised to say, that the verdict amounts to an acquittal, I am sure, they are as little authorised on the other side to say, that it amounts to a conviction. If the former interpretation is not satisfactory, the latter certainly cannot be so. If some other sense is given to the word 'only' than what I have put upon it, the whole becomes doubt and ambiguity; and a new trial must be had by another jury. This cannot be taken otherwise than as a general verdict; and in general verdicts, nothing is left to inference or intendment.* "You must have the understanding of another man, hear with other's ears, and see with another's eyes, before you can know what a jury meant, upon what they have not expressed." There is in the books the plainest case, where a direct inference must unavoidably be made from the finding of the jury; and yet that not being expressed, the verdict was rejected as insufficient.†

The jury had found the damages to the plaintiff, in the defendant's not keeping his promise, and yet, not having found directly that he made such promise, the verdict was set aside. If then we suppose the other side right in saying, that the jury have found sufficiently to bring the guilt of the defendant before the Court; it is at least saying so, without knowing what the jury meant, as to the construction put upon the libel. Let them model it as they will, they cannot make it a general verdict of guilty, without leaving their sense upon the construction unknown, which must necessarily be included in every verdict of guilty.

But let what arguments there will be made for this new-modelling the verdict of the jury, there is one superior to all the rest against it; which is, that the defendant would be thereby precluded from taking the sense of a superior court of review upon the verdict, as at present formed. If the defendant is found guilty, why is not the judgment entered as it is found, and the sentence of the Court passed upon him? It will then appear, by writ of error to the Lords, what this verdict was, by which he is said to be convicted. But if this new-modelling takes place, he will be for ever deprived of this advantage*; which indeed is the only reason I can suggest to myself for the attempt that is made to obtain it. For if it is a general verdict of guilty, I say again, it need not be entered otherwise than it is found. No case can be produced, where the words of a general verdict have been altered to make room for other words. They would indeed be words different from the meaning of the jury: in short, if it is not a verdict of conviction, your lordship will not alter it to make it so; and if it is, let it, as it must, be entered in the words wherein it is found.

Mr. *Lee* on the same side. It is an absurd and impossible idea, that the jury should convict that man of a libel, whom they meant to acquit of a crime; and this meaning is plainly demonstrated by the word of exclusion, which they have introduced into their verdict. The jury will never be said to have found such a verdict, as shews their intention to find him guilty of the charge laid in the information. They meant, no doubt, to have found him the printer and publisher of the paper, as it appeared in the Public Advertiser, and not as coupled with all those heavy charges and innuendoes, as described in the information. There are strong cases in the law to prove, that a partial finding is insufficient. Where a man was charged with an intrusion into a house and lands, and the jury only found the intrusion into the lands, the verdict was declared to be wholly void.† But in this case, let the finding of the jury be what it will, it is impossible for the Court to alter it; for it is most decisively laid down, in books of the greatest authority, that the Court cannot amend a general verdict in a criminal matter.

On the Part of the CROWN.

Solicitor General (Mr. Thurlow). I know no rule, or case in law, by which the silence of

* Vaughan, 75. Roll's Abr. 693.

† See vol. 19, p. 241.

* Because the alteration will not appear upon the record; and by some strange constitution in the jurisprudence of this country, no court of review can take notice of the misconduct of judges in making such alterations.—*Lond. Mus.*——This, I suppose, alludes to lord Mansfield's directing the informations against Wilkes to be amended, see vol. 19, p. 1075.

† 2 Leonard, 296.

a jury upon any fact, that should be made a part of their verdict, must be construed to imply the acquittal of any defendant. On the contrary, there is authority in the law upon the very case of a libel, where a partial finding of the jury was held sufficient. A charge was brought for the writing, collecting, and printing a number of ballads, and thereby forming a libel upon the king. The jury found the defendant guilty only of the printing; and this verdict was allowed to be good upon the issue. Wherever the jury shall have omitted a matter of fact, the Court will not intend that fact; neither will they conclude the defendant innocent, because the jury have not said that he is so; but they will then order a new jury to come and try the cause again.

If it is said that the jury meant to exclude a conclusion of law, that were monstrous. To say that the jury found the fact of publishing the paper, as charged in the information, but that they denied the interpretation of the law upon it, were bringing them wholly out of their province; for they are only judges of fact, and with the law they have nothing to do. If the jury are said to have found the publication of some other paper than that as charged in the information, it is saying that they have found a fact, which they are not charged to enquire into. This were making them to have done more absurdly than they have; and what they have manifestly no right to do. Their words must necessarily be referred to something; but why substitute a subject out of the information? For if they have found that the defendant only printed and published the libel charged in the information, they have found what will ever be enough to convict. The jury cannot prevent the judgment of law from passing upon the facts, which men are found to have committed.

The jury are to inquire into a fact as charged in the information; and the short answer they give in the words guilty or not guilty, must be referred to that particular charge; otherwise they say nothing.

It is not necessary for me to contend, that any facts shall be supplied by innuendo in the finding of a jury; but if the jury meant to exclude a conclusion of law, I dare say your lordships will not attend to it; for when a jury has found sufficient facts to support some verdict in the cause, they cannot go further, and find a wrong conclusion of law. When the jury have found sufficient matter of fact, your lordships will supply the matter of law; as was determined in the case of lord Paget; where, in the question of a fraudulent conveyance, the jury having found sufficient special matter, the Court inferred the conclusion of law, that the conveyance was fraudulent, though the jury had not expressly found the fraud.* However, in this case, the jury have expressly found some guilt; and it is now become the province of this court, to say what that guilt amounts to.

Mr Morton. The subject for the jury to have enquired into, was the application of this libel to the person, upon whom it is charged in the information to have been made. I confess that the matter here charged would not be libellous, if it affected any body else than the king. The jury have found the fact of printing and publishing only; and that was the only thing they had to find. For what is the crime charged? It is the printing and publishing the matter, and things contained in the information. Upon which the jury seem to me to have said, that he is only guilty of printing and publishing the paper charged in the information (for that is all we have to add); and this is the same as if they found him guilty generally.

Mr. Wallace. The verdict is full, and requires no intendment. The charge is for printing and publishing a libel; the defendant says he is not guilty of the charge: the jury, being asked, they say he is guilty; that is, only of printing and publishing; which is the same thing as finding him guilty generally.

It would have been material if the jury had excluded in this verdict the allusions made from the paper in question to the libel in the information. As to the objection, that they have not found the intention, that will avail as little now as it did before in the case of the King and Beare.* It was objected there also, that the jury had only found part of the charge, and that so much as they found did not infer any illegal act; for that there are cases in which it may be lawful to write a libel, as for a clerk drawing an indictment, or a student taking notes in court: but the Chief Justice said, their finding such a fact in the case of an information must necessarily infer a crime.

Mr. Dunning. Verdicts are not to be entered in any case in the precise words the jury give them; nor are they so. Something is always to be added. Had the word 'only' been omitted, there is no doubt the verdict in this case would have been competent; for the clerk would have added, 'the matters charged in the information.' Let those words be still added, and the insertion of the word 'only' will make no difference.

All the books agree, that the jury may, in these instances, take the law and fact together, and give a general verdict. This I know has been disputed; but whether disputable or not, is another matter. However it has not yet been insisted, that juries ought to take this upon them; nor will I intimate my own opinion upon it.

In this case at least the jury have not taken upon them to decide the law. They have said, that the defendant is guilty of printing and publishing a certain paper; but whether there is any guilt in that, or what degree of guilt, they do not chuse to determine; they leave

* Moore, 194. Dyer, 362.

* See this case considered much at large in 'Another Letter to Mr. Almon.' The case is reported in Lord Raymond, Carthew, 12 Mod. Salk.

that to others; for their own part, they beg to be excused. It being then at best a matter of dispute, whether the jury should decide upon the law or not, and as they have not done so expressly here, why should they, by inference, be concluded to have done so, in determining the paper not to be a libel, upon those perils to which they will be thereby subjected.

As to the objection, that the alteration will not appear upon the record, when removed by error into another court; this goes no further than in every other case, when the court or clerk add words to the general finding of juries. Besides, this is a matter of fact, whether the jury have found the defendant guilty, or not; and no matter of fact is subject to any revisal by error. Upon the whole, I am satisfied, that the meaning of the jury was to find the fact; and whether libel or not, to leave to the determination of the Court.

Mr. *Walker*. As to the objection, that the jury have not found the intention, it is manifest, that if the jury find the fact, they must find the design with which it is done; for the defendant is a free agent, and therefore answerable for the legal consequences of his own act.

Mr. Serjeant *Glynn* in reply. It seems to be allowed by all the counsel for the prosecution, that the verdict, as it stands at present, requires some kind of amendment; without which no judgment can be given upon it. I beg leave to say, if such words were to be added, as the gentlemen on the other side would wish to annex to the words found, such addition would flatly contradict the obvious spirit and meaning, as well as letter of the text, and make the whole such a jumble of contradiction and nonsense, that no judgment could possibly be given upon it. Mr. Dunning says, no verdict can ever be entered in the mere words of the jury, without adding something. I confess it: but what is that something, and who makes the addition? To the bare words 'guilty' or 'not guilty' is added, 'of the matters and 'things charged in the information' in such formal words as paraphrase the clear indisputable finding of the jury, without, in the smallest degree, impairing, amplifying, or altering the sense. This entry or addition is made by the clerk; and such an addition, should the clerk neglect to make it, the Court will afterwards supply, as a mere clerical omission. But it is one thing to correct the mistakes of the officer or clerk, and another to supply the intentional omission of the jury. When the jury bring in a common verdict, the clerk enters it in the common form; but the clerk has no right to expunge, or erase, or alter the words of the jury, when they have not found them in the common way; and I affirm, that the Court has no more power to supply such an omission of the jury than the clerk. The verdict of the jury is not at all altered or impeached by supplying clerical defects; but in this case, the sense of the jury, not of the clerk, the verdict itself would be materially and essentially affected and changed by the alteration proposed to be made by the Court.

It has been said too, that the jury meant to find the fact specially, or to bring in a special verdict, but is it a fair inference from the words that they meant to do so? It is well known, that in a special verdict all the facts must be found, and it must conclude with desiring the advice and opinion of the Court upon the whole: is this verdict so circumstanced? Do the jury here ask any question of the Court, or crave its assistance to guide them?* But if it were a special verdict, the Court could only determine upon what was expressly found, and not upon intendments and constructions of their own raising. However, we beg leave to insist that this was not meant as a general verdict, and that the jury understood it to be a verdict of acquittal; for, in a general verdict, they decide upon the whole of the case, and upon what they are silent, they acquit the defendant; by saying nothing of the paper, therefore, they find it no libel. Were I to admit the criminality of the paper to be a question of law, it is surely such a question as is comprised in the issue which they must necessarily take into their consideration when they give a general verdict. Whatever they have not decided upon, they have certainly negatived. Had they meant to ease their own minds as to the law, they could have done it in no other way, than by finding specially. This is the same case as that of Elizabeth Canning,† and of Penn and Mead.‡ There the jury used the word 'guilty,' and yet excluded the crime.§ Let us suppose, for argument sake, that the jury had thought, there was some degree of guilt in what they said, and yet negatived all the crime by some subsequent word: the verdict would then have been contradictory and repugnant to itself, and there must have been a new trial. Printing and publishing are not the only things given in charge to the jury; the construction is likewise in their charge; and by using the word 'only,' they have excluded this part of that charge.

The counsel for the crown have confounded the cases of general with those of special verdicts. Mackenzie's case was a special verdict. The conclusion there, that the blow was felonious, was apparent from the facts, which were found. The case of the King and Beare was very distinguishable from the present; nor is there any case, where, in a general verdict,

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* Non tali auxilio. *Lond. Mus.*

† See vol. 19, p. 669. ‡ Vol. 6, p. 968.

§ See, also, the duke of Newcastle's verdict in the duchess of Kingston's Case, p. 625, of this Volume. In a trial for forgery just now had before Mr. Baron Wood, at York, Summer Assizes 1813, the jury at first brought in the verdict "Guilty of uttering the forged notes, but without knowing them to be forged." As to "guilty of publishing only," see in this Collection the great Case of the dean of St. Asaph, at Salop, A. D. 1784.

the jury can be supposed to refer any matters to the Court. They have found, as their general verdict, that the defendant is guilty of nothing more than of printing and publishing; and by the word 'only,' applied to these acts, they have qualified and restrained that use of the word 'guilty.' They have found the defendant guilty only of a part of the charge; and for the addition or alteration which are now wanted to be made to the finding, the case becomes quite new and singular; because there is no instance of a verdict having been entered contrary to the finding of a jury, excepting in mere clerical mistakes. To say that the entry ought to be guilty generally, because, if the jury had not so intended, they would have brought in their verdict Not Guilty, would be at best, putting a sense upon doubtful words, which, if any explanation was necessary, ought to have been explained at the time the verdict was given; but it comes too late to be admitted now. If a meaning must be put by the Court upon these words, the most obvious one is that of acquittal. If we are to go out of the words for a meaning, resort to the affidavits of the jurymen. If there is no meaning in them, it is an insufficient verdict, and there must be a new trial. But if the verdict appears ever so unmeaning to your lordships, you cannot now amend it, because you have nothing to amend it by; as has sometimes been done by notes taken at the trial, to correct the misprision of the clerk. Nor can you now give a contradiction to the jury, by saying they meant to find the whole, when they declare they mean something short of it. If it is a good and sufficient verdict, it need not to be altered at all; if there is any thing more than clerical defects in it, it ought not to be altered. In the one case we are entitled to an acquittal; in the other, to a new trial.

Lord *Mansfield.* Though the Court will not yet determine whether the affidavit of any of the jury may be read in this cause, yet I have permitted one to be read a little by way of stating it;* and I there find, that the application of the innendoes is not denied; only the criminal construction put upon the paper in the information. To have denied the one would have been very material; with the other they have nothing to do. In that case, there would be no proof to them of the paper, as charged in the information. But if the jury find, that the

* This was the affidavit of William Sibley, baker. *London Mus.* Upon this passage of lord Mansfield's judgment, the author of 'Another Letter to Mr. Almon,' pp. 84 *et seq.* is very severe; and in another place (p. 67), he thus writes concerning the affidavits of jurymen:

"The permission to a jury to rectify or alter their own finding, or to declare against it by affidavit, after they have once been at large and mixed with the world, would be of the most dangerous consequence; it has rarely been asked, and ought never to be granted: the idea is novel, and contrary to the fundamental principles both of law and policy. And a late transaction forces me to add farther the application to jurors, after being discharged, to hear privately and *ex parte* other evidence, and to make affidavits in consequence thereof, either to alter the whole or any part of their verdict, or to explain it or to add to it, or to express a sorrow for having given it, is infamous, and the greatest inlet to iniquity, corruption, perjury and injustice, that can be devised; and therefore those who make such applications, when discovered, should be prosecuted at the public expence, fined and branded for ever. Every practice of this sort tends to lessen the force and effect of the public judicature of the country, and counteracts the guards with which the law, for wise reasons, has beset juries, by having them shut up immediately after being sworn, and no person whatever admitted to speak to them, lest some popular talk or external influence, some clandestine bias or partial representation, or intreaty should take place. Whenever any thing of the kind has in fact happened, for want of the bailiffs and parties' constant observation, it has, if made appear, been deemed to contaminate their verdict, so as to set it aside. All the jurors swearing that nothing had passed relative to the cause would not uphold it. Those who set about a private examination, especially of one side, after a public trial had, in order to stagger a jury, and to render them dissatisfied with their verdict, act in the grossest defiance of the law, and with the most audacious contempt of the Court they intend to affect or influence by it. It is embracery and tampering with jurors in order to defeat their own verdict. Even if after the jury be sworn and gone from the bar, they send for a witness to repeat his evidence that he gave openly in court, who does it accordingly, and this appear by examination in court, and indorsed upon the record, or postea, it will avoid the verdict."

See as to affidavits of jurymen vol. 19, pp. 669, 675, 684, *et seq.*

In the Case of Edmund Thirkell, Trin. 5 Geo. 3, where the defendant had been convicted of a misdemeanor, and afterwards eight of the jury signed a paper in his favour, intimating their disapprobation of the verdict which they themselves had given, lord Mansfield, and Wilmot, Just. concurred in expressing great dislike of such representations made by jurymen after the time of delivering their verdict. Lord Mansfield said, "It might be of very bad consequence to listen to such subsequent representations, contrary to what they had before found upon their oaths, and which might be obtained by improper applications subsequently made to them." And Mr. Just. Wilmot thought they ought to be totally disregarded. 3 Burr. 1696.

For more concerning jurymen's affidavits, see the cases cited in the Note to Hale v. Cove, 1 Strange, 642. Mr. Nolan's edition.

defendant published at all, they find the paper, as charged in the information, for that is their only enquiry. I take it from the affidavit, which has been stated, that it does not appear, whether the jury meant to say, that the paper is no libel; if they had the least doubt, whether the innuendoes were properly supplied, there should be a new trial. I did not leave it to the jury, whether the paper was innocent or not. I never do. I summed up to them, as I always have done in similar cases, that, if they were not satisfied of the fact of publication, or had a doubt of the application of any of the words in the information to the blanks in the letter, they must acquit the defendant. But I told them also, that whether the paper was criminal or innocent, was to them a subject of indifference; because, if innocent, judgment would be arrested in this court. Here the jury did not mean to find the malice of the defendant, because it was not within their enquiry; nor did they mean to exclude it, because it was not within their power to exclude a legal deduction.*

There may be something of a distinction in the books about amending a verdict in civil and in a criminal case. But it is a mistake; and there is nothing in it. In the case of Gibson for forgery, all the judges were of opinion, that where the officer had drawn up the verdict contrary to the finding of the jury, it might be amended.† There is a case of this sort in the year books, as early as the 3rd of Richard 3, I forget the page, as I speak only from the memory of my reading. This is the only way of altering a verdict either in a criminal or a civil case. There is, indeed, a sound distinction, which holds in the pleadings; for those cannot be amended in criminal matters.

Whatever may be the inclination of my opinion in this case, it is too late to have any effects from it in this term ‡; therefore let it stand over to the next.

Aston, Just. The jury are elected, tried, and sworn, to determine concerning the matters contained in the informations, therefore if they find any fact of publication, they must find, not the simple fact of publishing that Public Advertiser, sold at the defendant's house, but that very libel charged in the information.*

The Court will advise.

The following is Sir James Burrow's Report of this Case:

REX *versus* WOODFALL.†

This cause first came before the Court, on Friday 22nd June, 1770.

Mr. Lee then moved, on behalf of the defendant, to stay the entering up judgment against him, upon the verdict found in this cause.

A cross motion was made at the same time, by the counsel for the crown, for the defendant to shew cause why the verdict should not be entered according to the legal import of the finding of the jury.

It was an information against the defendant, by the Attorney General, for printing and publishing in the Public Advertiser, a seditious libel signed Junius. Upon the trial, the jury found him guilty of the printing and publishing, only.

The Court granted rules to shew cause, upon each of these two adverse motions; and ordered them both to be brought on upon the same day.

Accordingly, on Tuesday, 3d July, 1770, cause was reciprocally shewn, on each.

Serjeant Glynn and Mr. Lee argued for the defendant: Mr. Thurlow, (solicitor general,) Mr. Morton, Mr. Wallace, Mr. Dunning, and Mr. Walker, for the crown.

On the part of the defendant, it was insisted that the verdict, as found, did not amount to find Mr. Woodfall guilty of the charge in the information; but rather to acquit him of it. For, he is charged with printing and publishing this as a libel, with a malicious and criminal intention: but the jury find him guilty of printing and publishing, only. Whatever the jury do not find implies a negative: but this goes further; it says expressly, that they find this, and this only.

A criminal motive goes to the construction of the offence: a criminal intention is its essence. And this the jury have negatived.

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* "Such kind of reasoning in an answer would, as my lord Mansfield knows, be called, in the Court of Chancery, fencing with the question. It is answering with a reference to another thing on the truth and falshood of which its own must respectively depend, and therefore is deemed no answer at all." Another Letter to Mr. Almon, p. 63.

† This was a special verdict, and only made agreeable to the fact.—*Lond. Mus.*

‡ This might be so, if his lordship's opinion was against the defendant; not so, if otherwise; therefore if lord Mansfield had not already said enough, it were sufficiently manifest what that opinion is: as lord Mansfield received this verdict, he is indeed contending here for his own credit as a judge.—*Lond. Mus.*——The opinion which lord Mansfield finally delivered did not verify the anticipation of this note.

* See in "Another Letter to Mr. Almon," &c. p. 100, some observations upon this opinion. The "Card," No. 84, of the miscellaneous letters of Junius, inserted in Mr. G. Woodfall's edition, vol. 3, p. 308, seems to be addressed to Mr. Justice Aston.

† I have seen, in the handwriting of the late Mr. Serjeant Hill, the following note to this case of Woodfall: "It is well known lord Mansfield went great lengths in support of his own opinion always, and in this point particularly, and indeed all others that lessen the rights of juries."—See, also, pp. 444, 445.

They are judges of law and fact, as far as law is involved in fact. They may take this upon them: and here they have done so. They meant to acquit him of all criminal intention: and one of the jurymen has made an affidavit, "That he meant to acquit him of all criminal construction: and if he had thought that that could not have been thus done, he would have acquitted him." Therefore this cannot be considered as a verdict of conviction by twelve jurymen. A verdict ought to be found clearly, fully, and distinctly: it cannot be supplied by inference; neither can it be amended by any notes of the associate, in a criminal case. 1 Salk. 53. Rex v. Bold. 1 Salk. 47. Rex v. Keate.

They also cited Cro. Jac. 210. Cook v. Laneday; and Yelverton, 106; and Drury v. Dennis; 2 Rolle's Abridgment, 693. Title, "Verdict," letter S, pl. 5, between Baugh and Philips, referred to by lord chief justice Vaughan in the case of Rowe v. Huntington, Vaughan, 75, 76. who there says, "That finding the point in issue, by way of argument, in a general verdict, is never permitted; not though the argument be necessary and conclusive." There can be no supply by intendment, in any case; much less in the present, where it is impossible to supply the verdict by intendment, because nobody can know what the jury did intend, or by what rule, or upon what principle they decided; unless affidavits from the jurymen were allowed to be read. Another authority that they cited, was the case of Shelley v. Alsop, in Yelverton, 77, 78, which was a finding of the assumpsit by foreign implication; "which is not good, (as it is there said) upon any general issue:" and it is there laid down, "that the jury ought to give their verdict precisely according to their charge."

They insisted, that the verdict ought to remain in the words of the jury; without expunging any of their words, or substituting others in their places, or controlling them under any pretence of legal construction. They ought to be left as they stand; that the defendant may have the benefit of a writ of error to the House of Lords, if the opinion of this Court should be against him.

They hoped, however, that the present finding would be esteemed by the Court to amount to an acquittal of the defendant.

But, if the Court should not go so far as to hold it tantamount to an acquittal, there ought, at least, to be a Venire facias de novo. It certainly is not a conviction: and if it be not an acquittal, it can be no more than an imperfect verdict. And if a verdict be imperfect, there must be a Venire facias de novo. But we hope for his discharge, as upon a verdict of not guilty.

On the part of the prosecution, it was argued that the present verdict could not be considered as a verdict of not guilty. It positively and explicitly finds him guilty of the printing and publishing: and it does not import any negation of his guilt, as to the rest. The word "only" does not import the exclusion of any thing but facts: it cannot exclude conclusion of law.

It is certain that a verdict cannot be amended in matters of fact: but it may be perfected in point of form. The officer takes his note short: but the necessary finishing of the sentence may be supplied. The substance and matter of this issue is sufficiently found: the Court may order it into a proper form. The law here implies the intention. The printing and publishing was all that the jury were to enquire about. This verdict is not imperfect; nor is there any need of supplying any thing by intendment. The intention must be collected from the libel itself. The intention is the gist of the offence. The verdict ought to be entered according to the true meaning and intention of the jury. Something is always to be added to every verdict: the entry is never in the very identical words used by the jury; which are always concise, and not full and formal enough to stand supported against a writ of error.

Whether a jury may or may not take upon themselves to judge of matters of law, they must at least do it at their peril. But here they have not done it at all: they have not determined, that this paper is not libellous. So that whether they may at their peril do it, or whether they may not, they have not here risked that peril. The import of their verdict is a general finding of the facts, without expressing any sense of their own upon the law.

In the case of the King against Beere, reported in 12 Mod. 218. 2 Salk. 217. 1 Lord Raym. 414. Carthew, 407, and Holt, 422, the jury, as to the writing and collecting of the libels only, find him guilty, *prout in indictamento supponitur:* and as to all other things charged in the indictment, *præter scriptionem et collectionem*, they find him not guilty. The charge was for composing, making, writing, and collecting several scandalous, false and seditious libels. The finding was, "Quoad scriptionem et collectionem libellorum in indictamento mentionat' tantum, quod defendens est culpabilis; et quoad totum residuum in eodem indictamento content', quod defendens non est inde culpabilis." It was holden, "That the bare writing and collecting the libellous matter was criminal;" and "that the general finding shall be taken to be criminal." And Turton and Rokeby cited some cases to prove, "That the writing of a libel, without publishing it, was punishable by indictment."

They also cited Moore, 194. Dyer, 362. Hobart, 54. Moore, 888. 2 Lev. 111, and, to prove that the word "only" might be rejected, 2 Saunders, 380. Co. Lit. 227.

Serjeant Glynn replied; enforcing the former argument, and denying that the case of Beere, or other cases now cited, were like the present case.

Lord *Mansfield*. It is much too late in this term, for any thing to be further done in this cause, with any effect. Let it stand over to next term. *Cur. Advis'*

Tuesday, Nov. 20, 1770.

L. C. J. *Mansfield* delivered the Opinion of the Court:

This comes before the Court upon two rules: The first obtained by the defendant to stay the entering up judgment on the verdict in this cause. The second obtained by the Attorney General, that the verdict may be entered according to the legal import of the finding of the jury. The last rule must, from the nature of it, be first discussed, because the ground of argument upon the other cannot be settled till this is disposed of. Upon this rule it is necessary to report the trial.

The prosecution is an information against the defendant, for printing and publishing a libel in the Public Advertiser, signed Junius. The tenor of which is set out with proper averments as to the meaning of the libel, the subject matter, and the persons concerning which and of whom it speaks, with innendoes filling up all the blanks and the usual epithets.

In support of the prosecution, they proved by Nathaniel Crowder, that he bought the paper produced, and twelve more, from Colfield, the defendant's publisher, in the defendant's publishing-room, at the corner of Ivy-lane. That he goes often there, has occasionally seen the printing-room, and has had papers in the printing-room. They read the paper produced, and the tenor agreed with the information.

George Harris, register of pamphlets and newspapers, proved, that the defendant by himself and servants paid the duty for advertisements in the Public Advertiser; that the defendant had paid himself, and all the payments were in his account. That the defendant has made the usual affidavit, and has been allowed the stamp-duty for such papers as were unsold. That the duties for advertisements in the paper in question, were paid by the defendant's servant, and the receipt given on the defendant's account.

William Lee, clerk to sir John Fielding, proved, that he often carried advertisements for the Public Advertiser, to the defendant's, at the corner of Ivy-lane. That he generally paid ready money; that he has seen money paid to the defendant for advertisements, and he had a receipt from the defendant signed by him the 29th of November, for 32*l.* for printing advertisements in the Public Advertiser. On the part of the defendant they called no witnesses. His counsel objected to some of the innendoes, but they principally applied to the jury to acquit the defendant, from the paper being innocent, or not liable to the epithets given it by the information; or that the defendant's intent in publishing did not deserve the epithets in the information.

There was no doubt but that the evidence, if credited, amounted to proof of printing and publishing by the defendant. There may be cases where the fact proved as a publication, may be justified or excused, as lawful or innocent; for no fact which is not criminal, in case the paper be a libel, can amount to a publication, of which a defendant ought to be found guilty.(*a*) But no question of that kind arose in this cause. Therefore I directed the jury to consider whether all the inuendoes, and all the applications to matter and persons, made by the information, were, in their judgment, the true meaning of the paper. If they thought otherwise, they should acquit the defendant; but if they agreed with the information, and believed the evidence as to the publication, they should find him guilty. If the jury were obliged to find whether the paper was a libel, or whether it was a libel to such a degree as to deserve the epithets given it by the information, or to require proof of the express intent of the defendant in printing and publishing,(*b*) and of its being malicious to such a degree as to deserve the epithets given it by the information—then this direction was wrong.

In support of it, I told them, as I have from indispensible duty been obliged to tell every jury, upon every trial of this kind, to the following effect: that whether the paper (meaning as alleged by the information) was in law a libel, was a question of law (*c*) upon the face of the record: for after conviction, a defendant may move in arrest of judgment, if the paper is not a libel. That all the epithets in the information were formal inferences of law from

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(*a*) This seems to be somewhat obscure.

(*b*) I conceive that they might either require such proof of the publisher's intent, or collect it by inference from the mere fact of publication, as they should think fit; but that certainly they ought to find it.

(*c*) To these words Mr. Serj. Hill, in his copy of Burrow, had written the following note. (See the last edition published by Messrs. Clarke.)

"It is a question of *scurrility;* and how can that be a question of law? By St. Westm. 2d. 13 Edw. 1, c. 30, 'the justices shall not compel the jurors to give a general verdict in assize, but, if they voluntarily will, let the verdict be admitted *sub suo periculo.*' This statute, as appears in 2 Inst. 425, extends to all actions and all issues, and also to pleas of the crown at the king's suit.

"In the Trial of the Seven Bishops, though the Court was divided in their opinion, whether the petition, for presenting which the defendants were indicted, as for making and publishing a libel, did in law amount to a libel, or not, yet [qu. not] one of the four judges of the King's Bench, except the Chief Justice, expressly asserted, that that point was a matter of law, and therefore to be determined by the Court, and not by the jury; and two of the judges, viz. Holloway and Powell, left it to the jury as a matter to be determined by them, and declared to them their reasons for thinking it not a libel. See Foster 201, 202, 10 St. Tr. App. [56.] (qu. 196, Owen's Case, see it in this Collection vol. 18, p. 1203.) Holt's Rep. 683. 5 Mod. 209. Dyer 296. Lamb. Just. lib. 1, c. 13, p. 177, 178. ed. 1582. 5 Mod. 206. Cro. Car. 332."

the printing and publishing.(*d*) That no proof of express malice ever was required, and is in most cases impossible to be given. That the verdict finds only what the law infers from the fact: (*e*) therefore, after conviction, a defendant may, by affidavit, lessen the degree of his guilt. That where an act in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found: but where the act is in itself unlawful, (*f*) as in this case, the proof of justification, or excuse, lies on the defendant; and, in failure thereof, the law implies a criminal intent.(*g*)

The jury stayed out a great while, many hours; at last they came to my house; (the objection of its being out of the county being cured by consent.) In answer to the usual question put by the officer, the foreman gave their verdict in these words: "Guilty of the printing and publishing only." Nothing more passed.

The officer has entered up the verdict literally, without so much as adding the usual words of reference to connect the verdict with the matter to which it related.

Upon this, the two rules I have stated were moved for.

Upon that obtained by the Attorney-General, the affidavit of a juror was offered by the counsel for the defendant. But we are all of opinion that it cannot be received. Where there is a doubt upon the judges' report, as to what passed at the time of bringing in the verdict, there the affidavits of jurors, or by-standers, may be received upon a motion for a new trial, or to rectify a mistake in the minutes. But an affidavit of a juror never can be read as to what he then thought or intended.

This motion consists of two parts; first, to fill up the formal words of reference; the second, to omit the word 'only.' We are all of opinion, that the first is a technical omission of the clerk, and ought to be set right. As to the second, that the word 'only' must stand in the verdict.

There is no ground (from any thing which passed) to explain the sense of the jury, so as that the officer might have entered a general verdict. No argument can be urged for omitting the word 'only,' which does not prove that it can have no effect, though inserted; and therefore it is a question of law upon the face of the verdict. The defendant's motion must be considered upon the ground of the word 'only' standing; was it omitted, there could be no doubt. Guilty of printing and publishing, where there is no other charge, is guilty: for nothing more is to be found by the jury.(*h*)

In the case of the King and Williams, the jury found the defendant guilty of printing and publishing the North Briton, No. 45; the clerk entered it up guilty, and no objection was ever made. Where there are more charges than one, guilty of some only is an acquittal as to the rest. But in this information there is no charge except for printing and publishing. Clearly there can be no judgment of acquittal; because the fact found by the jury is the very crime they were to try.(*i*) The only question is, Whether, by any possibility, the word 'only' can have a meaning which would affect or contradict the verdict.

That the law, as to the subject matter of the verdict, is as I have stated, has been so often unanimously agreed by the whole Court, upon every report I have made of a trial for a libel, that it would be improper to make it a question now in this place. Among those that concurred, the bar will recollect the dead, and the living not now here. And we all again declare our opinion, that the direction is right, and according to law. This direction, though often given (with an express request from me, that if there was the least doubt, they would move the Court) has never been complained of in court; and yet, if it had been wrong, a new trial would be of course. It is not now complained of. Taking then the law to be according to this direction, the question is, whether any meaning can be put upon the word 'only,' as it stands upon the record, which will affect the verdict. If they meant to say they did not find it a libel, or did not find the epithets, or did not find any express malicious intent, it would not affect the verdict; (*k*) because none of these things were to be proved or found either way. If, by 'only,' they meant to say that they did not find the meaning put upon the paper by the information, they should have acquitted him. If they had expressed this to be their meaning, the verdict would have been inconsistent and repugnant; for they ought not to find the defendant guilty, unless they find the meaning put upon the paper by the information; (*l*) and judgment of acquittal ought to have been entered up. If they had expressed their meaning in any of the other ways, the verdict would not have been affected, and judgment ought to be entered upon it. It is impossible to say with certainty what the jury really did mean; probably they had different meanings. If they could possibly mean that which is expressed would acquit the defendant, he ought not to be

(*d*) Qu. Are they not rather inferences of reason which the jury have a right to make?

(*e*) This appears to be somewhat obscure.

(*f*) Qu. if any act, even the voluntarily putting another man to death, be in itself unlawful?

(*g*) Qu. if this implication lie not within the province of the jury?

(*h*) Qu. if they ought not also to find the malice and the tendency?

(*i*) Qu. if it be more than a part of it?

(*k*) Would it not make it a verdict of acquittal?

(*l*) Qu. if the jury as plain men did not by the words, 'guilty of publishing' only mean to say that the defendant published the paper?

concluded by this verdict. It is possible some of them might mean, not to find the whole sense and explanation put upon the paper by the innuendoes in the information. If a doubt arises from an ambiguous and unusual word in the verdict, the Court ought to lean in favour of a Venire de Novo.

We are under the less difficulty, because, in favour of a defendant, though the verdict be full, the Court may grant a new trial. And we are all of opinion, upon the whole of the case, that there should be a Venire de Novo.

This Judgment lord Mansfield, on the 10th of December, having previously desired that the Lords might be summoned for that day, read to the House of Lords;* and informed their lordships that he had left a copy of it with the clerk, and that their lordships might read it and take copies of it if they pleased, but he did not move that it should be entered on the Journal, nor did he make any other motion respecting it. This conduct seems to have excited some surprise in the House, and occasioned severe animadversions in the political writings of the time. On the next day lord Camden proposed the following Questions to lord Mansfield, and desired to have his lordship's Answers to them, having, as I understand Mr. Holliday (Life of lord Mansfield, p. 317,) left them in writing with the clerk.†

1. "Does the opinion mean to declare, that upon the general issue of Not Guilty, in the case of a seditious libel, the jury have no right by law to examine the innocence or criminality of the paper, if they think fit, and to form their verdict upon such examination?

2. "Does the opinion mean to declare, that in the case above mentioned, where the jury have delivered in their verdict Guilty, that this verdict has found the fact only, and not the law?

3. "Is it to be understood by this opinion, that if the jury come to the bar, and say that they find the printing and publishing, but that the paper is no libel, in that case the jury have found the defendant Guilty generally, and the verdict must be so entered up?

4. "Whether the opinion means to say, that if the judge, after giving his opinion of the innocence or criminality of the paper, should leave the consideration of that matter, together with the printing and publishing, to the jury, such a direction would be contrary to law?

5. "I beg leave to ask, whether dead or living judges, then absent, did declare their opinions in open court, and whether the noble lord has any note of such opinions?

6. "Whether they declared such opinions, after solemn arguments, or upon any point judicially before them?"

Lord Mansfield replied, that this method of proposing questions to him, was taking him by surprise; that it was unfair; and that he would not answer interrogatories. See 16 New Parl. Hist., pp. 1312, *et seq.* 1321, also p. 1304, Junius's Preface, published in Mr. Woodfall's late edition of the Letters, Junius's Letter signed Phalaris (letter 82) in the Miscellaneous Letters of Junius, Woodfall's edition, vol. 3, p. 295, and the letter of Nerva in a note to the same page.

The preceding Cases gave rise to numerous publications. Of those which impugned the doctrines laid down in the Cases of Almon and Woodfall, some of the most considerable are,

A Letter from Candour to the Public Advertiser.

A Letter to Mr. Almon concerning Libels, Warrants, the Seizure of Papers, and Sureties for the Breach of Behaviour, &c. By the Father of Candour.

Another Letter to Mr. Almon in matter of Libel.

A second Postscript to a Letter to Mr. Almon in matter of Libel.

A Summary of the Law of Libel, in four Letters, signed Philoleutherus Anglicanus.

A Letter to the Jurors of Great Britain occasioned by an Opinion of the Court of King's Bench read by Lord Chief Justice Mansfield, in the Case of the King and Woodfall, &c. by George Rous, esq.

See also An Inquiry into the Extent of the Power of Juries on Trials of Indictments or Informations for publishing Seditious or other Criminal Writings, &c. extracted from the second volume of Mr. Baron Maseres's Additional Papers concerning the Province of Quebeck, in which is a very copious, exact, and satisfactory investigation of the nature of the questions of intention and tendency in charges of libel. And An Enquiry into the question, Whether Juries are or are not judges of law as well as of fact, with a particular reference to the Case of Libels. (By Joseph Towers, L. L. D. a dissenting minister.)

Observations on the Rights and Duty of Juries in Trials for Libels, &c. by Joseph Towers, L. L. D.

Other prosecutions were had for the publication of Junius's Letter to the King, but I have not seen a report which is worth publication of either of them.

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* The phraseology of Burrow's Report of the Judgment differs from that in the Parl. Hist.

† The Parliamentary History mentions not this leaving with the clerk.

556. The Trial of Maha Rajah NUNDOCOMAR,* Bahader, for Forgery. At Calcutta, in the Province of Bengal: 15 GEORGE III. A. D. 1775. [Published by Authority of the Supreme Court of Judicature in Bengal. London: Printed for T. Cadell in the Strand, 1776.]

June 8, 1775.

At a Court of Oyer and Terminer, and Gaol Delivery, holden in and for the Town of Calcutta, and Factory of Fort William, in Bengal, and the Limits thereof, and the Factories subordinate thereunto, on the 3d day of June, 1775.—Before the hon. Sir ELIJAH IMPEY, knt. Chief Justice, ROBERT CHAMBERS, STEPHEN CÆSAR LEMAISTRE, and JOHN HYDE, esqrs. Justices.

The KING *v.* Maha Rajah NUNDOCOMAR.

THE Prisoner being called to the bar, and arraigned, and the indictment read, his counsel tendered a plea to the jurisdiction of the Court; but the Chief Justice pointing out an objection thereto, which went both to the matter of fact and the law contained therein, and desiring the counsel to consider if he could amend it, and take time for so doing, he, after having considered the objection, thought proper to withdraw the plea; whereupon the prisoner pleaded, Not Guilty: and being asked by whom he would be tried? he answered, By God and his peers. The Court desired to know whether he had any particular reason for using the word peers? His counsel answered, that the prisoner being a man of the first dignity in this kingdom, thought he should be tried by people of equal rank with himself, agreeably to the law of England, which permits every man to be tried by his peers. The Court asked, who the Maha Rajah considered as his peers? His counsel answered, he must leave that to the Court.

Chief Justice. The trial can only be by such persons as are by the charter required to form the jury. A peer of Ireland tried in England would be tried by a common jury. The charter directs, that in all criminal prosecutions, the prisoner should be tried by the inhabitants of the town of Calcutta, being British subjects.

It being late, the Court adjourned till the next morning at seven o'clock.

June 9, 1775.

The counsel for the prisoner informed the Court, that the Maha Rajah had been ill in the night, and had now a flux and fever, which rendered him incapable of taking his trial.

The Court desired Dr. Anderson and Dr. Williams to examine the prisoner, which they did, and reported that he complained of having been indisposed in the night, but that he had neither flux nor fever, and was very capable of taking his trial; whereupon he was called to the bar.

The Prisoner being informed of his right to challenge when the Jury came to be sworn, challenged the following gentlemen, from a paper held in his hand: John Lewis, William Atkinson, John Williams, William Dickson, Richard Johnson, Joshua Nixon, Robert Donald, James Miller, Tilly Kettle, Ramsay Hannay, Thomas Adams, Bernard Messinck, Wm. Hamilton Bird, Charles Moore, Alexander Macneil, James Lally, William Briggs, Philip Coales.

The Counsel for the Crown challenged Samuel Stalham.

The following Jury was sworn:

Edward Scott,	John Ferguson,
Robert Macfarlin,	Arthur Adie,
Thomas Smith,	John Collis,
Edward Ellerington,	Samuel Touchet,
Joseph Bernard Smith,	Edward Satterthwaite,
John Robinson,	Charles Weston.

The Jury elected Mr. John Robinson their foreman.

Mr. William Chambers, the principal interpreter, not being yet come from Madras, and the two assistant interpreters, on account of their imperfect knowledge of English, being deemed insufficient for a trial so long as this was expected to be, Mr. Alexander Kyn. Elliot, superintendant of the Khalsa Records, a gentleman eminently skilled in the Persian and Hindostan languages, and Mr. William Jackson, lately admitted an attorney of the court, who speaks the Hindostan tongue fluently, were requested by the Court to interpret.

The Counsel for the Prisoner desired that the evidence might be interpreted to him in the Hindostan language, as it was most generally understood by the audience, and requested that the interpreter of the Court might be employed for that purpose, and objected to the interpretation of Mr. Elliot, as being connected with persons whom the prisoner considered as his enemies.

Chief Justice. The principal interpreter of the court is absent; the gentlemen of the jury have heard the interpretation of the assistant interpreters on other occasions. Do you, gentlemen, think we shall be able to go through this cause, with the assistance of those interpreters only?

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* These proceedings are amply discussed in the Cases of governor Hastings and of Sir Elijah Impey, and in the Parliamentary Debates respecting those Cases.

Jury. We are sure we shall not be able.

Chief Justice. It is a cruel insinuation against the character of Mr. Elliot. His youth, just rising into life, his family, his known abilities and honour, should have protected him from it.

[Mr. Elliot desired he might decline interpreting.]

Chief Justice. We must insist upon it, that you interpret: you should be above giving way to the imputation: your skill in the languages, and your candour, will show how little ground there is for it.

Mr. *Farrer.* I hope Mr. Elliot does not think the objection came from me; it was suggested to me.

Chief Justice. Who suggested it?

Mr. *Farrer.* I am not authorised to name the person.

Chief Justice. It was improper to be made, especially as the person who suggested, does not authorise you to avow it.

Jury. We all desire that Mr. Elliot, whose character and abilities we all know, would be so kind as to interpret.

Mr. *Farrer.* I desire on the part of the prisoner, that Mr. Elliot would interpret.

Mr. Elliot and Mr. Jackson sworn to interpret.

The jury being impannelled, were charged with the prisoner, and the clerk of the crown read the Indictment as follows:

"*Town of Calcutta, and Factory of Fort William, in Bengal,* } I. To wit. The jurors for our lord the king, upon their oath present, That Maha Rajah Nundocomar, Bahader, late inhabitant of the town of Calcutta, and a person subject to the jurisdiction of the Supreme Court of Judicature at Fort William, in Bengal, after the 29th day of June, in the year of our Lord 1729, to wit, on the 15th day of January, 1770, in the 10th year of the reign of our sovereign lord George the 3rd, king of Great Britain, at the town of Calcutta aforesaid, with force and arms, feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, a certain bond in the Persian language, purporting to be sealed by one Bollakey Doss with the seal or chop of him the said Bollakey Doss, the tenor of which bond is as follows [here the bond is written in Persian] with an intent to defraud the said Bollakey Doss of the sum of 48,021 sicca rupees principal, and of four annas on each rupee of the said principal sum, as premium or profit on the said principal sum, against the form of the statute in that case made and provided, and against the peace of our said lord the king, his crown and dignity.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the aforesaid Maha Rajah Nundocomar, Bahader, afterwards, to wit, on the 15th day of January, in the year last abovesaid, at Calcutta aforesaid, a certain false, forged, and counterfeited bond in the Persian language, purporting to have been sealed by the said Bollakey Doss, with the seal or chop of him the said Bollakey Doss, feloniously did utter and publish as a true bond; which said bond is in the words, characters, and figures following, [Persian bond again recited], with an intent to defraud the said Bollakey Doss of the said sum of 48,021 sicca rupees principal, and of four annas on each rupee of the said principal sum, as premium or profit on the said principal sum; the said Maha Rajah Nundocomar, Bahader, at the time of publishing of the said false, forged, and counterfeited bond by him as aforesaid, then and there, well knowing the said bond to have been false, forged, and counterfeited, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity.

"And the jurors for our lord the king, upon their oath do further present, that Maha Rajah Nundocomar, Bahader, late inhabitant in the town of Calcutta, and a person subject to the jurisdiction of the Supreme Court of Judicature, at Fort William in Bengal, on the 15th day of January, in the year last abovesaid, with force and arms, at the town of Calcutta aforesaid, feloniously did falsely make, forge, and counterfeit, and did cause to be falsely made, forged, and counterfeited, a certain bond, written in the Persian language, and purporting to be sealed by one Bollakey Doss (then deceased) in his life time, with the seal or chop of him the said Bollakey Doss; the tenor of which is as follows [Persian bond again recited] with an intent to defraud Gungabissen and Pudmohun Doss, executors of the last will and testament of the said Bollakey Doss, of the sum of 48,021 sicca rupees as principal, and of four annas on each rupee, as a profit or premium on the said principal sum, against the form of the statute in that case made and provided, and against the peace of our sovereign lord the king, his crown and dignity.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the aforesaid Maha Rajah Nundocomar, Bahader, afterwards, to wit, on the said 15th day of January, in the year last abovesaid, at Calcutta aforesaid, a certain false, forged, and counterfeited bond, purporting to be sealed by the said Bollakey Doss (then deceased) in his life time, with the seal or chop of him the said Bollakey Doss, feloniously did utter and publish as a true bond; which said bond is in the words, characters, and figures following, to wit, [Persian bond again recited] with an intent to defraud the said Gungabissen and Pudmohun Doss of the said sum of 48,021 sicca rupees of principal, and of four annas on each rupee of profit or premium on the said principal sum; the said Maha Rajah Nundocomar, Bahader, at the time of publishing the said false, forged, and counterfeited bond, by him as aforesaid, then and there, well knowing the said bond to have been false, forged, and counterfeited, against the form of the statute in such case,

made and provided, and against the peace of our said lord the king, his crown and dignity.

"And the jurors for our lord the king, upon their oath aforesaid, do further present, that on the 15th day of January, in the year last abovesaid, Maha Rajah Nundocomar, Bahader, late inhabitant of the town of Calcutta, and a person subject to the jurisdiction of the Supreme Court of Judicature, at Fort William in Bengal, with force and arms, at the town of Calcutta aforesaid, feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, a certain writing obligatory in the Persian language, purporting to be sealed by the said Bollakey Doss, with the seal or chop of him the said Bollakey Doss, the tenor of which writing obligatory is as follows [Persian bond again recited] with an intent to defraud the said Bollakey Doss of the sum of 48,021 sicca rupees of principal, and of four annas on each rupee of profit or premium on the said principal sum, against the form of the statute in that case made and provided, and against the peace of our said lord the king, his crown and dignity.

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"And the jurors for our lord the king, upon the oath aforesaid, do further present, that on the 15th day of January, in the year last abovesaid, Maha Rajah Nundocomar, Bahader, late inhabitant of the town of Calcutta, and a person subject to the jurisdiction of the Supreme Court of Judicature at Fort William in Bengal, with force and arms, at the town of Calcutta aforesaid, feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, a certain writing obligatory in the Persian language, purporting to have been sealed by the said Bollakey Doss (then deceased) in his life time, with the seal or chop of him the said Bollakey Doss; the tenor of which writing obligatory is as follows [Persian bond again recited] with an intent to defraud Gungabissen and Pudmohun Doss, the executors of the said Bollakey Doss, of the sum of 48,021 sicca rupees of principal sum, against the form of the statute in that case made and provided, and against the peace of our said lord the king, his crown and dignity.

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"And the jurors for our lord the king, upon their oath aforesaid, do further present, that on the 15th day of January, in the year last abovesaid, Maha Rajah Nundocomar, Bahader, late inhabitant of the town of Calcutta, and a person subject to the jurisdiction of the Supreme Court of Judicature, at Fort William, in Bengal, with force and arms, at the town of Calcutta aforesaid, feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, a promissory note for payment of money, in the Persian language, purporting to be sealed by the said Bollakey Doss, with the seal or chop of him the said Bollakey Doss; the tenor of which promissory note is as follows, [Persian bond again recited] with an intent to defraud the said Bollakey Doss of the sum of 48,021 sicca rupees of principal, and of four annas on each rupee of profit or premium on the said principal sum, against the form of the statute in that case made and provided, and against the peace of our said lord the king, his crown and dignity.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Maha Rajah Nundocomar, Bahader, afterwards, to wit, on the 15th day of January, in the year last abovesaid, at Calcutta aforesaid, a certain false, forged, and counterfeited promis-

sory note, for the payment of money, in the Persian language, purporting to have been sealed by the said Bollakey Doss, with the seal or chop of him the said Bollakey Doss, feloniously did utter and publish as a true promissory note; which promissory note is in the words, characters, and figures following, [Persian bond again recited] with an intent to defraud the said Bollakey Doss of the said sum of 48,021 sicca rupees of principal, and of four annas on each rupee of profit or premium on the said principal sum; the said Maha Rajah Nundocomar, Bahader, at the time of publishing the said false, forged, and counterfeited promissory note, by him as aforesaid, then and there, well knowing the said promissory note to have been false, forged, and counterfeited, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity.

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"And the jurors for our lord the king, upon their oath aforesaid, do further present, that the said Maha Rajah Nundocomar, Bahader, afterwards, to wit, on the said 15th day of January, and year last abovesaid, at Calcutta aforesaid, a certain false, forged, and counterfeited writing obligatory, in the Persian language, feloniously did utter and publish as a true writing obligatory; which said writing obligatory is in the words, characters, and figures following, [Persian bond again recited] with an intent to defraud the said Bollakey Doss of the said sum of 48,021 sicca rupees of principal, and of four annas on each rupee as profit or premium on the said principal sum; the said Maha Rajah Nundocomar, Bahader, at the time of publishing the said false, forged, and counterfeited writing obligatory, by him as aforesaid, then and there, well knowing the said writing obligatory to have been false, forged, and counterfeited, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity.

"And the jurors for our lord the king, upon their oath aforesaid, do further present, that on the 15th day of January, in the year last abovesaid, Maha Rajah Nundocomar, Bahader, late inhabitant of the town of Calcutta, and a person subject to the jurisdiction of the Supreme Court of Judicature at Fort William in Bengal, with force and arms, at the town of Calcutta aforesaid, did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, a certain writing obligatory in the Persian language; the tenor of which writing obligatory is as follows, [Persian bond again recited] with an in-

tent to defraud Gungabissen and Pudmohun Doss, the executors of the said Bollakey Doss, of the sum of 48,021 sicca rupees of principal, and of four annas on each rupee of profit or premium on the said principal sum, against the peace of our said lord the king, his crown and dignity.

"And the jurors for our lord the king, upon their oath aforesaid, do further present, that the said Maha Rajah Nundocomar, Bahader, afterwards, to wit, on the said 15th day of January, and year last abovesaid, at Calcutta aforesaid, a certain false, forged, and counterfeited writing obligatory, in the Persian language, feloniously did utter and publish as a true writing obligatory; which said writing obligatory is in the words, characters, and figures following, [Persian bond again recited] with an intent to defraud Gungabissen, and Pudmohun Doss, the said executors of the said Bollakey Doss, of the said sum of 48,021 sicca rupees of principal, and of four annas on each rupee, as profit or premium on the said principal sum; the said Maha Rajah Nundocomar, Bahader, at the time of publishing the said false, forged, and counterfeited writing obligatory, by him as aforesaid, then and there, well knowing the said obligatory writing to have been false, forged, and counterfeited, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity.

"And the jurors for our lord the king, upon their oath aforesaid, do further present, that Maha Rajah Nundocomar, Bahader, late of the town of Calcutta, being a person subject to the Supreme Court of Judicature at Fort William in Bengal, on the 15th day of January, in the year abovesaid, with force and arms, at Calcutta aforesaid, feloniously did falsely make, forge and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, a certain writing obligatory in the Persian language; the tenor of which certain writing obligatory is as follows, [Persian bond again recited] with an intent to defraud Gungabissen and Hengoo Laul, the two nephews and trustees named in the last will and testament of Bollakey Doss, deceased, of the sum of 48,021 sicca rupees of principal, and of four annas on each rupee of profit or premium on the said principal sum, against the form of the statute in that case made and provided, and against the said peace of our said lord the king, his crown and dignity.

"And the jurors for our lord the king, upon their oath aforesaid, do further present, that Maha Rajah Nundocomar, Bahader, late of the town of Calcutta, being a person subject to the Supreme Court of Judicature, at Fort William in Bengal, on the 15th day of January, in the year abovesaid, at Calcutta aforesaid, a certain false, forged, and counterfeited writing obligatory, in the Persian language, feloniously did utter and publish as a true writing obligatory; the tenor of which writing obligatory is as follows, [Persian bond again recited] with an intent to defraud Gungabissen and Hengoo Laul, the two nephews and trustees named in the last will and testament of Bollakey Doss, deceased, of the sum of 48,021 sicca rupees of principal, and of four annas on each rupee of profit or premium on the said principal sum; the said Maha Rajah Nundocomar, Bahader, at the time of publishing the said false, forged, and counterfeited writing obligatory, by him as aforesaid, then and there, well knowing the said writing obligatory to have been false, forged, and counterfeited, against the form of the statute in that case made and provided, and against the peace of our said lord the king, his crown and dignity.

"And the jurors for our lord the king, upon their oath aforesaid, do further present, that on the 15th day of January, in the year last abovesaid, Maha Rajah Nundocomar, Bahader, late inhabitant of the town of Calcutta, and a person subject to the jurisdiction of the Supreme Court of Judicature at Fort William, in Bengal, with force and arms, at the town of Calcutta aforesaid, feloniously did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged and counterfeited, a certain writing obligatory, in the Persian language; the tenor of which writing obligatory is as follows, [Persian bond again recited] with an intent to defraud Gungabissen, the surviving executor of Bollakey Doss, deceased, of the sum of 48,021 sicca rupees, of principal, and of four annas on each rupee, of profit or premium on the said principal sum, against the form of the statute in such case made and provided, and aginst the peace of our said lord the king, his crown and dignity.

"And the jurors for our lord the king, upon their oath aforesaid, do further present, that the said Maha Rajah Nundocomar, Bahader, afterwards, to wit, on the 15th day of January in the year last abovesaid, at Calcutta aforesaid, a certain false, forged, and counterfeited writing obligatory, in the Persian language, feloniously did utter and publish as a true writing obligatory; which said writing obligatory is in the words, characters, and figures following, [Persian bond again recited] with an intent to defraud Gungabissen, the surviving executor of Bollakey Doss, deceased, of the said sum of 48,021 sicca rupees of principal, and of four annas on each rupee, as profit or premium on the said principal sum; the said Maha Rajah Nundocomar, Bahader, at the time of publishing the said false, forged, and counterfeited writing obligatory, by him as aforesaid, then and there, well knowing the said obligatory writing to have been false, forged, and counterfeited, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity." (Signed)

June 7, 1775. JA. PRITCHARD, Clerk of the Crown.

(Signed)
W. M. BECKWITH,
Clerk of the Indictment.

TRANSLATE of the PERSIAN BOND, recited in the Indictment.*

"I who am Bollakey Doss.

"As a pearl necklace, a twisted kulghah, a twisted serpache, and four rings, two of which were of rubies and two of diamonds, were deposited by Rogonaut Roy Geoo, on account of Maha Rajah Nundocomar, Bahader, in the month of Assar, in the Bengal year 1165, with me, in my house at Moorshedabad, that the same might be sold; at the time of the defeat of the army of the Nabob Meer Mahomed Cossim Cawn, the money and effects of the house, together with the aforesaid jewels, were plundered and carried away. In the year 1172, Bengal style, when I arrived in Calcutta, the aforesad Maha Rajah demanded the before-mentioned deposit of jewels; I could not produce the deposit when demanded, and, on account of the bad state of my affairs, was unable to pay the value thereof; I therefore promise and give it in writing, that when I shall receive back the sum of two lacks of rupees, and a little above, which is in the Company's cash at Dacca, according to the method of reckoning of the Company, I have agreed and settled, that the sum of 48,021 sicca rupees is the principal of the amount of the said deposit of jewels, which is justly due by me, and over and above that, a premium of four annas upon every rupee. Upon the payment of the aforesaid sum from the Company's cash, I will pay that sum, without excuse and evasion, to the aforesaid Maha Rajah. I have, for the above reasons, given these reasons in the form of a bond under my signature, that when it is necessary it may be carried into execution.

"It is witnessed,

"MEHAB ROY;

"SCHLAUBUT, the Vakeel of Seat Bollakey Doss;

"ABDEHOO COMMAUL MAHOMED.

Alabd, "BOLLAKEY DOSS."

"Written on the 7th day of the month of Bhadoon, in the Bengal year 1172."

The Counsel for the Prisoner desired that the witnesses might be kept separate.

Court. The great number of witnesses in this cause, the difference of their casts, and the length of time the trial is likely to take up, renders it almost impossible to confine them. If any method can be proposed, by which these inconveniencies will be removed, we shall be very ready to grant the request.

After a short debate it was agreed, that peons should attend the witnesses to keep them separate, and prevent any person having communication with them; and that each witness, immediately after having given his evidence, should be kept in the gallery; and that a constable should attend there, to prevent any natives from having access to them.*

Mohun Persaud sworn on a *voir dire.*

Mr. *Farrer, (Adv. for the Pris.)* Has Gungabissen made you any promise, in case the prisoner is convicted?—*A.* I am to have five per cent. on any money received.

Court. Is it a special promise on this occasion?—*A.* It is a general commission that I am to have upon all the affairs of Gungabissen.

* See vol. 8, p. 792, vol. 12, p. 871, vol. 13, p. 329, vol. 19, p. 348.

* In the former Edition is given the following insufficient

GLOSSARY.

Adawlut. Literally signifies justice; but often used for a court of justice.

Arzee. A representation in writing, or letter from an inferior to a superior.

Banyan. A particular cast among the Hindoos.

Batta. Difference of exchange upon coins.

Chucklah. A district.

Consumah. A household steward.

Cooly. A labourer, or porter.

Cossid. A messenger.

Darogah of a Cutcheree. Superintendant of a court.

Durbar Expences. Money given to persons in power.

Ferd. An Arabic word, expressing unity; but technically signifies a sheet of paper, containing an account.

Foujedurree. A particular office under the government.

Gold Mohir. Sixteen rupees.

Gomastah. Agent.

Gurree. A portion of time containing about 22 minutes.

Hircarrah. Literally a spy; but commonly means a person who runs on messages, and attends the palanquin.

Jamma. Part of the dress of a native of India.

Jammah. Debit side of an account.

Khalsa. Exchequer.

Khelaat. A dress of investiture given to a person upon his nomination to an office.

Kidmutgar. A waiting servant.

Kulghah. An ornament for the turban.

Kuttree. A particular cast amongst the Hindoos.

Mohirir. A writer.

Moonshee. A secretary or writer.

Mullah. A teacher.

Nuzzer. A present of compliment made by an inferior when introduced to a superior.

Peon. A footman, or person to go on messages.

Pottah. Title deed.

Ruffeek. Literally a friend; but means all through this trial a half-friend and half-dependant.

Serpaiche. An ornament for the turban.

Sewarree. Equipage.

Shroff. A banker, an exchanger of money.

Sunnud. A grant from the government or its officers.

Tzaradar. A farmer.

Vakeel. An attorney.

Mr. Farrer. Is it a promise in writing, or by word of mouth?—*A.* It is a written letter of attorney: originally it was a letter of attorney to me, Mr. Hamilton, and Mr. Lodge: the two last withdrew upon the commitment of the prisoner. I have likewise in my possession a Nagree letter of attorney, drawn by Mr. Driver.

James Driver examined.

To whom is that Nagree letter of attorney made?—It was a power of attorney made to Mohun Persaud, and one John Love. Afterwards I drew one in English, to Mohun Persaud singly.

The counsel for the prisoner desiring that the papers might be produced, Mohun Persaud, together with the clerk of Mr. Janett, attorney for the prisoner, was sent to fetch them: upon which the counsel for the crown called

Commaul O Dein Cawn, sworn upon a *voir dire.*

Prisoner's Counsel. Do you know the punishment of perjury by the English law?

Court. You had better tell it him.

Counsel. When the life of a man is at stake, if you tell falsely, you will be deemed infamous, put in the pillory, and burnt in the hand.

[Counsel for the crown desired that the questions might be interpreted to the witness in the Persian language, as the witness understood that language best.]

Court. What language do you understand best?—*A.* Persian.—[Being again interrogated, he said he understood both equally well, and could answer in either.]

Which can you most easily explain yourself in?—I will answer in either. Hindostanee is my native language.

Which language will you be examined in?—I think I shall be best understood in Persian.

Prisoner's Counsel. Have you received any money from Mohun Persaud, or any other person, to give evidence on this occasion?—No: defend me, good God! I never do such devilish things.

Do you expect any favour or protection, or have you had any promise of money from any person, for giving evidence on this occasion?—No.

Sworn in chief.

Counsel for Crown. Whose seal is to that bond? [shewn the bond.]—*A.* It is my seal; but the words signifying "it is witnessed," are not of my signature.

Whose name is expressed in that seal?—Obdahu Mahomed Commaul.

Is that your name?—That was my original name.

When, or upon what occasion, did you change your name?—At the time of the Nabob Nutchum al Dowla, I got a royal title, and I am since called Commaul O Deen Ally Cawn.

Did you affix your seal to that bond?—No, I did not.

Can you give an account how it came fixed there?—No, I cannot say.

Was the seal ever out of your possession?—I sent the seal to Maha Rajah Nundocomar, at Mongheer.

When did you send it?—At the time the war between Jaffier Ally Cawn, and Cossim Ally Cawn subsisted.

Upon what occasion did you send it?—When I was released from confinement, Maha Rajah Nundocomar desired a servant of mine to desire me to send my seal to him—my servant had been before that with Maha Rajah Nundocomar. The representation the man made with regard to sending the seal was this—

Court. Is that man alive?—*A.* He was killed that same evening.

What was his name?—Eoll Mahomed, my Jemedar. He likewise desired the servant to request me to send a nazzer with the seal, that he might, with the seal, seal a petition to the Nabob, and present it with the nazzer. I then delivered to Shaik Cossim Ally, my Consumah, one gold moheer and four rupees, as a nazzer to Maha Rajah Nundocomar, and one gold moheer and four rupees as a nazzer to the Nabob; and likewise the seal, of which this is the impression, [pointing to the seal on the bond] in order that he might put them into a bag, that it might be sent by a messenger to Maha Rajah Nundocomar. The bag was accordingly sent by a messenger.

Do you know the name of that messenger?—I do not know what the Cossid's name is; there are twelve hundred at that place. It is fourteen or fifteen years ago.

Do you know if it was ever received by the prisoner?—I do; for Maha Rajah Nundocomar wrote me a letter in consequence of it. [The letter produced.]

Counsel for Prisoner. I admit the Maha Rajah had the letter.

Counsel for Crown. Read the letter.

Court. Go through with your evidence.

Counsel for Crown. The letter does not say the seal was received; but it acknowledges the receipt of the letter, and the seal was inclosed in the letter.

Court to Prisoner's Counsel. Do you see the consequence? Do you mean to admit it?

Counsel. I have duly weighed what your lordship said, and therefore will not admit it.

Witness read the letter, of which the following is a translate, omitting unnecessary compliments.

[After the customary compliments.]

"I have received your letter, with which I have made myself acquainted, and by which I have been rendered joyful.—Thanks to the great God, you have been released. The nazzer of congratulation which you sent to me, has arrived. May the great God reward you with victories! In consequence of your letter I have got an arzee for you written out; have presented it, together with the nazzer you have sent for that purpose, to the Nabob; and having received an answer, send it in-

closed in this letter. You will be made acquainted with the contents, by inspecting it. With respect to the circumstance of calling you to the army, about which you have written, as the Victorious (the Nabob) intends shortly to leave Mongheer to go to Patna, there is no necessity for your making so long and troublesome a journey; you had better stay some time longer at your own house. When God is willing that the victorious army should return to Moorshedabad, you will attend there, and make me joyful by your company.—Every thing then will be settled properly.—Rest contented.—Remain certain that I am your friend, and write an account of your health. The cloth you before sent is arrived.—What else shall I write?"

Directed to Shaik Mahomed Cummaul.

Dated the 2d of Rubbee, ul Akher, in the fourth year of the reign.

Cross Examination.

Q. Is it always customary to affix the seal to all arzees presented to the Nabob?—*A.* Yes.—An arzee is never presented to the Nabob without a seal.

Was your seal ever returned?—No.

Do you know who has got it?—Maha Rajah Nundocomar.

How do you know?—I sent it, and never got it back.

Have you ever applied for it?—Yes, I have several times. I have likewise complained concerning its not being delivered.

Did you ever receive any answer to those complaints?—I demanded the seal of Maha Rajah Nundocomar, who said it was not in his possession. I told Coja Petruse of it: I intended to complain, but Munshy Sudden o dein advised me not.

When would you have made your complaint?—At the time when Mr. Palk confined Maha Rajah Nundocomar; it was about three years ago, then Munshey Sudden o dien advised me not to complain, because the governor had given his son Rajah Gourdass the khallat for the office of Dewan of the city of Morshedabad.

Whom did you mean to complain to?—To the governor and to the Audaulet.

Did you want to complain to any other person?—No.

Did you ever hear of your seal being put to any bond?—Yes, Mohun Persaud first told me that my seal was to a bond, and then the Maha Rajah himself told me he had put my seal to a bond; I saw the bond once before himself. [The bond stated in the indictment produced.]

What passed between Mohun Persaud and you upon the time when he told you of the seal?—First, he bid me pay 600 rupees, which I owed the estate of Bollakey Doss. I said, "I am a poor man out of employment; how shall I get the money?"

When was this?—It was about two months before Mr. Palk confined the Maha Rajah. It was about two months before I got my post, which is three years since.

Court. Go on with your story of what passed between you and Mohun Persaud.—*A.* Mohun Persaud then asked me if I was a witness on behalf of Maha Rajah to a bond of Bollakey Doss, or if my seal was affixed to it. I said I was a witness for no man, and that I knew nothing with respect to this matter. He then asked if my seal, with the name of Abdahu Mahomed Commaul, was fixed to that bond. I then said there may be a great many people of the name of Mahomed Commaul. I then went to Maha Rajah Nundocomar, and repeated to him what Mohun Persaud had said to me. He said, It is true; having confidence in you I have fixed your seal, which was in my possession, to the bond of Bollakey Doss. Having sworn, you will give evidence of this before the gentlemen of Audaulet. I answered, How shall I be able to take a false oath? He answered, I had hopes in you. I answered, Men will give up their lives for their masters, but not their religion; have no hopes of me. I then went and informed Coja Petruse and Munshey Sudden o dien of what had passed.

Was Bollakey Doss alive or dead at the time the seal was sent?—He was alive; he had absconded from Mongheer. Some years after, he came to Calcutta.

After you had told Coja Petruse and Munshey Sudden o dien, did you tell it to any others?—No.

Cross Examination.

When did you change your name?—Ten or fifteen days before Mahomed Reza Cawn was appointed Naib Subah. I have got a seal, which was given me at the time, which has got the day and year upon it. I can produce it.

Where is the sunnud?—The sunnud is dated some years before I took the title; at the time the King and colonel Coote were at Patna a sunnud was procured for me by Shitabroy, who sent it to Maha Rajah Nundocomar, who detained it some time in his possession. In the time of the Nabob Nutchum al Dowlah I was appointed to the Foujdarry of Hidgelee, from which time my title commenced.

Where is the sunnud?—It is at Hugly, but the great seal is with me.

[Mr. Farrer desired it might be produced, which was agreed to.]

What did the dignity consist of?—I was by that means named Cawn, but received no jaghire.

Is it not customary for natives when they receive a title to take it immediately?—Whenever the Subah confirms it and gives him a seal, it is then customary to make use of it.

At what time did the Nabob confirm it?—Maha Rajah Nundocomar was at that time Naib Dewan. About ten or twenty days after he was dismissed, and Mahomed Reza Cawn was appointed in his place.

Was Nutchum al Dowlah Nabob at the time colonel Coote and the King were at Patna?—He was Nabob at the time the title was *jârres*.

Interp. This word literally interpreted means "to flow;" but what is meant by it is, "confirmed."

When did you begin to use the seal with your titles?—At the time of the Nabob Nutchum al Dowlah, when two seals were given me, I was appointed Foujdar of Hidgellee, and had two seals, one great and one small one, sent me from the government.

When a royal title is given to a native, can he make use of it without the permission of the Nabob?—He gets the sunnud, and perhaps a jaghire from the King, but cannot make use of it till a seal has been given by the Nabob, and he is permitted to use it.

How came you to apply to Maha Rajah Nundocomar to draw up your arzee?—As I had no connection with the Nabob, why should I draw up an arzee myself? The Maha Rajah desired I would send my seal to put to an arzee, and I did so.

In executing any bonds or deeds, do you make use of your signature or your seal?—When I execute a bond on my own account, I write the word "Oolaubd" (the slave of God) and fix my seal under it. When I witness any paper, I write, "It is witnessed," and fix my seal under those words.—[He produced a paper sealed with the same seal, to prove he had the seal. The jury compared it with the impression on the bond, and think them the same; each of the impressions shewed a small flaw which was in the original seal. He likewise produced the great seal, which he had from the Soubah.]

Were you ever upon terms of friendship with the Maha Rajah?—He was a friend of my father, and my grand-father. We were often in friendship, and often broke off. The Maha Rajah protected me from ten years of age. When he was Dewan of Mahomed Heba Beg Cawn, I was farmer of Chonngi. The first difference, that happened between me and Maha Rajah, was when I was appointed to Hidgelee. It was not a dispute, but a difference of two days.

Court. What was this dispute about?—*A.* It begun thus. First he said he would be my security, and afterwards went off from his promise. I got another man to be my security, and afterwards went frequently to Maha Rajah's house.

To what amount was he to be security?—The revenue for which he was to be my security, was between 3 and 4 lacks of rupees.

Were you so reconciled together as to live upon friendly terms?—Yes.

Who were present when the Maha Rajah acknowledged having put his seal to the bond?—No one.

Is it usual for the Maha Rajah to have no attendants?—Where he is private, or has business, he is certainly very often alone.

Did he make his acknowledgment more than once?—No.

Was it before or after you quarrelled?—It was before, two or three months.

Court. You say in your examination, "I am witness to no man:" then how came you to produce papers, to shew how you sign your name as witness?—*A.* I did not mean to no person whatsoever, but to no man upon this occasion.

Court to Interp. Would you, from the idiom of the language, understand him to say, "I am no witness to any man?"

Interp. His own words are, "to a man a witness I am not."—[The witness said this was the idiom of the language, and his common mode of expressions, and mentioned some instances of it.]

Court. Point out the words, "It is witnessed," which you say are not your hand-writing. [He points to the words wrote over his seal in the bond.] Do you mean to say, that the impression of that seal appearing upon the face of this bond is the impression of your seal?—*A.* I do; that is the place in which I usually write these words.

Court. Have you ever paid the 600 rupees to the estate of Bollakey Doss?—*A.* I have. About five or six months after I was appointed to Hidgelee I paid that money. I have got the acquittal.

Counsel for Prisoner. What did you do for a seal in the intermediate time between the time your seal was sent to Maha Rajah Nundocomar, and the time you had your new one? What seal did you make use of?—*A.* I had another seal made for me.

Where is that seal?—When I got my new title, I destroyed that seal, I defaced it.

Counsel for Crown. Is not that customary upon getting a new title?—*A.* It is at the option of the party. Some people keep their seal, some are afraid to do it.

Court. Have you any papers with the impression of that seal?—*A.* How should I have any papers? My house was twice beset by the servants of Mahomed Reza Cawn, and all my papers destroyed.

Was the second seal of the same size and characters as the first?—I do not remember.

How came it that you kept the papers you produced, as you said you lost all your papers?—I lost most of my papers. A little box was saved, and these three papers were in that box.

[Counsel for prisoner desires that these three papers may be deposited in Court——they were.]

Mr. *Farrer*, counsel for the prisoner, observed, that in England a prisoner, from his knowledge of the language, had an opportunity of hearing the evidence and making his own defence, which Maha Rajah Nundocomar was deprived of: he therefore thought it reasonable that his counsel should be permitted to make a defence for him.

Court. All the evidence has been given in a language the prisoner understands. Any defence he chuses to make will be interpreted to the Court.

The counsel also observed, that Commaul o Dien said the Maha Rajah had confessed to him that he had made use of his seal. He must therefore know that he had put his life in his power; was it likely then that he should quarrel with this man on so trifling an occasion, as the being his security?

Coja Petruse examined.

In what language do you chuse to be examined?—In Persian, Hindostanee, or Portuguese; but rather in Persian.

Are you acquainted with the last witness, Cum. o Dein?—I have known him upwards of 20 years.

Had you any particular conversation with Cummal o Dein, respecting a seal?—It was three or four years ago.

Tell the particulars of that conversation.—I will tell what I remember: One day I was sitting in my house, Cummal a'din Cawn came to me and said, "My seal is in the possession of Maha Rajah Nundocomar: I wanted to get it again, but could not." I then aked, why his seal was in the possession of Maha Rajah Nundocomar? He told me, "When Jaffier Ally Cawn was Nabob, he had desired my seal, that he might put it to a request, and get me some employment. I sent it to him in consequence; but he does not now return it to me, I will go to Mr. Barwell, and complain."—This was the conversation that passed between us that day; there was no other conversation. On another day there was, respecting the business of Hidgelee, where he said that Maha Rajah Nundocomar had agreed to stand his security. I said it was very well. Some days after, I asked how that business was settled? He answered, "Maha Rajah Nundocomar is not my security." I asked, how so? He said, "he demands three things from me: First, That I should give a writing, that I was a witness to the bond of Bollakey Doss, to which my seal is affixed:—Second, That I should represent receipts of money [Burramed, the Persian word] against Mr. Lushington: Third, That I should represent another Burramed against Bussunt Roy. I answered, I cannot sell my religion."

Were you acquainted with Bollakey Doss?—Yes, he used to come to my house.

Were you acquainted with his circumstances?—No; I do not know if he was in good or bad circumstances.

Jury. You have known Cummal a'din Cawn twenty years; what is his general character?—I never heard he had a bad name.

Has he a good name?—I never knew any thing bad of him; the world is apt to give good or bad names with very little reason: some speak well, some speak ill of him; I never knew any harm of him.

What is his general character?—Ten people speak well of him, to four who speak ill of him.

Is there not now, and has there not been for some time, a declared enmity between you and Maha Rajah Nundocomar?—He may have an enmity to me, but I do not know that he has; and I have none to him.

Moonshee Sudder o Dein sworn.

Are you acquainted with Cummal a Din Cawn?—Yes, I have known him for near 20 years.

Had you at any time any conversation abont his seal being affixed to any bond?—I had, in the month of Assar, Bengal year, 1179.

Do you recollect that conversation? if you do, tell it as well as you can.—He was conversing with me about the farm of Hedgelee; the circumstance of the security was mentioned. I said, Now you are a competitor for the farm of Hedgelee, you will undoubtedly be obliged to give security. You are always going backwards and forwards to the house of Maha Rajah Nundocomar: if you can get him to be your security, it will be better. He said, I shall probably not be able to get him to be my security, because he has affixed a seal of mine to a bond of Bollakey Doss; and he says to me, It is necessary for you to give evidence: but I have refused it, saying, I will not give up my religion. I asked him in what manner the seal had come into Maha Rajah Nundocomar's hands, and how he had fixed it? He answered, "I formerly sent him my seal to be fixed to an arzee to be presented by Maha Rajah Nundocomar to the Nabob Jaffier Ally Cawn, and that seal is with him; he now has affixed that seal to a paper of Bollakey Doss's without my knowledge. I do not therefore now desire him to stand my security."

Did any thing more pass that day?—I remember no more that day. He came to me upon another day, and said that Gungabissen would be his security. I then informed Mr. Barwell, that Gungabissen would be his security; but he answered that security would not be approved of by the council. Four or five days after, Commaul o Dien Cawn came to me again, and said that by intreaty he had persuaded Maha Rajah Nundocomar to be his security: of this also I informed Mr. Barwell, who said that if he would come and stand his security, it would do. Maha Rajah Nundocomar afterwards wrote a letter to council respecting his standing security; but whether he did or not, I cannot tell.

Had you any further conversation with Commaul o Dien?—I soon after went to Moorshedabad and Dacca: when I returned, Commaul o Dien said to me, "Maha Rajah Nundocomar has produced two papers; first, that I should give evidence about the seal of the bond of Bollakey Doss; second, about standing security for Hedgelee, and said, Take this and sign this, pointing to the two papers. I would not; and afterwards got Lane, Dutt and others, to be my securities."

Mohun Persaud returned with the papers.

Counsel for Pris. Have you brought all the letters of attorney uncancelled, relative to the estate of Bollakey Doss?—I have.

Have you any other instrument in writing, relative to the estate of Bollakey Doss, besides those you have produced?—I have his books.

Have you any other deed, relative to the estate of Bollakey Doss, executed to you by Gungabissen?—No other.

[The joint power of attorney to Mohun Persaud, Mr. Hamilton, and Mr. Lodge, is produced. Another to Mohun Persaud and John Love. Another to Mohun Persaud singly, dated 6th of May, 1775, which appeared to be a general power of attorney in English, without any mention of a commission of five per cent.]

Have you the promise of any sum of money, in case the Maha Rajah Nundocomar should be convicted on this trial?—None.

Mohun Persaud examined in chief.

How long were you acquainted with Bollakey Doss?—It is now 14 years since I first knew him.

How long has he been dead?—About six years.

Where did you first know him?—At Muxadavad.

When did he come to Calcutta?—Ten years ago.

What business did he follow?—That of a shroft.

Was he esteemed a man of property?—He was thought a rich man.

Had he a house at Benares?—He had a correspondence there.

Did he draw for any considerable sums upon that house?—For many sums. He drew one bill to lord Clive for a lack of rupees.

Was the bill paid?—Yes, the money was paid to Mr. Chamier, then resident at Benares.

Was that money ever repaid by lord Clive?—It was, five months afterwards, to Bollakey Doss in his life time.

Was there any account open between Maha Rajah Nundocomar and Bollakey Doss?—There are debits and credits between them in Bollakey Doss's books to a great amount.

Are the books now in being?—They are in my possession.

What language are the books wrote in?—In the Nagry language.

Court. The books must be produced, as we cannot receive parole evidence of their contents.

Mr. *Durham*, Counsel for the Crown, acquainted the Court that the books were then at hand, in consequence of a notice from the defendant to produce them, but added that, as they were in the Nagree character, he could not point out the entries to which he meant to have examined Mohun Persaud, and therefore declined making any use of them.

The books were then ordered to be kept in court, for the defendant's counsel to avail themselves of them if they should be able.

A Nagree Mounshy was called and sworn. He was ordered to translate a paper, which the counsel for the crown said was a general power of attorney to Mohun Persaud and Pudmon Doss, executed by Bollakey Doss before he went to Benares, of which the following is a translate.

"The Writing of Bollakey Doss.

"Before this, being in a bad state of health, for which reason deeming myself obliged to go to Benares, I have appointed my brother Mohun Persaud and Padmohun Doss my attornies to transact my business, and to receive and pay, and to answer and make any demands for me, and in paying and receiving whatever durbar expences may be incurred, after my several debts are collected; and whatever remains, after the disbursements of the durbar expences to be paid to whom it may be due; and of what is due after that I have written in a paper with my own hand, which you will pay.

Account whatever concerns Debts.

Maha Rajah Nundocomar - - -	10000
Doolub Ram Twarry on account of a bill in Muxadabad - - - -	3095
Gou Mullick - - - - - - - -	2707 8
On Roy Mohun Sing's house at Moorshedabad on account of a bill - - - - - - - - - -	3500
Golab Doss Palate - - - - -	1000
Raganaut Deu Shroft, one bill - -	506
Nurbaram on bill - - - - - -	850

Accounts.

My own Factory at Moorshedabad, rather more or less - - - -	10000
Poog Kissou Doss at Benares - -	5000
	36588 8

Roy hu Persaud's, what will remain due to him on settling his accounts.

Meer Cuttul Ally, whatever may appear.

Besides these, whatever small debts may appear in my papers.

Accounts, Credits.

The English Company at the Dacca Factory.	
Nabob Jassaraut Cawn at Dacca.	
Meer Amoo Sait at Haugly houses.	
One house at Calcutta.	
One house at Moorshedabad.	
Two houses at Patna, mortgaged for	3500
Caja Wanyes principal in China concern - - - - - - - - - -	2200
Balance of accounts of salt in partnership, Gobin dun Doss - - - -	1500
Dacca goods at Benares, valued at -	10000
Besides this, as by my papers may appear.	
To be received from Dr. Fullerton	
To be received from Mr. Moore	

This is wrote by guess; and, besides this, whatever may appear from my papers is true debts and credits. Besides this,

"The bond of Meer Askruff was sold to Mr. Bolts; the bond of the court of Cutcherru, as well as the kerranamah, or written agreement, which he gave in the name of Mohun Persaud. He took the seal in the name of Mr. Sparks the Vakeel: upon it Mr. Sparks filed a complaint in the Audaulet: you will appear and answer about it. Upon whatever other outstanding balances you shall recover, you shall receive five per cent. whatever contingent expences you may find it necessary to disburse in Calcutta, and papers you shall receive. I have appointed you my attorney for two years; whether I remain here or not, I have vested you with a power in my affairs, and in payment of money. I am not concerned in trade here.

"Dated nine days after the middle of Poos, in the year 1825. Witnessed Goodharru Persaud, Mookaus Bollakey Doss.—Witnessed Kissen Jewin Doss.—Witnessed Gherub Doss, Puttick, Dirane Dutt.

"Signed Kissen Jewin Doss.—Signed Bolaukee Doss, Doss Jevo.—Signed Kissen Jewan Doss."

To prove this letter of attorney,

Kissen Juan Doss was called in and sworn.

Court. Is that paper your writing?—*A.* It is my writing and witnessing, but I did not see it executed.

Is the name Kissen Juan Doss, at the bottom of the paper, written as a witness to the execution?—It is written by way of witness.

Of what?—As witness to the signature of Bollakey Doss.

How came you to put your name as a witness to a paper being signed by Bollakey Doss, if you did not see him sign it?—It was carried by Pudmohun Doss to Chandernagore, signed there by Bollakey Doss, and brought to me; and I knowing his hand-writing, witnessed it.

Did you witness it as seeing it signed, or as knowing his signature?—Seeing Bollakey Doss's signature to it, I set my name as a witness.

Keres Doss Pullock sworn.

Do you know this paper? [shewn letter of attorney.]—I do; it is a power of attorney from Bollakey Doss.

Did you see him sign it?—I was present, and saw Bollakey Doss sign his name.

Cross Examination.

Where was Bollakey Doss when you saw him sign his name to it?—At Calcutta.

What house?—His own house.

At what hour of the day?—I don't know.

Who else was present when it was executed?—Mohun Persaud, Pudmohun Doss, and Kissen Juan Doss. [Question repeated by the Court.] Mohun Persaud, Pudmohun Doss, and two or three other people. It is now two or three years ago; how can I remember?

[Mr. Elliot desired to explain Mr. Jackson's interpretation, and said that the witness did not say that Kissen Juan Doss was present, but that Kissen Juan Doss's signature was to it; and being again asked if Kissen Juan Doss was present, answered he was not.]

What did you mean to say about Kissen Juan Doss?—That his signature was to it.

Do you know his hand writing?—Yes.

Did you see him sign it?—Yes.

Where was he?—In Bollakey Doss's house.

Was it at the same time Bollakey Doss signed it?—It is six years; I do not recollect. I know Kissen Juan Doss signed it.

[Mr. Elliot observes he signed it once when he wrote it, and once as a witness.]

Couns. for Pris. You have sworn that Kissen Juan Doss signed it, then you must know when he signed it.—*A.* Kissen Juan Doss wrote the paper, and gave it into the hands of Bollakey Doss.

Did you see it?—Bollakey Doss gave it me, and desired me to sign it, which I accordingly did in Persian.

When did Bollakey Doss sign it, before or after you did?—Bollakey Doss having signed it, gave it to me to sign.

Did you see Kissen Juan Doss sign it?—I do not recollect.

Then how do you know that he signed it at all?—I know nothing about his signing it.

Kissen Juan Doss called again.

Court. When did you write this paper?—*A.* Having inspected the papers of Bollakey Doss which were at Calcutta, I from them drew up this paper.

But when?—It may be within two or three months of six years, I cannot speak with precision.

By whose directions and from what materials did you write it?—By the directions of Pudmohun Doss, he is my superior; having both of us inspected Bollackey Doss's papers, we drew up that paper.

Did you take what you wrote from the books, or from what Pudmohun Doss told you?—What I wrote I took from the books.

If the books are given you, can you point out the parts from whence you drew these papers?—I can.

Do you recollect how many books were in your possession?—Two books, called the Rôey Nâmah, and the Cotta.

Were those all the books?—Our books are drawn up from year to year; in those two books are the contents of this paper.

Were there only two books for each year?—When there was a great deal of business in the house, two books were filled up in a year; when not so much, two books might last for four years.

Do you recollect how many books you examined to make up this account?—I have been thirteen or fourteen years a servant, and during that time six books have been used.

How many books did you examine to make out that paper?—We had three books within the first five years, one called the Kussara, where every thing is entered fully; from thence it is entered fairer into the Rôey Nâmah, and from the Rôey Nâmah to the Cotta.

From what particular books did you take this paper?—All the books were in my possession; but what is contained in this paper, I extracted from one book, the Cotta. It is the custom to draw up papers from the Cotta; but the Rôey Nâmah and the Kussara being more full, merchants frequently refer to them in the drawing up of papers.

Are these all the books that contain Bollackey Doss's transactions?—There are two books more besides these three.

[The Court directed all the books to be brought.]

You said before there were six books; how comes it that there are only five now mentioned?—One, a Kussara, is lost; but the substance is extracted into the Cotta.

How came you to sign this paper twice?—One signing, which is in the body of the paper, is because it was wrote by me; the other as witnessing, having seen Bollakey Doss's signature to it.

What is the first date of those three books?—Nine years and something less than two months from this time; it is dated the 13th day of Savoon, Naugree stile, 1823. The three books depend upon each other, and begin with the same date.

What is the last date in the books?—The second of Maug, Nagree stile, 1827.

Do the books now produced, contain transactions prior, or subsequent to these?—There are two before.

[*Q. to Mr. Elliot.* How does the Nagree and Bengal year differ?—*A.* The Nagree year begins the first day of Choit; there are 750 years difference between the Nagree and Bengal; the present year is 1832 Nagree, and 1182 Bengal.]

Are these the books from which you made out the paper produced?—They are.

Are all the transactions between Bollakey Doss and Maha Rajah Nundocomar contained in those books?—All the business transacted with Maha Rajah Nundocomar at Calcutta is contained in those books, but what was transacted before he came to Calcutta is not.

Do all the six books you mentioned, relate to transactions at Calcutta?—Two books relate to the transactions at the army; he was at that time with the army at Mongheer: what was done there was entered in his books, those are the books not brought. Bollakey Doss remained with the Nabob: whatever he transacted there, is in those books; he had houses at Moorshedabad, and other places, and at each place there was a different set of books: whatever was transacted in those places, was in books there.

How came this account of the debits and credits of Bollakey Doss to be drawn up from three books, when he had separate books at different places?—What had his affairs elsewhere to do with a statement of his debts and credits at Calcutta?

Then this paper was only a statement of his debts and credits at Calcutta?—Yes.

[Upon inspection of the Persian bond in the indictment, it appeared to bear date in the month of Badoon, 1182, Bengal year, which answers to the Nagree year, 1823.]

Mr. *Driver* examined.

Court. Were those the books deposited in the mayor's court?—*A.* Yes.

What other books and papers were delivered from the Court?—I have no account of the books and papers delivered from the Court.

[The Court ordered Mr. Sealy, late register of the mayor's court, and now register on the equity side of the court, to attend with the other books and papers in his possession, belonging to the estate of Bollakey Doss.]

Saturday, June 10, 1775.

Mohun Persaud examined.

Have you the two books relating to Bollakey Doss's transactions with the army?—I do not know where the two books kept with the army are; I never saw them.

How came you to select those three books?—I brought these books, because they contain the Calcutta accounts.

Are these all the books and papers you received from Mr. Sealy?—There are many books in the chests. I had two chests of papers from Mr. Sealy; they may contain accounts: these three books were at my house; I have three other books at my own house, which may be brought.

[The Court ordered them to be brought immediately.]

Kissen Juan Doss examined.

Do you know what are become of the other two books?—They are at Mohun Persaud's house, he has taken them out of the chest.

When did he take them out of the chest?—Fifteen or twenty days, or perhaps a month ago.

Did you see him take them out of the chest?—I took them out of the chest, by Mohun Persaud's order, and carried them to his house.

Did he know what they were when he directed you to take them out?—He did know.

At what place did you take them out of the chest?—At Mr. Driver's house.

Who were present?—Five or six persons, whose names I do not know; Mr. Driver was not there.

How do you know that Mohun Persaud knew the contents of those books?—He told me to take out the books of the army, and of

Calcutta, out of the chests; he then took them home.

Q. Who kept the key of the chest?—*A.* [*by Mr. Driver.*] I think Mohun Persaud; it was given to Gungabissen, and I believe he gave it Mohun Persaud.

Kissen Juan Doss's examination continued.

Where are the accounts of the first year after Bollakey Doss's arrival at Calcutta?—They are in the books of the army accounts.

How comes it so?—There was no harm in that, as the balance was put into the new books.

Does that balance contain a balance of the Calcutta accounts only, or of the Calcutta and army accounts?—Of all the accounts; when one year ended, the balance was carried to the next year's accounts.*

June 10, 1775.

Mohun Persaud examined.

When did Bollakey Doss die?—In the month of Assar, Nagree year, 1826, or June, 1769.

Did Bollakey Doss make any will?—He left a power of attorney.

Court. The Probate is the only proper evidence.

The Probate of the Will, of which the following is a Translate, was read:

"By the Mayor's Court at Calcutta, at Fort William in Bengal.

"(L. S.)

"II. MAY, *Reg.*

"Be it known to all men by these presents, that on the 8th day of September last, 1769, the Will of Bollakey Doss, deceased, a copy whereof is hereunto annexed, was exhibited and proved before the court; and administration of all and singular the goods, chattels, and credits of the said deceased, in any wise belonging, was, and is hereby committed to Gungabissen, one of the executors in the said Will named, being first sworn, well and truly to administer the same, and to pay the lawful debts of the deceased, and the legacies in the said Will contained, as far as the goods, chattels, and credits of the said deceased shall extend, and the law oblige; and also to exhibit into this court a true and perfect inventory of all the said goods, chattels, and credits, on or before six months from this day; and to render into this court a true and just account of all the effects of the said deceased, on or before the 24th day of October, which will be in the year of our Lord, 1770. Dated the day, month, year and place above mentioned.

"Signed,

"DAVID KILLICAN, Mayor.

"CORNELIUS GOODWIN, Alderman."

What do you know concerning the transactions between Bullakey Doss and Maha Rajah Nundocomar?—The accounts of them are in the Cotta, Nagree year 1825, or 1768 Christian æra.

What do you know of Maha Rajah Nundocomar's transactions with Pudmohun Doss, and Maha Rajah Nundocomar's with Bollakey Doss in his lifetime?—About five months after the death of Bollakey Doss, Pudmohun Doss and Gungabissen obtained the bonds from the Company, on the account of Bollakey Doss, and carried them to Maha Rajah Nundocomar. In the evening of that day, Pudmohun Doss informed me of that circumstance. I then shewed Gungabissen the power of attorney granted to me, and which I had before shewn to him, in order to prove to him that 10,000 rupees only were due to Maha Rajah Nundocomar; and the day afterwards, I went to the house of Maha Rajah Nundocomar. He desired me to sit down, and said, The Company's bonds are received; some durbar expences will arise on them. I answered, I am an attorney; to whom ever money is paid, their names must be written down, and filed in the audaulet: to which he answered, What is that to you? I will do it. I then went to my own house: four or five days after, I returned to Maha Rajah Nundocomar: he asked me if Pudmohun Doss had spoken any words to me; I answered, No: he then said, I and Pudmohun Doss have drawn out (teekkeeah) three papers; the amount of one is 48,021 sicca rupees; the amount of the other two together is 35,000 arcot rupees. I remained silent, and some little time after went home. Fourteen or fifteen days after, Pudmohun Doss said to me, Come along with me to the house of Maha Rajah, and take the Company's bonds, which he has received. I with Gungabissen and Pudmohun Doss accordingly went thither; it was night time, the lamps were burning, and the Maha Rajah was sitting above stairs: we sat down by him, and Maha Rajah called for his escrutore and opened it, and took out all the papers that were contained in it, and spread them before him: he cancelled (by tearing the top) a Nagree bond for 10,000 rupees; he also produced the potta of the house and gave the cancelled bond and the potta into the hands of Gungabissen; he likewise tore the heads of

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* It being now eleven o'clock, the Court made no adjournment, but one of the judges at least always remaining in the court, or in a room adjoining, and open to the court, the jury retired to another adjoining room, under the charge of the sheriff's officers, to take refreshment and to sleep. The Court met the next day about eight in the morning, and proceeded on the cause; the like was done at the end of each day, and at other times in the trial, when refreshment was necessary.——[See the Cases of Hardy, and Horne Tooke, A. D. 1794; of Stone, A. D. 1796.] The repetition of the date *is in the* Original.

three Persian papers, and said to Gungabissen, Do you take these.

[Bond shewn him.]

Is this one of the papers he cancelled?—I did not then know what the papers were, I cannot read Persian; this is one of them. I have since informed myself of the circumstance: at that time I could not tell, I now know that it is for certain. After having torn the tops of the papers Maha Rajah Nundocomar offered them to Gungabissen, who said, Give them to Pudmohun Doss. Maha Rajah then looked at me sideway angrily, and turning to Pudmohun Doss, said, Do you take the papers. Pudmohun Doss took them; Pudmohun Doss and Maha Rajah kept counting by their memories some sums of money on their fingers, but wrote nothing down. Maha Rajah said, I will take eight bonds: having separated the other seven, he put them into the hands of Pudmohun Doss; there were originally nineteen bonds; the governor and council took two, on account of commission due to one Michael; the other seventeen were given to Maha Rajah. When he gave the seven bonds to Pudmohun Doss, he said, You have before taken two: he answered, I have. Maha Rajah said to Pudmohun Doss, Indorse the eight bonds I have taken: Pudmohun Doss answered, I will get them indorsed by Kissen Juan Doss, the Gomastah of Bollakey Doss. Maha Rajah put the eight bonds into the hands of Choiton Naut Podar. I, Pudmohun Doss, Gungabissen, and Choiton Naut, (into whose hands the bonds were put) went out together, and sat down in my bhaita khauna (sitting room) Pudmohun Doss sent a man to call Kissen Juan Doss. Kissen Juan Doss arriving, indorsed the eight bonds, and Pudmohun Doss gave them to Choiton Naut Podar, who carried them away.

Do you know of any receipt or acknowledgment for those bonds?—I was at that time confined in the court of Cutcherry: he never wrote, or signed any receipt before me. Pudmohun Doss took a receipt from him, but I do not know when he got it. [Paper shewn to witness, marked F.] This is the receipt: I know it, because I took a copy out of the mayor's court.

Are you sure this is the original?—I do not read Persian; the Monshy took the copy by my directions.

Do you know of any further transactions?—I know a deal more of Bollakey Doss's business, but not of these eight bonds.

Did any conversation pass between you and Commaul O'Dien Ally Cawn about this transaction?—Some money was due from Commaul O'Dien on account of Bollakey Doss; I did not know what the amount was. Commaul O'Dien said it was about 600 rupees: I then said, Pay it to me: the demand was made three or four different times. Commaul O'Dien one day came to me at my house, and said, I cannot pay this money, I have none. I then shewed him copies of the different papers I had taken out of the court, and desired him to look at them: he read them, and having read them, said, This is the impression of my seal: when this paper (ikkut) was written I do not know; the name on the seal is mine; where, or when the paper was written I do not know, I am not a witness to it. About four, five, or six months afterwards, Commaul O'Dien came to me and said, Maha Rajah Nundocomar is security to government for me, for the pergunnah of Hidgellee: he says to me, Do three things, and I will be and remain your security: with respect to the bond of Bollakey Doss say that you are a witness, and having sworn before the gentlemen of the adawlut give evidence of it: write out also an account of receipts of money (Burrâmud) against Mr. Lushington: write out likewise a Burrâmud against Bassent Roy. Commaul O'Dien told me, he then answered that he could not speak away his religion: if I can get any one else to stand my security, I will give up all thoughts of him. I at that time sent for Mahomed Allum, who lives three doors from the house I inhabited, in a house belonging to me: he came to me, and I told him all the Maha Rajah had said to Commaul O'Dien, and likewise told him Commaul O'Dien's answer to Maha Rajah Nundocomar; I likewise said to him——

Court. What you said to Mahommed Allum is no evidence.

Do you know if Bollakey Doss could write Persian?—He neither could read it nor write it, nor did he understand it well.

Did you ever see him execute bonds or other papers?—I have seen him. Sometimes he wrote the bonds himself in Nagree, sometimes in Bengal, but always signed them with his own hand: he did not write the body of the bond with his own hand, for he could not write Bengal.

How did he execute bonds?—He always put his sign manual to a bond.

Court to Mr. Elliot. What word does he use for bond?—*Immasook*, which is a Persian word; it is *khut* in the Nagree language.

To Witness. Did he put any thing besides his sign manual?—He put his seal to letters; I never heard of his putting his seal to obligatory papers, on which money was to be received.

What is the usual manner of Nagree merchants executing bonds; do they put their sign manual, or seal?—At Agrah, Delhy, Lahore, Guzerat and Surat, it is the custom of Shroffs to get the body of the bond wrote by their Gomastahs, and they sign it with their own hands.

How do Nagree merchants and Shroffs in Calcutta execute bonds?—Shroffs in Calcutta sign a bond, and do not fix any seal.

Cross Examination.

Where does Gungabissen now live?—In my house.

How long has he lived there?—It may be two years and a half, or three years.

What age is he, and in what state of health?—I do not know his age exactly, he is a young man.

Has he any particular infirmity you know of?—He has been sick something above two years; he was at first very ill, then got better; he is now worse.

How long is it since he relapsed?—How can I tell when he became worse? He is not a dying man, but very ill.

How do you know that he has got worse?—Because he is in my house, I see him every day.

When did he get better?—I cannot ascertain that date so exactly to commit it to writing.

I do not ask the exact date; will you tell it as near as you can?—Some days he has violent purgings, at other times he gets better; it sometimes continues upon him for ten days, more or less.

Court. Give a positive answer to the question?—*A.* I cannot tell.

How was he yesterday, how is he to-day?—I do not know, I was here all day.

Would not you have heard if he had been so ill as not to be able to come out?—I heard nothing of him last night, he has not for a long time been in a state able to go out of the house; some time ago he went twice to the court house to sign papers.

Can you particularize the time?—About a month or two months ago, I believe; I cannot tell exactly.

Has he ever been out since he was last at the court house?—He has never been out of his house since the time he came to the court house to sign the papers.

Has he since then been so sick as not to be able to go out?—He is so weak that he has been obliged to be held up by people when he came out of the house.

Can any person that wanted to see him have access since he went to the court house?—Any person having business has access, several have seen him since.

Who has seen him?—I do not put a watch over him; how can I tell who has seen him?

Mention one that has seen him?—Kissen Juan Doss, Baul Govin, Kirib Doss Pattuck.

Do you know any more?—A great many people have seen him besides; any body that wishes to see him may.

Court. Name some others?—Monic Chud Baboo, the son of Huzzymull, Jaggernait Dugonaut Duboo.

The counsel for the prisoner, suggesting that Gungabissen was under confinement, and not so ill as alledged by the witness, the court requested Dr. Williams and Dr. Stark to examine Gungabissen, and report to the court whether he could safely come out and give evidence, or not.

Q. You said Bollakey Doss drew a draught on Benares in favour of lord Clive for a lack of rupees. Is that transaction in those books?—*A.* It is.

Court. How do you know it was paid?—It appears in the books, a receipt was transmitted from Benares, and lord Clive paid the money.

Can you find it out?—I can.

Mohun Persaud and Kissen Juan Doss examined the books, and found the following entry.

Kissen Juan Doss. The particular account of this transaction is in the Rosenamma.

ENTRY *read.*

"The cotta written in the name of the Dewan Nabkissen.

		Rs.	
Debit side, page 403	. . . .	20,000	0
420	. . . .	100,000	0
428	. . . .	7,000	0
Making in the whole	. .	127,000	0
Credit side, page 427	. . . .	33,517	8
429	. . . .	93,482	8
		127,000	0

Court. Give a translation of the Rosenamma, page 424.

"In the name of the Dewan Nobkissen, 14 Maug, 1822, (Saturday 1st of August) 20,000 0

Particulars as follows

Paid by Dukee Ramseil . . 14,600 0

10,000 of which was paid on the 21st of Fagun, and 4,600 on the 24th day of the same month."

Court. Look whether there is any mention of the lack of rupees of Banaris in this page.

Mr. *Elliot.* We are not now upon the lack, but upon the 20,000 rupees.

Dr. Williams and Dr. Stark returned from examining Gungabissen, and inform the court he was so ill that he could not possibly attend.

Kissen Juan Doss continues reading from the Rosenamma.

"Page 424. In the name of the Dewan Nabkissen, a letter of credit (sefaurush) has been written upon Bridjoo Mohun Doss and Curhick Doss, on account of lord Clive, and paid to Mr. Chamier at Banaris, for which a receipt was given on the 5th day of Chyte, one lack of sicca haulee Banaris rupees."

Mohun Persaud cross-examined.

Whose property was the money in that account? was it belonging to Bollakey Doss, or the house at Banaris?—How should I know? It will appear in the books.

Has any notice been served upon you by Mr. Jarut?—Yes.

Who were the witnesses to the bond you

say is a false one?—Mahomed Cummal Selabut, and Matob Roy, I believe.

Do you know or can you give any account of Matob Roy?—I never knew, saw, nor heard of Matob Roy; I may have seen many people of that name, that I do not know.

Do you know Selabbut?—He was of the same cast with me, I knew him well.

Where is he?—Dead.

Where did he die?—In Calcutta, in the house of Bollakey Doss. Bollakey Doss was then living.

How long before Bollakey Doss's death?—Bollakey Doss died in 1826, or 1769. My house and the house of Bollakey Doss are near.

How long before the death of Bollakey Doss did Selabut die?—I cannot tell exactly, he died some time in the year 1823 of Nagree, 1767.

What was Selabut?—He was a Vakeel of Bollakey Doss's. I knew him well, he came to Calcutta before Bollakey Doss: he was an Agra Walla; I never eat rice with him, nor he with me; he would eat rice which my servants dressed.

What was Selabut's usual method of attesting papers as a witness?—I have seen him frequently with my own eyes take off his seal, wet two or three papers, and fix his seal to them.

Was not Selabut bred to some kind of business with Bollakey Doss?—He was Vakeel of Bollakey Doss, and executed whatever business he ordered.

Did he write Nagree?—I never saw him; he wrote Persian in my presence: he has also fixed his Persian seal in my presence; I have now in my possession writings of his.

Were Bollakey Doss and Selabut of the same cast?—They were both Agra Wallas, but I do not know if of the same cast: by Agra, I mean the place he came from.

Court. Was he a Nagree merchant or shroff?—*A.* I do not know.

When did you know, according to your own account; or when did you suspect this a false bond?—After the bond had been given by Maha Rajah Nundocomar to Pudmohun Doss, and I had read it, then I imagined it to be forged.

Was that the first time?—From the day on which Maha Rajah Nundocomar mentioned to me Durbar charges, some doubts arose in my mind.

When was it that you first heard mention of the bond?—I never heard of it till Pudmohun Doss shewed it me. Maha Rajah Nundocomar had mentioned a circumstance of three papers, but had not specified this bond.

What were those doubts you mention?—That the Durbar charges were not just and fairly charged, because I knew Mr. Verelst, Mr. Cartier, and Mr. Russel had not received any.

Was any mention made of their names?—Their names were not mentioned, but Mr. Verelst was governor, and Mr. Cartier was second.

When did you first hear of Durbar expences?—When Pudmohun Doss had told me of the Company's bonds, I went the next day to Maha Rajah Nundocomar, and then heard of the Durbar expences. I heard it before from Pudmohun Doss, who had mentioned some circumstances concerning Gocul, Gosaul, and Nobkissen; and he said, You must prepare a jewel, and then the gentlemen will pay you your money. I do not remember having heard any thing else concerning Durbar expences, before I heard it from Maha Rajah Nundocomar.

Who were present when those papers were delivered?—I, Gungabissen, Pudmohun Doss, and the Maha Rajah. Choitanaut came in to receive the bonds; a person of the name of Goossud, by the orders of Maha Rajah, brought a little escrutore. I saw no one else.

Can you take upon you to say there were no one else?—How can I say there was no one else? I saw no one else.

If there had been any one else, should you have seen him?—We sat in the dhalan (hall): there was no one present but those that had been mentioned. When Goossud came in, and had delivered the escrutore, Maha Rajah sent him away.

Were you three, Gungabissen, Pudmohun Doss, and you, ever at Maha Rajah Nundocomar's house at any other time?—Frequently, together and separate.

Mention the time.—I used to go every day, I cannot mention any particular period when we were all together.

Can you tell me if at any other time papers were produced?—I never saw him at any other time take or give papers relative to Bollakey Doss's estate.

When you saw the papers at Maha Rajah Nundocomar's, you knew not what they were; how come you now to know the bond to be one of them?—Maha Rajah Nundocomar put this paper in the hand of Pudmohun Doss: he tore it at the top; I did not read it at that time; Pudmohun Doss afterwards brought it to me, and explained it to me as one of the three papers.

Court. Are there any other circumstances by which you know it?—*A.* There is also this circumstance, that I knew Bollakey Doss did not owe Maha Rajah more than 10,000 rupees.

Did you ever see Bollakey Doss execute any bond?—I never did: was I to see his handwriting, I should know it.

[Question repeated.]—I saw him execute a bond for 1,000 rupees.

Court. Were you intimate with Bollakey Doss at the time of the wars between Jaffier Ally Cawn, and Cossim Ally Cawn?—*A.* I have been acquainted with Bollakey Doss 14 or 15 years: we corresponded then.

Did you ever hear of any jewels belonging to Maha Rajah Nundocomar, being deposited

with Bollakey Doss?—I never did. I was together with Nobkissen when he introduced Bollakey Doss to lord Clive.

Have you discovered any material transaction of Bollakey Doss, except this bond, which he did not tell you of?—Bollakey Doss used not to inform me of all he did.

Do you recollect being at Mr. Driver's house some time ago, and taking away some books of Bollakey Doss's?—I took them, [pointing to the books produced in court.]

Who was present when you took them?—Kissen Juan Doss and Mr. Driver's sircar.

Did Kissen Juan Doss take them from the chest, or did you take them?—He did.

Did you tell him the books by name?—I desired him to look into the books respecting an account of Rogoo, and also into the Calcutta books.

Did you ask for any other books?—I did not.

Did you not ask for the army books?—I did not particularly mention the army books, but desired him to look for the books of Rogoo's accounts.

Are the books concerning Rogoo the army books?—I do not know whether it was entered in the army books or no.

Do you now know, whether Rogoo's accounts is in the army books or no?—I have not looked into the books.

Don't you know there are books called army books?—I do not know.

Do you know whether, among Bollakey Doss's books, there are any that relate to transactions at the army?—I had not seen the books before, when Kissen Juan Doss brought them to my house, and examined them.

[The Bond produced.]

Counsel for the Crown. Is this one of the three papers you saw Maha Rajah Nundocomar tear, and deliver into the hands of Pudmohun Doss?—*A.* Yes.

Was there money paid on this bond?—The Company's bonds were thereupon indorsed to Maha Rajah Nundocomar.

Did Maha Rajah Nundocomar, before this transaction, before the three met, when the bond was delivered up, ever mention to you his having such a bond?—Maha Rajah Nundocomar told me, that he and Pudmohun Doss had drawn up these three papers, one of the papers for 48,021 rupees, and two papers for 35,000 rupees. Gungabissen was not present.

Court. Where was the bond found?—It was deposited in the mayor's court, as part of the estate of Bollakey Doss.

When Maha Rajah Nundocomar told you that he had drawn up three papers, was Gungabissen present?—He was not.

Mr. *Sealy*, late Register of the Mayor's Court, called and sworn.

Court. Look at that paper, [Bond shewn him] was it among the papers belonging to Bollakey Doss?—*A.* It was.

Was it torn then?—It was.

Are you enough acquainted with money transaction in this country, to know whether that is the customary way of cancelling bonds?—I am not.

Was this paper delivered with other papers belonging to the estate?—I do not know. I was not then Register; it was one of the papers that was delivered to me as belonging to the estate of Bollakey Doss.

Rajah Nobkissen examined.

Do you know whose seal this is? [Paper produced.]—The name upon the seal is Maha Rajah Nundocomar. It appears to be his seal, I cannot tell who affixed it.

The Paper, of which the following is a translate, read by Mr. Elliot.

"[Nundocomar Bahader Maha Rajah.]

"Formerly the jewels belonging to me were deposited with Seat Bollakee Doss. In the Bengal year, 1172, he gave me a bond as the value thereof, for the sum of rupees 48,021, and a premium. I having delivered over the said bond to Gungabissen, who is the nephew and manager of the business of the aforesaid Seat; he paid all together the sum of current rupees 69,030, in bonds of the English Company, which is the amount of my demand, as principal, premium, and batta.

"Written on the 4th of Maug, in the Bengal year, 1176."

Court. Is the affixing a seal, the manner in this country of authenticating papers?—*A.* There are three sorts of customs in this country. First, for money matters, merchants among themselves sign and witness, but do not seal; that is, the Bengal and Calcutta merchants. Second. Among Mogul Mussulmen, who know no character but Persian, they write 'Alaubd,' and set their seals. Third. Government affairs pass by seal, without sign manual of any kind.

Is the application of a seal sufficient to such a paper as that? [Shewn Receipt, letter F.]—As one might know Nagree, and the other Persian and Bengal, such a seal might be sufficient. This paper being only a receipt, a seal is sufficient. The word 'Alaubd' is not needful in this case.

Is it necessary that such a writing as this be confirmed by witness?—It is not necessary. [Translate of bond exhibit A. read.]

The Prisoner desired he might ask Rajah Nobkissen a question.

Court. Let him consult his counsel before he ask the question.

The question being over-heard by Nobkissen, he said, "Maha Rajah Nundocomar had better not ask me that question." Upon which Nundocomar declined asking the question.

Court to Jury. You must receive no prejudice from this; you must forget the conver-

sation, and judge only by the evidence at the bar.

The jury said they would only judge by the evidence.

How long did you know Bollakey Doss before his death?---I believe, three or four years, when lord Clive was governor.

What was Bollakey Doss's business?---He was not then in any business in Calcutta.

Were you intimate with him?—I was very well acquainted with him.

What was his general character?---A very honest man.

Did you know Pudmohun Doss?---I did.

Do you know any thing of Bollakey Doss's circumstances?—He was reckoned a monied man.

Are you acquainted with Bollakey Doss's manner of executing bonds?---I know nothing about it.

Moonshey Sudder O'Dien examined.

Did you know that seal? [Receipt exhibit F. produced.]—The name of Maha Rajah Nundocomar, Bahader, is to the seal. I frequently, when I was Moonshey to Mr. Graham at Burdwan, had occasion to see the Rajah's seal; this appears to be his: as an oath has been taken, I have only to say, that it appears to me in my mind to be the same: I believe it to be the seal of Maha Rajah Nundocomar.

Is the application of the seal alone, without the word 'Alaubd,' deemed sufficient authentication to such a paper?---It is proper that a receipt should be signed.

You are asked if the seal alone is sufficient authentication. What is the custom? Is it generally esteemed sufficient in a country court of justice?—This is what I think; a man of rank, whose seal is well known in the country, and is known to above ten people, it is a sufficient authentication for such a person as this. If the chief person of the court is not satisfied, he can call witnesses and swear the person himself.

Have you sat as a judge in a country court?—I was once a Durongah of a Cutcherry at Burdwan, under Mr. Graham.

Would you, as a judge of the court of Audaulet, admit the authenticity of such a paper, supposing the identity of the seal to be acknowledged, without the assurance of the person, that he had sealed it himself?---I would call witnesses if it was denied; I would call witnesses and oaths.

To what purpose?---I would enter into a regular trial, to prove if his seal had not been stolen by his servants, or whether it was a forged seal.

Suboot Pottack examined.

Were you acquainted with one Sielabut?---I remained in the same place with him, from the time I was ten years old, till he died. When we were at Delhi, our houses were separated; at Mongheer and Calcutta we lived together in the same house: Sielabut was Vakeel to Bollakee Doss, and wrote Persian for him.

Have you seen him write?---I always used to see him write.

Do you know his hand writing?---Perfectly well.

What name is upon this bond?---That of Sielabut, Vakeel to Bullakee Doss.

Is this the hand writing of Sielabut?---No.

Can you take upon you positively to swear it is not his hand-writing?---I can swear it.

On what grounds are you so positive?---I am well acquainted with the form of the letters of the hand writing in my possession.

How did Sielabut use to attest Persian writings?---He used to witness and put his seal under it.

What do you mean by that expression?—Writing the word 'witness,' and putting his seal under it.

Have you seen him attest any paper?---I have seen him very often.

Did he write better or worse than the paper shewn you?---This is a better hand writing than Sielabut's.

Did he write a good or bad hand?—He wrote rather a bad hand.

Whose hand writing is that? [A Paper produced.]—The hand writing of Sielabut.

Do you discover Sielabut's hand writing among these papers? If you do, separate them from the rest. [More papers produced.]—There is not any of Sielabut's hand writing among them.

Is there any of his hand-writing among these? [More papers produced.] Those three papers have his hand-writing. [The three papers were put aside, and marked G.]

Have you any more papers of Sielabut's hand-writing?—I have none.

When did Sielabut die?—Six years and three months ago.

Where did he die?—In an out-house near the dwelling-house of Bollakey Doss. It was a Bearer's house.

Were you present when he did?—I was present.

Cross Examination.

Where were you born?—At Delhi.

When did you first leave Delhi?—About nine years ago.

Where was Sielabut born?—Sielabut was an older man than me when he died; I cannot tell where he was born.

What cast was Sielabut?—He was an Agra Walla, and a Banyan.

What cast are you?—A Bramin.

Are there any Bramins among the Agra Wallas?—They are all Banyans.

Where is Agra?—Agra is a village, or town, in the pergunnah of Hussaul.

When did you first see Sielabut?—I saw him first at Delhi, but do not recollect when.

How old were you when you first saw Sielabut?—Ten years old..

When you first saw Sielabut, upon what bu-

siness did he come to Delhi?—He acted at that time as Vakeel to the King's Wolocky, cavalry.

In whose service are you now?—I am in no body's service. I carry on a little business of my own.

Upon what occasion came you to live with Sielabut?—When Sielabut served the Wollaky troops, I was a servant to him.

What service could you do him at that age?—Persons of five years of age enter into the service of merchants; I was ten years of age; I did whatever he bid me, assisted him in his trade, went of messages, and gave answers.

How long did Sielabut remain at Delhi?—He left Delhi with Mynhier O'Dowlah, into whose service he entered.

Where was that?—I do not exactly remember, it may be about 14 years ago.

Did you leave Delhi with him?—I did not go away with him: my father did.

What employ had your father under him?—He did not serve Sillabut, he was above being in his service,

How came you first to Calcutta?—I came to Sielabut.

How came your father above serving Sillabut, when you did?—I served him in a particular manner: he left much business under me.

When Sielabut executed any paper of his own, did he put his seal, or signature?—When he executed deeds of his own, he began, "I who am Sielabut," and fixed his seal to the deed.

Did you ever see Sielabut sign or attest any paper instrument?—When I and Sielabut went to Jaggernaut, Bollakey Doss paid him some money, for which he gave a receipt; he put a seal to it.

How old are you now?—Thirty nine years.

How long did you live with Sielabut at Delhi?—I was with him when he was Vakeel to the royal cavalry, to the Nabob Buckah.

At what different places were you with him?—I was with him at Delhi, at Banneehenvonput, which is the jaghire of Naggeer Pollywn: I was with him in the Nabob Sujah al Dowlah's army at Buxar. Sillabut came to Calcutta with Bollakey Doss, and I went home: he went from Calcutta to Jaggernaut, from whence he returned to Calcutta, where he died.

Have you been with him at any other places?—I have been at other places with him on a journey: I have lived with him at the places I have mentioned, but no other.

Court. Were you with him at Mongheer?—*A.* I was not at Mongheer; nor was he there, that I knew of.

How came you to know the situation of this house at Mongheer?—I know nothing of his house at Mongheer, nor have I said any thing about it.

How come you to say you lived at Mongheer?—I did not give such evidence, that I lived at Mongheer.

[Mr. Jackson observed, that the witness made use of the word *lascar* (camp) and Calcutta; which Mr. Elliot interpreted, Calcutta and Mongheer.]

Mr. *Elliot.* I have frequently interpreted army and Mongheer as synonymous, because the army was there.

Have you understood this witness perfectly?—Mr. *E.* I have not all through understood this witness so easily as the others, though by a repetition of the questions I perfectly understand what I interpret. His Moors is higher than what I am used to.

Mr. *Jackson.* I perfectly understand this man; I learnt my Moors by residing two years high in the country. I did not so perfectly understand Kerree Doss Pottack, the father, from whom I interpreted last night.

Court (to Mr. Jebb.) We are informed you say, that the witness Keree Doss Pottack did not understand the interpreter, Mr. Jackson.—*A.* Keree Doss Pottack told me last night, when he went from the bar, that he was confused: I told Mr. Driver, that he did not understand the interpreter: I collected this from what the witness told me, not from my own observation.

[The Counsel for the Crown attempted to call Keree Doss Pottack to the matters deposed by Subboh Pottack; which was opposed by the Counsel for the Prisoner; and Mr. Justice Chambers being of opinion, that the contradiction upon his evidence was such that he ought not to be believed upon his oath, the Court refused to suffer him to be called.]

Rajah Nobkissen examined.

Did you know Sillabut?—Yes; he was a Vakeel and Munshy of Bollakey Doss.

Are you acquainted with his hand-writing?—I am; I have seen him write many times.

[Bond shewn him.]

Is this the hand-writing of Sillabut?—The words "Sillabut, Vakeel of Bollakey Doss," are not of his hand-writing; it is not his common writing: I have seen several papers of his hand-writing.

Can you take upon you to swear it is not his hand-writing?—Sillabut has wrote several letters to me and lord Clive, and has wrote several things before me: this is not the kind of writing I have seen him write; but God knows whether it is his hand-writing or not.

What is your opinion about it?—The prisoner is a Bramin; I am a Coit; it may hurt my religion: it is not a trifling matter; the life of a Bramin is at stake.

Do you, or do you not, think this the hand-writing of Sillabut? Remember, you are upon your oath, to tell the truth, and the whole truth.—I cannot tell what is upon my mind on this occasion about it.

Why not?—This concerns the life of a Bramin. I don't chuse to say what is in my mind about it.

Did Sillabut write a better, or worse, hand than this?—The letters on this paper are well formed: those of Sillabut are not badly formed, but are not so good as these. [The papers are

shewn him which were shewn to the former witness, for the purpose of selecting those which were the hand-writing of Sillabut: he immediately fixes on the three papers before proved to be the hand-writing of Sillabut.]

Witness. These three are the hand-writing of Sillabut; I can find no other papers of his writing among these.

Did you ever see these papers before?—Never in my life: I never was in such a cause: I would rather lose a great sum of money than be in such a cause.

Hussein Ally examined.

In whose service are you?—I am a servant to Commaul O'dien Ally Cawn.

How long have you been his servant?—Two years this last time: I was formerly in his service, and quitted it, and returned to him again.

While you were in his service did you ever receive directions to send a seal to Maha Rajah Nundocomar?—I had directions: it was the seal of Commaul O'Dien Cawn; but he was not at that time called Commaul O'Dien Cawn, but Mahomed Commaul.

Did you send the seal in consequence of those directions?—I packed the seal in a bag.

Was there any thing put in the bag besides it?—I sewed up the bag with my own hand: in it I put three gold moheers and eight rupees, besides the seal; and delivered it to Commaul o Dien Cawn, who said he intended to send it to Maha Rajah Nundocomar.

Did you see the bag afterwards?—Never since.

Have you seen the seal since?—I have not.

Did you send it away, or did Cummaul o Dien Cawn send it?—Cummaul o dien sent it; I did not.

Cross-Examination.

Do you know Commal o Dien's Munshy?—I do.

How is he called?—Cordan Nowas Cawn.

Do you know of his being applied to to give evidence in any cause?—Yes; Cummaul o dien Cawn applied to him to give evidence in the affair of Maha Rajah Nundocomar and Mr. Fowke about the arzee.

Did he use any inducement to persuade him; and what?—I know nothing of any.

What passed on that occasion, to your knowledge?—I do not know of any thing that passed.

How do you know the Moonshy was applied to?—I know that he was applied to, because he actually went to the house of the Lord Chief Justice, to give evidence; I have heard from many people.

Do you know of Cummaul o dien Cawn's offering money to Cordar Nowas, his Munshy, to induce him to give evidence?—I do not know of any such offer.

Do you know one Mahomed Wassen, a seal cutter?—I do.

Do you know of his having been applied to to give evidence?—I do not know of his having been applied to; he asked him if he had cut a seal, of which he shewed him an impression, and said, Tell the truth and do not throw your religion unto the wind. This is all I know.

In what capacity did you serve Commaul o Dein Cawn?—I am his Consumma.

Kissen Juan Doss examined.

How long did you serve Bollakey Doss?—It is twelve or thirteen years since I went into his service.

In what capacity did you serve him?—It was my particular province to write the papers.

Were you well acquainted with all Bollakey Doss's business?—Bollakey Doss had many servants, of all whom Pudmohun Doss was best acquainted with his affairs; he was the chief. What papers I wrote, I wrote them understanding them.

What was your particular business under Bollakey Doss?—To write papers.

Did you write in the books?—Pudmohun Doss and I wrote in them; he was the chief; what I wrote I understand; other people also wrote in them.

Did you read what was written by other clerks?—I did.

Did you ever know of any debts due from Bollakey Doss to Maha Rajah Nundocomar?—I knew it from Pudmohun Doss only.

Did you know of any bond to Maha Rajah Nundocomar from Bollakey Doss, of your own knowledge?—I knew of one for ten thousand rupees.

Did you ever hear of any jewels of Maha Rajah Nundocomar's being in Bollakey Doss's possession?—I did not hear it from Bollakey Doss.

Did you write the bond for 10,000 rupees?—No; Mohun Persaud's brother, Iwallatte Persaud, wrote it at Chandernagore. I have seen the bond here.

Cross-Examination.

How many books of Bollakey Doss have you seen here?—Eight, [eight books produced] five of which are of consequence.

Do these five contain all the accounts of business which came within your knowledge and charge?—Yes.

Had not Bollakey Doss, besides his business account, many of a private nature which came into these books?—There were other private accounts contained in books which were stolen or destroyed from Bollakey Doss, when we were at Buxar with the army. This will appear by the books produced; you must not take it from my mouth: I never saw those books that were stole; balances from those books are entered in the books on the table.

He turns to the books and reads this entry.

"The Jumma of Dean Chund Ruttingar, as entered in the private cottah of Bollakey Doss.

"Your Jumma in the private accounts of Bollakee Doss. Those papers were plundered

at the battle of Buxar; therefore Rutton Chund having drawn out your accounts, and having extracted your accounts from your books, according to orders, an entry is made of them here."

Witness. There is an account in the Rosenamma here produced, of the contents of all the papers and books that were stolen.

June 11, 1775.

Mr. Justice Le Maistre having suggested, that Dr. Williams had informed him that Gungabissen might be brought into court on a cott, to give his evidence, and the jury being very desirous to hear it, the Court declared their opinion, that Gungabissen having a great interest in the estate of Bollakey Doss, which was divided by his will in shares accordingly to the component parts of a rupee, the Counsel for the Crown would not be entitled to call him; the prisoner was therefore told to advise with his counsel, and say whether he wished to have him called. The Court at the same time acquainted the jury, that as Gungabissen was a witness who would not be called on the part of the crown, they must receive no prejudice if the prisoner declined calling him; because, if called by the crown, he would have a right to object to him, on account of his interest. The prisoner having consulted with his counsel, returned for answer, that if he was sure Gungabissen would speak to the truth, he should be desirous to have him called; but that he considered him as under the influence of Mohun Persaud, and therefore feared that he might not speak the truth, and that he declined calling him; but the jury shewing a strong desire that he might be called, the prisoner and his counsel consented that his evidence should be received; whereupon Dr. Williams and Mr. Stark were again sent, and on their return

Mr. *Williams* was sworn.

Court. How was Gungabissen yesterday?—*A.* I went to Mohun Persaud's house: I found him lying upon his cot. The first question I asked him was, what his name was: he said, Gungabissen. I asked him as to his disease: he told me, he had a severe flux; ten, twenty, or thirty stools a day; a continual thirst; and that on drinking, he went to stool, and it came from him immediately. I felt his pulse, and found him to have a slow hectic fever; and I believe he has a scirrhous liver.

When you saw him yesterday, did you think he could be brought into court?—I thought he could not with safety. On my return, I reported to the chief justice in court, that I did not think it safe to bring Gungabissen to the court. I thought it, and reported it. I afterwards acquainted Mr. Justice Le Maistre, that if there was an absolute necessity for his appearance here, I thought he might be brought on a cot; and I would attend him myself. Mr. Justice Le Maistre having before that said, that the gentlemen in the House of Commons were sometimes brought in their flannels, then I said what I mentioned about the cot. I went to see Gungabissen this morning, with an intention, if possible, to have brought him here. I was the first person that entered his room: I found him off his cot: no one was in the room I saw him in yesterday: he was not in the room I saw him in yesterday; but in a little room of veranda, contiguous to that in which he lay, supported by three or four people, at stool, and so much exhausted, that he tumbled on the cot when they brought him to it, and it was some time before he could give me an answer. After recovering his strength, I asked him some questions relative to his disorder; he told me he was worse, and that his very bowels were coming from him: I told him he must go with me in a dooley: he said that it was impossible; did not I see what a state he was in? and held out his hand to me. He was then in a cool sweat, with a low pulse. I further proposed to him, that he should go in his cot, and be lifted over the veranda by ropes, and be covered up. He replied, he must die if he went; he could not go; he must die. I then desisted from any farther persuasion, and returned.

What is your opinion?—That the man could not be brought here, and carried back again, without imminent danger of expiring from fatigue; and that he has not strength to undergo any examination, after the fatigue of bringing him to court: had he not told me that he has been exceedingly ill near two years, I should not have supposed he could live many hours, from the state he appeared in this morning.

Master *Mac Veagh*, Keeper of the Records, being called, produces three papers.

What papers are these?—The original will of Bollakey Doss, and a translate of it; together with an account current of Bollakey Doss's estate.

From whence had you these papers?—I received them from Mr. Sealy, the late Register of the Mayor's court.

Mr. *Sealy* examined.

Did you deliver these papers to Master Mac Veagh?—I did.

Where did you get them from?—I took them from the records; they are part of the records of the Mayor's court, and were among the other records and muniments.

Is the account current in English an original paper?—It is.

Are these any part of the muniments of the late Mayor's court?—They are.

[The Translate of the Will of Bollakey Doss was read, of which the following is a copy.]

A Will of Bollakey Doss, in Nagree Language, translated into English.

"I, Bollakey Doss Augurwall, being weak

in body, do make this my will, as I pretend to dispose of my estate personally, should I live longer; but, in case of my decease, then my said estate to be distributed as follows: after the money due to me by the Company is received, first, I request my debts be paid, agreeable to accounts, and the remainder to be divided into sixteen parts, or sixteen annas, whereof to be distributed for the divine service, viz.

"To Sree Goberdun Nautjee, one anna (1 *a.*) To Saut Mundier, or Seven Pagods, named Sree Be-tthol Nautjee, Sree Mothureshjee, Sree Gocul Nautjee, Sree Modun Mohonejee, Sree Duarrackow Nautjee, Sree Goculchunder Mohunjee, Sree Nownit Peeawjee, two annas, (2 *a.*) To Sree Bridjupauljee, half an anna, (6 *p.*) To all the Ballokes of Gussainjee, one anna, (1 *a.*) To Sree Modun Mohunjee, and Sree Bhugguerrutjeer Boho, half a pic, or English (1½*p.*). To Sree Govindjee Tickoytmow, half a pic, (1½*p.*) To Sree Mohaw Probhojee, half a pic, (1½*p.*) To Sree Gopeul Nautjee, and Sree Govindjee, half a pic, (1½*p.*) To Poorestum Khetter, half a pic, (1½*p.*) To the Bustnubs of Gocul and Brendabun, a quarter of an anna, (3*p.*) To all persons assisting in the Sreejeer Saut Mundier, half an anna (6*p.*) To Sree Brayjayr Mohunt, Buyragguies, and Goburden Tulhatty, a quarter of an anna, (3*p.*) For the making of Sree Nautjee's garden, one anna, (1 *a.*) To Sree Bollodebjee, a quarter of an anna, (3 *p.*) To Sree Gopaul Lauljee, at Banaras, a quarter of an anna, (3 *p.*) To Sree Jomunahjee, half a pic, (1½*p.*) To Sree Baulkissonjee, at Surat, half a pic, (1½*p.*) Ditto, one anna, (1 *a.*) making in the whole nine annas. The remainder seven annas to be distributed as follows, viz.

"To my wife, four annas, (4 *a.*) To Gungabissen, and Hingoo, my nephews, one anna, (1 *a.*) To my three daughters, named Shebun Bebee, Gungaw Bebee, and Motichun, three quarters of an anna, (9*p.*) or three pics each. To my brother, Sam. Doss, a quarter of an anna, (3*p.*) and from the remainder one anna, (1 *a.*) To Kissen Jebun Doss, five hundred rupees, (500 *r.*) To Pautuckjee, one hundred rupees, (100 *r.*) To Bassjee, fifty rupees, (50 *r.*) and the remainder to other persons.

"After the Company's money is received, out of the said money ten per cent. to be paid to brother Prodoomone Doss, as I have given him a note; and after my debts are paid off, the remainder and residue to be distributed according to the particulars above-mentioned.

"I have given Baubo Dhorromchun a note for four thousand rupees, (4,000 *r.*) which are to be paid him.

"And besides this, the outstanding debts at Dacca, Rungpore, Denazpoze, Purneah, Muxadavad, Houghly, Mungair, and Patna; to be recovered agreeable to books and accounts on those places, and the same to be distributed as follows, viz.

"To Sreegeer Duarroy, Gooroor Duarroy, and Saut D. Mundier, two annas, (2 *a.*) To make a garden and well in my name, to be given to the Brahmons, two annas, (2 *a.*) To my wife, four annas, (4 *a.*) To Gungabissen and Hingoo, my nephews, four annas, (4 *a.*) To Prodoomone Doss, for his trouble and pleasure, four annas, (4 *a.*) making sixteen annas.

"I do further declare, that I had made a power of attorney, before this, in the names of brothers Mohun Persand, and Prodoomone Doss; which I leave to the pleasure of brother Prodoomone Doss. I request, all I owe, and what is owing to me, be paid and received, according to accounts of every settlement. This is my will, which I thought proper to make in my life-time, and desire to be executed in the same manner as aforesaid; and at the request of my wife, I appoint Gungabissen and Hingoo Laul, my two nephews, my trustees. And the management of all the business, debts, and dues, books and papers, I leave to the care of Prodoomone Doss.

"Mitty, or month of June, fourth day of the moon Sumbet, or the Nagree year, 1826.—Written by Kissenjebun Doss.—Signed by Bollakey Doss, who approved of the above writing.—Witness Dorromchurn, Kissenjebun Doss, being declared by Bollakey Doss. Bengal year, 1176, June 12th. [*A true copy.*] —Signed, Richard Mac Veagh, Keeper of the Records."

Court. This account is properly no evidence; it is not delivered in by an executor; and very little would arise from it if it had been signed by the executor; for, as the money had certainly been paid, whether properly or not, the executor would have brought it into his account; otherwise he would have been himself chargeable with it.

The Counsel for the Crown closed their evidence.

The Counsel for the Prisoner objected, that there was no evidence of the forgery and publishing of the bond produced; but the Court being unanimously of opinion, that there was sufficient evidence to put the prisoner upon his defence,

The *Counsel* for the *Defendant* stated his Defence as follows.—That, first, he could call witnesses present at the time when Bollakey Doss executed the bond: that two witnesses to the bond, now dead, were living when this transaction came to the knowledge of Mohun Persaud: that he would produce letters in Bollakey Doss's hand-writing, admitting the bond, and the circumstances of the jewels, and an account signed by Mohun Persaud and Pudmohun Doss, in the presence of Gungabissen, in which the sum contained in the bond is included, as also a paper in the hand-writing of Bollakey Doss, in which the particulars of the transactions are stated: and that entries were made of the same in the books that were lost, and letters of correspondence between Bollakey Doss and Maha Rajah Nundocomar, in which this transaction was mentioned.

Tage Roy called.

Have you got any natural brother?—I have one brother only, called Maitabroy; he was my elder brother.

Is he living or dead?—He is dead.

Where was he during the last eighteen months before his death?—Sometimes at Houghly, and sometimes at Calcutta.

What was his native place?—Bareai Adampore, at Doncacollah, in the chucklah of Burdwan.

Have you ever seen your brother write?—I have.

Can you read Bengal?—Yes.

Is this your brother's writing? [A Letter produced marked I.]—It is not my brother's writing.

Who then wrote it?—I did, by my brother's direction, in his presence.

Look on the cover: whose seal is that?—It is my brother's seal.

Can you read Persian?—I cannot read Persian, but I know the seal.

Was the impression on your brother's seal affixed by you?—I set the seal.

How came your brother not to write?—My brother was engaged in other business, and desired me to write.

To whom was it directed?—Mahomed Heeamut Seeragut Roopnarain Chowdrowjee.

When did your brother die?—About two years and half ago.

Was your brother a person well known in Calcutta?—He was known to rich and poor in Calcutta.

To whom? mention some persons.—He was a servant to Sam. Buchy, who was in the gaol. Baboo Huzreymull and Diachund Baboo knew him.

Cross-Examination.

Was your brother a servant to Sam. Buchy?—He was.

On what account was Sam. Buchy in gaol?—He was six years in gaol, on a dispute about the Company's salt.

How old are you?—Thirty-three.

How old was your brother?—Three years and a half older than I.

When did you come to Calcutta?—Nine days ago.

From what place?—Donyacalla in the chuckla of Burdwan.

On what account did you come to Calcutta?—A letter came from Burdwan, from the Rajah of Burdwan's house, calling me there: I did not go on that letter: afterwards Roopnarrain Chewdree wrote me a letter; a peon came with the letter.

Have you got that letter?—The letter was wrote to the Jannadar: he did not give me the letter: another letter came to me with a peon and kittree, from Roopnarrain Chowdree: when they arrived I was busy, and was not found; when I was found, they gave me a letter, requiring me to come to the presence.

What do you mean by the presence? do you mean the Court?—I do not mean the Adawlet: they did not tell me plainly where I was to come: they told me I must tell what I knew: I said I knew nothing but what I knew from my brother: I came on that letter: I received it the third of Justin.

Were you ever in Calcutta before?—I came to Calcutta nine years ago.

Where did your brother die?—At Donyacolly, in his own house: he was ill five months.

Were you ever in Calcutta when your brother was there?—Yes.

Whom did he live with?—Sometimes in the house of Mohun Loll and Nundo Loll: he always staid with Sam. Buchy, being his servant.

When was your brother acquainted with Roopnarrain Chowdree?—From the time when he went to Burdwan.

How long ago is that?—Ten or twelve years ago.

How long did your brother stay in Burdwan?—He never staid long.

What do you mean by the time of your brother's going to Burdwan?—My brother went three different times to Burdwan upon business.

When did he first go?—The year Mr. Sumner went Chief to Burdwan: he went with Cossenaut Baboo; that was the first time.

Was your brother ever in Burdwan before in his life?—Not in the town of Burdwan.

Was he ever in the province of Burdwan?—He was born in a chuklah of that province.

Was your brother a servant to Cossenaut Baboo?—No: he went with Cossenaut Baboo, who promised to give him employment, as I have been informed.

How long did your brother stay with Cossenaut?—Ten or twelve days.

Did your brother write Bengal?—Yes.

Did your brother write his letters himself, or you for him?—When I was with my brother, and he desired me to write, then I used to write.

How long is it since you wrote that letter?—Thirty-six months.

Where is your brother's seal now?—With me: I can produce it.

How long have you had it?—It was in my house after the death of my brother: I had it.

Have you sealed any letters with the seal since you had it?—No: why should I seal with the seal of a deceased person?

Baboo Huzrey Mull examined.

Were you ever acquainted with a person of the name of Matheb Roy?—My house is a house of charity: a great many people come backwards and forwards to and from my house: I do not know what Matheb Roy you mean.

Do you know any body of the name of Matheb Roy?—There was one Matheb Roy, a

kitree, here a great while ago: he came from the westward.

What sort of a man was he?---He wore a chowran (broad) turban: he was rather old.

How old might he be?---Something above fifty.

How many years ago is it since he seemed to be above fifty?—About ten years ago.

Was he fifty ten years ago, or would he appear to be that age now?---I saw him then; I speak of his age as then: I have not seen him since.

Court. Have you seen him more than once? —*A.* I may have seen him two or three times: I do not recollect: it was a great while ago.

Have you ever heard of any body else of the name?---I am much employed in business: I cannot tell whether I have seen any other person of the name.

Did you know any of his connections? did you know his relations?---I did not.

Do you know whether he had a brother?—People know these things by enquiry: I do not.

Did you know whether he was a servant to Sam Buchy, or to any man in gaol?---Sam. Buchy was formerly my Gomastah: afterwards he set up business for himself: I cannot say whether he was or was not servant to Sam. Buchy, as many people went backwards and forwards to my house.

Do you believe he was a servant of Sam. Buchy's?---I do not remember.

Are you sure that Matheb Roy ten years ago appeared to be above fifty?---I never enquired his age: it is only from looking at him: I have mentioned that he appeared above.

Are you sure that he was more than twenty-six years?---He certainly was more than twenty-six years: I before said he was fifty years: I cannot tell to a year.

Can you say with certainty, whether you sent a man of the name of Matheb Roy to Burdwan?---I do not remember: I cannot say for certain: Sam. Buchy can best tell.

Is Sam. Buchy alive or dead?—He is alive.

Cossenaut Baboo examined.

Did you ever know any man of the name of Matheb Roy?—What Matheb Roy do you mean?

Did you ever keep any man in your family of that name?---There was a person of that name, who was son of Bungoo Loll Sunnub, Kittree of Burdwan, who used to come backwards and forwards to my house: he did not live in my house, but eat and drank there: Bungoo Loll was a man of consequence: he was a servant to the Nabob.

How long have you known Matheb Roy?---About twenty-five years.

Is that since you first knew him?—Yes; I knew him well; he was a man of this country as well as myself.

What was his figure?---A whitish man, marked with the small pox.

How old would he be if alive now?---I cannot say for certain; I imagine about fifty, if alive now.

Do you take his age from his appearance, or from your knowledge?—From seeing him.

When did you first know him?—The time of the Marattas disputes, when the Nabob fled to Ballaw, in the year 1148, or 49, I first knew him: thirty-four years ago, A. D. 1741.

How old was he when you first knew him? —He was a young man, from eighteen to twenty.

How many children had Matheb Roy?—Four; one called Ballub Roy, the second called Matheb Roy, the third called Saheb Roy, and the fourth called Panjeb Roy.

How many children had Saheb Roy?—One son, I knew of no more.

Did you ever know any Matheb Roy, the son of Saheb Roy?—No; I am sure, I did not know a Matheb Roy, the son of Saheb Roy.

Did any Matheb Roy go to Burdwan with you in the time of Mr. Sumner?—I do not remember.

Are you positively sure that no Matheb Roy was the son of Saheb Roy?—I did not know a Matheb Roy, the son of Saheb Roy.

Was there any Matheb Roy, the son of Saheb Roy, that you promised to get an employ for?—I do not remember.

Do you know the son of Saheb Roy?—I do know the son of Saheb Roy, the son of Bungoolol.

Do you know his name?---His name is Doman, I believe.

Tajee Roy is called and shewn to Cossenaut.

Is that the son of Saheb Roy?—This is no son of any Saheb Roy, I know.

Court. Tell this man what Cossenaut has said, and tell him the consequences of speaking falsely.

Tajee Roy. I am the son of Saheb Roy, the son of Bungoolol.

How many sons had your father?—One.

Cossenaut. There is another Bungoolol of another cast.

Of what pergunnah was the last Bungoolol? —I do not know where he was born; he was in service at Mancoor, and lived at Hougly.

Do you know his family?—I do not.

Of what pergunnah was the first named Bungoolol?—Of the city of Burdwan.

Are you sure he was not of Doynacolly?—I cannot determine; I knew him at Burdwan, and I did not know him at Doynacolly.

Did you know the other Bungoolol?—I do not know the man now here, the other Bungoolol was in service at Mancoor.

Q. to Tajee Roy. Is your father, Saheb Roy, alive or dead?—*A.* Dead.

Where did your grandfather Bungoolol live?—At Saitagong, in the district of Hougly.

How many children had he?—Only one.

How came you to say that your brother went to Hougly with Cossenaut in the time of

Mr. Sumner?—I do know that he went to Hougly with Cossenaut; if Cossenaut does not recollect it, I cannot help it; he was a poor man; I can prove that he did go by a hundred people.

Q. to Cossenaut. If any man of that name or family had gone with you, should you have recollected it?—*A.* When I went to Burdwan, many persons went with me: I cannot say he did not go.

As you knew the family of the Bungoololls of Mancoor; if one of them had gone with you, should you know him?—I believe I should have known if any person of the name of Matheb Roy had gone with me.

[Question repeated by one of the Jury.] If such a man had gone, I certainly would know him.

[Question again repeated.] I did not know Bungoololl of Hougly's family; therefore cannot say whether I should have known him.

How old was Bungoololl of Hougly?—I cannot tell.

How long is it since you saw him?—I have taken an oath; I cannot safely say.

How many people do you guess might follow you to Hougly, expecting employment?—Great men and little men were with us: I cannot say exactly, I believe about 500 or 1,000.

Tagge Roy examined.

Is your grandfather alive?—No.

How long is it since he died?—Fourteen years.

Do you know whether your grandfather was in any service?—He was Izardar at Hougly.

Do you know a place called Mancoor?—Yes.

Was your grandfather in service there?—I know Mancoor; it was my grandfather's farm.

Where was the house of your grandfather?—At Hongly.

Was it not at Barree Adam Poor?—My grandfather's house was at Hougly.

Where was your father's house?—My father lived with my grandfather.

Did your father live in the house after your grandfather's death?—I was very young.

Where were you born?—At Chirisura, at the time of the Maratta invasion.

Where was your brother born?—At Barree Adam Poor in his uncle's house.

Have you ever been examined before, about the matters you have given in evidence to-day?—Whatever I was asked, I answered truly.

To whom did you say that?—To the gentlemen.

To what gentlemen do you mean?—That gentleman, [pointing to Mr. Jarret, attorney for prisoner.]

Where was that?—In the house of the gentleman with Mr. Jarret, [pointing to Mr. Farrer, counsel for the prisoner.]

Roopnarrain Chowdree sworn.

Did you know any person of the name of Matheb Roy?—I did.

Where is that person now?—Dead.

Do you know the family of Matheb Roy?—He was of one cast, and I was of another: I do not know his family.

What was his father's name?—Saheb Roy.

How many brothers are there?—Taijee Roy and Matheb Roy.

Did you know his grandfather?—No.

What were the names of the brothers of the Matheb Roy you know?—Taijee Roy and Matheb Roy.

Do you mean two sons of the father, or three?—Two only used to come to me.

Do you know when Matheb Roy died?—In the month of Maug, 1179.

Did you remember any letter from Matheb Roy before his death?—Yes, in the month of Baudon, 1179.

Joydeb Chowbee examined.

Did you know the late Bollakey Doss Seat?—I did.

Did you know of his ever executing any bond to Maha Rajah Nundocomar? Tell what you know about it.—I remember that Bollakey Doss Seat wrote out a bond in the name of Maha Rajah Nundocomar; his writer wrote it.

Did you see his writer write it?—I myself with my own eyes saw the writer write it in the Persian hand.

Did you see it afterwards executed?—I saw Bollakey put his seal to it.

Who were the witnesses to it?—Mahomed Commaul of Muxadavad, Matheb Roy, a Kettry, and Sillabut, the Vakeel of Bollakey Doss.

Did you see them witness it?—I myself saw those three men witness it.

What was the amount of the bond?—I do not remember exactly: I believe it was within 45,000 rupees, and something above 40,000.

At what time of the year was this?—I do not recollect.

Tell as near as you can what month it was?—It was in the rainy season.

Do you know the person now called Commaul O'Dien Ally Cawn?—I do know him.

Is he the person you saw witness that bond you mention?—No.

Who was the Mahomed Commaul you saw witness it?—A man of Muxadavad.

Did you know his father?—I did not.

Is that Mahomed Commaul living?—He is dead.

Do you know him to be dead, of your own knowledge?—I do certainly know.

How long is it since his death?—About five or six years.

Where did he die?—I went to the house of Maha Rajah; I was by when he was carried to be buried: I enquired whether it was a Bramin or a Mussulman going to be buried: they answered, it was Mahomed Commaul.

Did you know Matheb Roy? who was he?—Matheb Roy was a kettry of Burdwan; I knew him; he was frequently coming backwards and forwards to the Maha Rajah.

How long have you been acquainted with

Bollakey Doss?—I knew him when he lived at Muxadavad, and often saw him after he came to Calcutta.

What connection had you with Bollakey Doss?—He was a Banian, and I was a Bramin; there is no relationship; there was friendship between us; I knew him, and he knew me.

Had you any connection in business with him?—There was no connection in business between us; he was a great Shroft; I frequently went to sit down in his house; he desired it.

What was your business?—I was formerly a servant of Maha Rajah Nundocomar: he is now without employment; his employment is gone, and so is mine.

Where is the bond you speak of executed?—The bond was executed in the house of Baboo Huzree Mull in the Burra Buzar.

Who lived in that house?—The bond was there written: people belonging to Huzree Mull lived in it; there was a part of it separated from the rest, in which Bollakey Doss lived; it was in the separate house where Bollakey Doss lived.

Can you read Persian?—I do not know Persian; how can I read it?

Were you there by chance, or sent for?—Bollakey Doss called me and carried me with him.

Did he come to your house for you?—He came to the house of Maha Rajah Nundocomar, where I was then sitting. Maha Rajah Nundocomar said to Bollakey Doss, Money has long been due from you to me; now pay it. Bollakey Doss said in answer, I have lost every thing by plunder at Dacca; I have not now the power of paying; a great sum of money is due to me from the English; when I receive that, I will pay you first of my creditors. Having said this, he added, I will now write out a bond. Bollakey Doss in this manner pressed Maha Rajah Nundocomar a good deal, and put his hands together in an attitude of praying; and at last Maha Rajah consented. Bollakey Doss then said to Maha Raja, Send Mahomed Commaul with me to my house; I will there write out the bond immediately. Having said this, Bollakey Doss, in company with Mahomed Commaul, left Maha Rajah's; I likewise obtained dismission from Maha Rajah. Having gone down stairs, Bollakey Doss said, Come along with me to my house, and I having executed a bond before you and Mahomed Commaul, will send it to Maha Rajah. After this, Bollakey Doss and I went to the house of Baboo Huzree Mull, in the Burra Buzar: being arrived there, he sent for his writer. The writer came, and was ordered to write out a bond in the name of the Maha Rajah. The writer wrote out a Persian bond, and put it in the hands of Bollakey Doss Seat. Bollakey Doss Seat, having seen the bond, took the ring off his finger, and sealed it, and said to Mahomed Commaul, Be you a witness to it. Mahomed Commaul affixed his own seal, with his own hand, as a witness; he said to Matheb Roy, Be you also a witness to this: Matheb Roy sealed it with his own hand. He said to Siellabut, Be you also a witness to this; and he signed it with his own hand. Seillabut having put it into the hands of Bollakey Doss Seat, he put it into the hands of Mahomed Commaul, and said, Carry it with Seillabut to Maha Rajah Nundocomar's.

You say Sillabut signed the bond; what did he write on it?—He wrote his own name, as a witness; I do not know Persian, I imagined he signed it.

Did Bollakey Doss read the bond before he signed it?—The writer put it into the hands of Bollakey Doss, and he, having seen it, signed it.

Did he read it?—The writer read it to him; he heard it.

What is that writer's name?—I do not remember it.

Was you acquainted with him?—I have seen him with Bollakey Doss; I was not acquainted with him.

Do you remember what sort of a man he was?—I do; his colour was black; he was about forty years of age.

Do you know Sillabut?—I did not know Sillabut.

What was he?—A Vakeel of Bollakey Doss.

How many years was he with him?—I do not know.

How many years did you see him about Bollakey Doss?—Three or four years.

Do you mean three or four years before signing the bond?—I do not remember how many before; Sillabut lived sometimes with Bollakey Doss, and sometimes with Maha Rajah Nundocomar.

How long after sealing this bond did you know this person about Bollakey Doss?—Two or three years.

Where did he go then?—He went within that time to Jaggernaut, to perform religious ceremonies along with Mohun Persaud; when he returned to Calcutta he died.

When did he die?—I do not know; I was told he returned; I heard of his death.

Did any body else write upon the bond?—Nobody else.

Did any body besides Sillabut write any thing at all upon the bond?—Sillabut wrote upon it: Mahomed Commaul sealed it; Matheb Roy sealed it.

Did any body else use a pen?—Not to my remembrance.

[The Chief Justice, in a low voice, told the Counsel to shew him another bond with three seals.]

Court. You have sworn positively; you must answer positively.—A. I speak from certainty what I know: I saw nobody else write upon the bond: I do not remember it.

Do you know Mahomed Commaul?—I was acquainted with him.

Where were you acquainted with him?—

He was a servant of the father of Maha Rajah Nundocomar: when his father died, Mahomed Commaul used frequently to come backwards and forwards to Maha Rajah Nundocomar's house.

Were you intimate?--There was no friendship between us: I had seen him two or three times at Maha Rajah's.

What was his employment when the bond was signed?---A russeck (dependent) of Maha Rajah Nundocomar.

What sort of a man was Mahomed Commaul?---A middling sized man, of a yellow colour, rather whitish.

What was his age?---He was near 35.

Did Matheb Roy or Mahomed Commaul seal first?---Mahomed Commaul sealed first.

Who sealed next?---I do not remember whether Matheb Roy sealed next, or Sillabut signed.

In what part of the bond did Bollakey Doss put his seal? Was it at the top or at the bottom?---It is a great while ago: I know nothing of such a dispute to come: I cannot be positive as to such things.

What size was the paper? Was it as large as this? [The indictment, consisting of two half sheets of parchment, doubled, was shewn him.]---I do not remember if it was large or small.

Court. Do you remember if the seal was on the inside or the outside of the paper?---*A.* Bollakey Doss, I remember, sealed in a place like this, [pointing to a margin in a Persian paper, shewn towards the right hand corner at top.]

Are you sure of that?---I remember.

Where did Mahomed Commaul seal?---If I were to see the bond I should be able to tell.

Was it larger or smaller than this paper? [A large sheet of Bengal paper shewn him.]---I cannot tell whether it was larger or smaller: how can I speak to what I do not remember?

Was it as large as this? [A very small piece of paper shewn him.]---I know not.

Was it like this? [The back of the real bond shewn him.]---I do not remember; but if I was to see the real bond, I could tell the seal and the size.

Could you know the impressions of the seals, if you saw them?---If I see the impressions of the seals as they were, I should know them.

Should you know Bollakey Doss's seal?---I know Bollakey Doss's seal; from seeing the impression of the seal, I shall know it.

How came you so well acquainted with Bollakey Doss's seal?---It is a (buddaumee) almond seal.

Court. Let him describe the shape. [He describes an oval on a paper.]

Q. How can you know the impression of Bollakey Doss's seal, not understanding Persian?---I frequently saw it upon his hand.

Did you ever see Bollakee Doss's seal but upon his finger?---I never saw his seal in any other place than his finger.

Court. Were you to see the seal of Bollakey Doss upon a paper, should you know it from any other?---*A.* I should know the impression of Bollakey Doss's seal if I was to see it; I have frequently seen it upon his finger.

Do you know the impression of Mahomed Commaul's seal?---I should know it; I have frequently seen it upon his finger.

Were you to be shewn a paper with the impression of Mahomed Commaul's seal on it, should you know it?---I could not read the letters, but should be able to judge from the shape.

Court. Should you know the seal? Many seals are of the same shape.---*A.* I do not read Persian; but I think I should be able to know the seal.

Court. Have you often seen the seal on Mahomed Commaul's finger?---*A.* I have often seen it on his finger; he used often to come to the house of Maha Rajah Nundocomar, and I used to see the seal on his finger.

Who sealed first after Bollakey Doss?---Bollakey Doss having sealed it, put it into the hands of Mahomed Commaul, and he sealed it.

Where was it wrote?---In the house of Hurree Mull, in the Burra Bazaar, in the presence of us all.

What room was it in?---There is a long room runs east-west, the door to the south: it was executed there.

Who was present besides?---Shaik Ear Mahomed, Choyton Naut, Lollah Domanking, Matheb Roy, Sillabut Vakeel, and the person who wrote the bond.

What was his name?---He was not of this country; I did not know him.

What hour of the day was it?---It was before mid-day.

Did any particular conversation pass at that time?---There was no conversation.

Was there not between the rest of the company, while the bond was writing?---I remember no conversation: when the bond was finished, he put it in the witnesses' hand: we said nothing: what should we say?

How long was the writer writing the bond?---One gurree (22 minutes.)

Who brought in the ink for the seals?---The ink-stand was near Bollakey Doss; he dipt his seal on the cushion, and sealed the bond.

Did he bring it with him?---He was a shroff of consequence, possessed of a sicca ink-stand: it was silver.

Who brought it into the room?---I first saw it near Bollakey Doss.

Was the ink-stand in the room, or brought afterwards?---Bollakey Doss went with his sewarry before us; when we came in, we found him sitting, with his ink-stand before him.

What conversation passed while you were at Maha Rajah Nundocomar's?---I have already related.

Did no more pass?---No.

Was there any conversation about what the sum of the bond was for, at Maha Rajah's?---There was no conversation about the amount of the bond at Maha Rajah's.

Do you remember any mention of a premium to be given?—No.

Do you remember the sum?—I do not.

Did you hear the bond read?—The writer read it, but I did not understand; it was read in Persian: how should I know what the bond was?

How do you know the sum?—I did not know the amount of the bond: I heard that it was within 50 and above 40,000 rupees.

When did you hear that?—It was two or three days after the time.

Did Bollakey Doss look at any books before he ordered the bond to be wrote?—I did not see him examine any books before the bond was executed; when I came he was sitting down, and I did not see him examine any books.

How long did you come after him?—He went in his palanquin; I followed him: it might be half a gurree, (11 minutes.)

Did you find the other persons you mentioned, sitting when you came in?—Four of us came together; myself, Mahomed Commaul, Choyton Naut, and Shaik Ear Mahomed. Matheb Roy, Lotta Demon, Sing Sillaut, and the writer, were there when I came in.

Had the writer began to write when you came in?—After we had sat down, the writer began to write.

In what language did Bollakey Doss speak to the writer?—He talked in Moors: he spoke Moors.

Does he understand Persian?—I do not know; he talked Moors.

Was the bond read in Persian?—Yes.

Was it, after being read in Persian, explained in Moors?—No: it was read in Persian, and was not explained in Moors.

Did you hear Bollakey Doss give any direction as to the sum?—Bollakey Doss said nothing in my presence about the sum.

Did Bollakey Doss, any time before, tell him the sum?—God knows whether he told him before.

You say you heard Bollakey Doss give directions to write the bond: what were the directions?—He spoke these words: Write out a bond in the name of Maha Rajah Nundocomar.

Did he say any more?—No; he spoke no other words.

Did Bollakey Doss say 'a bond,' or 'the bond?'—He said, 'a bond.'

Did he say any thing about consideration?—When I went, he spoke the words I said, and no more.

Do you know this paper? [Bond produced.]—This seal of the buddamee (almond, oval) shape, is Bollakey Doss's.

What is this paper?—This little seal is Mahomed Commaul's.

Can you swear to that positively?—I do not know the words: the largest seal is Matheb Roy's.

How came you to know the seal of Matheb Roy?—I have seen his seal on his finger: I saw him frequently at Maha Rajah Nundocomar's house.

If the gentlemen of the adaulet were to put the seal of Mahomed Commaul on another paper, should you know it?—I should.

Was there any conversation of jewels at the Maha Rajah's?—No.

Was there any at Bollakey Doss's?—No.

[The seal of Commaul O Dien Ally Cawn, before produced to the jury, is shewn him.]

Do you know whose seal this is?—I do not.

[Joseph Satcheb, clerk to Mr. Jarret, is called to prove the delivering of notice to Mohun Persaud to produce an original Nagree paper, given to him by Maha Rajah Nundocomar, when he, Gungabissen, and Pudmohun Doss, were in the Maha Rajah's house, signed in the proper hand-writing of Bollakey Doss, and to produce it as evidence for the defendant.]

Q. to Mohun Persaud. Have you produced any papers, in consequence of the notice?—*A.* I cannot produce it; I have produced all the papers I have: I have no paper under such description.

Mohun Doss called.

Do you know Gungabissen?—I do.

Do you know Mohun Persaud?—Yes.

Did you know Pudmohun Doss?—I did.

Did you know Bollakey Doss?—I did.

Have you seen him write?—I have.

Are you acquainted with his hand-writing?—I am.

Do you remember Maha Rajah Nundocomar, Gungabissen, Pudmohun Doss, and Mohun Persaud, in conversation together?—I do; at Maha Rajah Nundocomar's house.

Did you, upon that occasion, see any papers?—Pudmohun Doss said to Maha Rajah Nundocomar, Give me papers. Maha Rajah having got the papers, bid me copy them: I observed to Gungabissen, Mohun Persaud, and Pudmohun Doss, that Maha Rajah had bid me copy the papers; and asked them, if I should do it; they all answered, Write them out. Having wrote them, I gave them to Maha Rajah Nundocomar: Pudmohun Doss took the original, and the copy remained there.

What did Pudmohun Doss do with them?—The copy I wrote remained with Maha Rajah Nundocomar; the original remained with Pudmohun Doss.

What did Pudmohun Doss do with the papers?—He took them himself, and put them up: whether he carried them out of the house I know not.

Have you ever seen the papers since?—Never.

[A paper shewn him: a copy of the paper was offered to be given in evidence.]

Court. You have traced it into the hands of Pudmohun Doss, but not into the hands of Mohun Persaud. This is not sufficient to entitle you to give the copy in evidence.

[A Nagree paper is produced.]

Is that signature the hand-writing of Bollakey Doss?—[After looking at it for some time, shewing great difficulty to make it out, he said,] If I see the original paper from which I copied, I can read it.

Are the words at the bottom Bollakey Doss's hand-writing?—Bollakey Doss's name is written at the bottom.

Is that of his hand-writing?—There were only five letters of Bollakey Doss's name on the paper I copied. I cannot tell whether this is his hand-writing: I do not know: I am not his gomastah. Kissen Juan Doss knows Bollakey Doss's hand-writing and Pudmohun Doss's.

Kissen Juan Doss examined.

Look at that paper; [Nagree paper shewn him.] whose signature is it?—Bollakey Doss's signature; it is his hand-writing; the body is the hand-writing of Pudmohun Doss.

Are there any words wrote by Bollakey Doss besides his name?—There are.

Mr. *Elliot* delivered into court the following Translate of Nagree papers, which mark Exhibit L.

"Maha Rajah Debraje Nundocomar Geeoo, at Calcutta, with compliments, written from Chinsura, by Bollakey Doss, with many obeisances. May God always grant him health, and I shall be joyful. I myself am by your favour in health; you have written a Persian letter, which has arrived; by the reading of which I have been rendered joyful and contented. You have written, that till the governor shall come, you wish me to stay at Chinsura. Accounts are received that the governor will shortly arrive. I have, according to your desire, remained here. The governor arriving, as business will quickly be done, you will do: I have hopes in you.

"You will hear other circumstances where you are; I am unjustly oppressed; you are the master. What else shall I write?

"You have written about Derrumchund; therefore he and I acquittal have settled, which you know; besides this, nothing respecting state is unknown to you; accordingly you have told, and what you say I pay great attention. The Company's money being received, out of it rupees two thousand, out of that self will give. I am not disobedient to your orders.

"At this time from the side of expences much trouble is; therefore rupees five hundred you bestow upon me; then I will give it with the rest. Business quickly will be done there first will give. Brother Pudmohun Doss is going; you will be acquainted with other circumstances by him; you are a master of every thing. At this time you have considered every thing; and who, except yourself, will do it? What other representation shall I write? There is no more.

"In the year 1826. In Jente the 26th Tuesday.

"Signature, Bollakey Doss.

"You are my master; it is necessary you should make enquiries about me at this time. The circumstance above written, you will make yourself acquainted with."

Mr. *Elliot*. In translating the Nagree paper exhibit L, I at first wrote, "yourself;" but as the counsel for the prisoner desired I would translate it literally, and charged me not to deviate in the smallest degree from the words and idiom of the original, I have now written "self," the word signifying only "self." The Moonshy understands it as meaning the person to whom it was written: I fear the translation will scarcely be understood.

June 12th, 1775.

Lutchmun Doss* examined.

Do you know Mohun Persaud?—I do.

Did you know Pudmohun Doss?—Pudmohun Doss was my elder brother: why should not I know him?

Mohun Persaud examined.

Is this your hand-writing?—It is.

Is that the signature of Pudmohun Doss?—One of the signatures is mine: I cannot tell whose the other is exactly.

Have you often seen him write?—I have.

Are you acquainted with his hand-writing?—I have many papers of his writing.

Do you believe this to be his?—It is my opinion it is not; if you will order me, I will bring another paper of Pudmohun Doss's hand-writing.

Luchmun Doss* examined.

Do you know the hand-writing of your brother Pudmohun Doss?—I do.

Is the signature his writing?—It is.

Who wrote all the paper?—It is all his writing.

[Nagree paper fixed and marked exhibit M. of which the following is a translate.

Accounts.

Rs.	*As.*	
66,320	7	Amount of a bond.
50,483	7	One time
10,920		One time
61,408	7	
4,912		Batta at 8 Rs.
60,000		One time Durbar and other expences
11,362	8	A bond on account of a mortgaged house
2,552		Ready cash 2200 Rs.
596	2	On account of Dearcam Chund Ghee Tawn 527 Rs.
140,804	1	
3,000		Paid by Chitonaute at one time, 1500 1500
145,804	1	

* So in orig.

Rs.	As.			
73,435		Tomusook 4 bonds 18435 Khut,	20000,	20000
60,000		Three notes Khut.	20,000,	20,000
10,000		One note	10,000	
		Tomusook.		
146,435		Bonds 8		
2,369	1	Current rupees remain due		
145,804	1			

(Signed) MOHUN PERSAUD.
PUDMOHUN DOSS.

Kissen Juan Doss examined.

Have you seen Pudmohun Doss write?—I have.

Do you know his hand-writing?—I do.

Look at this paper: is it Pudmohun Doss's hand writing?—It is.

Joydeb Chowbee examined.

Court. Are you sure you saw Mahomed Commaul carried out of Maha Raiah Nundocomar's house to be buried?—*A.* I heard it with my own ears that Mahomed Commaul was dead, and saw them carrying him out to be buried.

Are not the customs of burying Mussulmen and Gentoos very different?—They are: I who am a Bramin will not go near a Mussulman that is dead.

How do they carry out a Bramin?—When a Bramin dies, they either put him on a cot, or sticks laid in the form of a cot: they put a cloth over his body, and he is carried out on the shoulders of eight or ten men.

Is there any thing else particular in the burial of a Bramin?—When a Bramin dies, all his relations and friends, and all the other persons of the village, go to him: he is carried on the shoulders of eight men, and about twenty other people go with him: they carry him to the river side, and place him on wood, which his son, if he has any, sets fire to.

Are there any other particular marks to distinguish the burial of a Bramin?—There are particulars in their dress according to their rank: if a rich man, he may have very valuable cloths: a poor man would have a cloth from five to ten rupees over his shoulders.

Is there any thing particular in the form of the dress of those who attend them?—They wear their dooty, and throw a cloth over their shoulders.

What is their dooty?—The cloth which common sircars tie round their loins.

Are there any more particularities attending their burial?—No.

In what manner do they carry out a Mussulman to be buried?—He wears his own cloths: when they carry a rich man, a fine dress is worn: the dress of a poor man is not more than two rupees.

Are they always carried on a cot?—They throw a cloth over his body: I do not know exactly the manner.

What was Mahomed Commaul?—A Mussulman.

What cloths had he when he was carried out?—They threw the same cloth over a Mussulman as over a Bramin.

Were you to see a man carried out to be buried, attended by Mussulmen, should you know whether he was a Bramin or a Mussulman?—I saw from far he was a Mussulman; I should know by Bramins being with him, if he was a Bramin, and because the Gentoo is about the neck of a Bramin.

[Question repeated.] I should know it was a Mussulman, because the Jamma is tied on the right side.

Do you mean the Jamma of the deceased, or of his attendants?—I mean of the people.

Were you to see Mussulmen attending a corpse, should you know it to be a Mussulman?—I should conceive it to be a Mussulman certainly.

What persons were attending the body of Mahomed Commaul?—I saw that they took away the body; I do not know who attended him.

You say you know Mussulmen from Bramins at a great distance: were the persons attending Mahomed Commaul's corpse, Mussulmen or Bramins?—Mussulmen.

Do you mean when you first saw the body carried out?—I mean when I first saw the body carried out.

Were you sure they were Mussulmen?—I can speak with certainty.

If, as soon as you saw the body come out, you saw it was attended by Mussulmen, how came you to ask whether it was a Bramin or a Mussulman?—I never asked whether it was a Bramin or a Mussulman.

Was it because you knew him to be a Mussulman that you did not ask the question?—I did not ask: I heard Mahomed Commaul was dead, and I saw Mussulmen attending the body.

Did you hear, at that time, or before, that he was dead?—I heard before.

What was the name of the man?—Mahomed Commaul.

Are you very sure?—Yes.

Are you sure he had not "Ally" to his name?—He went by the name of Mahomed Commaul: I never heard of any other name he had.

[*Mr. Elliot* informs the Court, that the word 'Obdahu' on the seal is no part of the name, but means "the slave of God."]

Choyton Naut examined.

Did you know Bollakey Doss?—I did.

Did you ever know Bollakey Doss execute any bond to Maha Rajah Nundocomar?—I did.

Did you see him execute any bond?—I saw myself, and heard it.

Who witnessed the bond you saw Bollakey Doss execute?—Mahomed Commaul, Sheikhut and Madheb Roy.

Did you see them witness it?—Yes, I did with my own eyes.

What was the amount of the bond?—Above 40, and within 50,000 rupees.

Where is the Mahomed Commaul you saw witness the bond?—His house was at Muxadavad; when he witnessed the bond he staid here some time, and afterwards went home.

Where is he now?—He is now dead.

Did any other person witness the bond?—No other than Mahomed Commaul, Matheb Roy and Seilabut.

Do you know one Commaul O'Dien Cawn?—Yes.

Is he the same person that witnessed the bond?—No; this is Commaul O'Dien; that was Mahomed Commaul.

Do you know that paper? [Exhibit M.] Yes.

What is it?—An account.

Can you read it?—Yes.

Court. Read part of it. [He did so.]

Were you present when the account was settled?—Yes.

Who else was present?—I was present, and Joydeb Chowbee, and Pussudden Gooptoo.

Who else was present?—Nobody else.

Who was in the room at the time, besides Joydeb Chowbee, and Pussudden Gooptoo?—Mohun Persaud, Gungabissen, and Padmohun Doss.

Are you sure nobody else was present?—Maha Rajah Nundocomar was also there.

Was the Nagree writing wrote in your presence?—The signatures at the bottom were wrote in my presence.

Whose writing are the signatures?—Mohun Persaud's and Padmohun Doss's.

Where was this account signed?—At Maha Rajah Nundocomar's house.

Where?—In Calcutta.

Were you at Maha Rajah Nundocomar's house before the parties came there?—Yes.

Were you present when they came?—Yes. On one day, the three persons before-mentioned settled the account in conversation: on another day, two of them only were at the house of Nundocomar, and signed the account.

Were there any Company's bonds at either of those times produced by Gungabissen, Padmohun Doss, and Mohun Persaud?—Yes.

What became of them?—Padmohun Doss gave eight bonds to Gungabissen, and Gungabissen gave them to Maha Rajah.

Court. Tell what passed on the occasion.—Upon Gungabissen's giving the bonds to Maha Rajah, Maha Rajah said, You give me these bonds in payment. Maha Rajah told Gungabissen to indorse the bonds, and further Maha Rajah Nundocomar said to Gungabissen, Are you satisfied with this account? upon which Gungabissen replied, If any body should call you to an account about this account, I will say, Maha Rajah has nothing to do with it. Then Gungabissen took an oath to be answerable to his father, brother, and mother, or any other person, if they should enquire about the account: upon which eight bonds were delivered to Maha Rajah Nundocomar, and he kept them: Gungabissen said it was late, he would indorse the bonds in the morning: after they were gone, Maha Rajah Nundocomar desired me to come to him early in the morning, and take the bonds to Gungabissen to get them indorsed. Next morning I went to Maha Rajah Nundocomar's, and took the bonds with me to Mohun Persaud's house, where I saw Gungabissen, Padmohun Doss, and Mohun Persaud: I said to them, Indorse the bonds; on which Gungabissen sent for Kissen Juan Doss: when he came an indorsement was wrote, written by Kissen Juan Doss, and Gungabissen signed it and delivered them to me: I then took them away, and delivered them to Maha Rajah Nundocomar.

Cross-Examination.

Who are you?—Choyton Naut.

What is your business?—I am a Shroff of the Banyan cast.

How long have you been in Calcutta?—About fifteen years.

Where did you come from?—I had a house at Muxadavad; I have one in Calcutta.

Have you always resided in Calcutta?—I have been to my own house, and come back again.

How often?—Three or four times.

How long have you stayed at a time at Muxadavad?—Sometimes one, sometimes two, and sometimes four months.

You knew Bollakey Doss: had you any business with him?—I had no connections in business with him; I was well acquainted with him; Bollakey Doss had a house at Muxadavad, near mine.

When did Bollakey Doss die?—About six years, more or less.

How long had he lived in Calcutta before that?—He came to Calcutta in 1172.

Where did he live in Calcutta?—In Hurreymull's house in the Burrah Buzar, when he first arrived: he afterwards lived in several other houses.

How long did he live in that house?—I believe, two or three months; I cannot tell for certain.

Do you know what house he afterwards went to?—To Boggy Conty's house, to the eastward of Mohun Persaud's house in the Burrah Buzar; after leaving that house, he lived in Mohun Persaud's house, with him.

You say you were present at the settlement of accounts between Maha Rajah and Bollakey Doss; at the time of the first adjustment were any books or accounts produced?—I saw no accounts brought.

Were there any the second time?—Not that I saw.

Were you present the whole time?—I was.

What was the balance settled?—2,860 *r.* 1. [This agrees with the account produced.]

Was the balance struck the first or the second time?—When the said bonds were delivered to Maha Rajah, then the balance was struck.

Who wrote the Bengal writing on that paper?---Poorsudden Gooptoo.

Who is that man?---He was a writer to the Maha Rajah.

When did he write the Bengal account?---Three or four days after.

Where is the man?---In Calcutta.

Who wrote the Nagree writing on the paper?---Pudmohun Doss.

Can you read both Bengal and Nagree?---No.

Did you see Pudmohun Doss write it?---I did.

What sort of a man is Pudmohun Gooptoo?---A thin man, of a yellow colour.

You say Kissen Juan Doss indorsed some bonds: Do you know what bonds?---The Company's bonds.

Were any body else present?---Nobody else was present.

You say you were present at executing a bond by Bollakey Doss: was it in his own house, or where?---It was in Hudjeerymull's house, then inhabited by Bollakey Doss.

How came you there?---Shack eer Mahomed, Mahomed Comaul, and Joydeb Chowbee and I were present at Maha Rajah's: afterwards Bollakey Doss came in, and went to Maha Rajah. Maha Rajah demanded from Bollakey Doss the payment of his money; Bollakey Doss answered, "I have at present no money, I cannot pay it, I will write out a bond." Maha Rajah Nundocomar said, "Very] well, write out a bond, fix your seal to it, and having got it witnessed, send it to me." Bollakey Doss then said, "Give me Mahomed Commaul, that he may go with me, I will give the bond to Mahomed Comaul, and one of my own servants, and send it to you." Bollakey Doss having got dismission from Maha Rajah Nundocomar, went down stairs with Mahomed Commaul: I likewise got dismission, and I, Joydeb Chowbee, and Shaik eer Mahomed, went down stairs together. Mahomed Commaul and Bollakey Doss were standing there. Bollakey Doss having got into his palankeen, went to his own house; and we four men, half a gurree afterwards, went after him. Bollakey Doss was before that sitting in his own house; we went to him, and sat down by him. Four other people were there; Matheb Roy, Seillabut, the writer, and Diman Sing. Bollakey Doss said to the writer, "Write out a bond in the name of Maha Rajah Nundocomar." He wrote it in Persian. Having wrote it, Bollakey Doss said, "Read it." The writer having read it, he Bollakey Doss heard it. Bollakey Doss said it was good. Mahomed Commaul said it is good. Bollakey Doss had a ring upon his finger: he took it off, and sealed it with his own hand: he then said to Mahomed Commaul, Do you affix your seal as a witness: he then said to Matheb Roy, "Do you fix the seal of testimony to it:" he then said to Seillabut, "Do you write testimony to this:" he wrote, and both of them sealed. Bollakey Doss put the bond into the hands of Mahomed Commaul, and he said to Seillabut, "Do you go along with him, and both of you deliver the bond to Maha Rajah Nundocomar." Having taken the bond, they both went away, and I went to my own house.

Do you understand Persian?---I can neither read nor write it.

Were you acquainted with Sielabut?---I was: he was Vakeel of Bollakey Doss.

How long?---He came along with Bollakey Doss: from that time I knew him.

Where is Sielabut now?---I don't know where he is: I heard he went with Mohun Persaud to Jaggernaut, and that upon return he died.

What sort of a man was he?---Not a very whitish man, nor a very old man.

Were you acquainted with Mahomed Commaul?---I used to go to Muxadabad: he was at that time the servant of the Keblagaw, or father of Maha Rajah Nundocomar.

In what capacity did he serve him?---A Mussaheb. [Companion.]

How long ago is that?---Formerly; I don't know how long ago.

Did you know him in Calcutta?---I did; when Maha Rajah's father died, he came to Maha Rajah's in Calcutta.

When did that happen?---I do not recollect.

When did he come to Calcutta?---I do not remember the express period; It was in the Bengal year 1172.

Was he a very black man?---Not very black.

Was he tall or short?---Of a middling height, neither very tall nor very short.

Of what age was he?---Within 35, that is about 33, or 34, when he arrived at Calcutta.

Where is he now?---He died in Calcutta.

In what house?---I do not know, I heard that he died in Calcutta.

How long ago?---It might be five or six years ago.

Do you remember Matheb Roy?---I did not know him.

Are you a servant of the Maha Rajah?---I was formerly a servant of the Maha Rajah; I am not now, he is out of employment; I am yet in hopes.

What are your hopes?---That I shall obtain some employment; I was once the Nabob's Hussanchee, [cashkeeper]. I was likewise the Maha Rajah's Hussanchee.

What reason have you to hope for an employment?---I have no reason. Maha Rajah is a great man, a man of consequence; I am in hopes he may get me employment.

How long have you had those hopes?---From the time the Maha Rajah has been out of employment; I have gone every two or three days to his house: he says, Very well, when I am in employment I will get something for you.

Where was Matheb Roy born, and what is his employment?---Matheb Roy's was not in the district of Burdwan. I do not know what his employment was: he used to come once in two or three days to Maha Rajah Nundocomar's house.

Had he much respect shewn him at Maha Rajah Nundocomar's house?—Not much.

Did Matheb Roy understand Persian?—I don't know whether he read Persian or not; he had a Persian ring upon his finger.

What sort of a seal was Matheb Roy's?—Neither very large, nor small; a four-cornered seal.

Did you ever see him write Persian?—I never saw him.

Did Mahomed Comaul understand Persian?—I do not know. He had also a Persian seal on his finger.

What shape was it?—It was also a four-cornered seal, but smaller than the other.

Did Bollakey Doss wear a seal upon his finger?—He had one.

Of what shape was it?—A Budelamie seal.

Of what size?—Neither very large, nor very small.

Do you know the sum of the bond you saw executed?—It was above 40 and under 50,000 rupees.

How do you know that?—When the bond was read before Bollakey Doss, in the house of Bollakey Doss, I asked Bollakey Doss, as I did not understand Persian, what was the amount: he told me between 40 and 50,000 rupees.

Was it mentioned in the house of Bollakey Doss, at the time of executing the bond, that it was for that sum?—I cannot say, I do not remember well: it was between 40 and 50,000 rupees.

Was it mentioned at that time?—I do not remember, I don't know.

How come you then to know it?—Bollakey Doss ordered the writer to read it; I heard it, and remember that.

Did the writer read the whole bond?—He did from beginning to end.

Was it only from hearing it read, that you knew the amount?—I knew it from no other reason; I heard of the bond at Maha Rajah's before.

Did you hear the sum at that time?—No.

In what language was it read?—In Persian.

Was it read more than once?—I remember no more than once.

Was it read in any other language?—I do not remember that it was.

What is Persian for forty thousand?—How should I say? I do not understand Persian.

If you did not understand Persian, and only knew the sum of the bond from its being read in Persian, then how can you tell the amount of the bond?—You have sworn me upon the water of the Ganges: how can I tell more than I remember?

The Court, desirous of elucidating every part of this witness's evidence, asked Mr. Elliot, if he was certain that the witness understood him. Mr. Elliot answered, "The witness seems to understand what I have said perfectly well; he understands Moors as well as any person I have examined here in that language." N.B. The man had desired to be examined in Bengal, alleging that he did not understand Moors well.

Messieurs *Elliot*, *Jackson*, and *Jebb*, sworn.

Mr. *Elliot*. The man seems to understand what I said perfectly well. I have no doubt of his understanding me: he seems to me to understand Moors as well as any man I have examined, and speaks it more grammatically than common Bengalers do: I am sure he understood the questions I asked respecting the sum.

Mr. *Jackson*. When Mr. Elliot began to examine this witness, he desired me to give particular attention, during the examination, to the evidence he gave with regard to the preciseness of the interpretation. I did so, and confirm what Mr. Elliot has said in every particular.

Mr. *Jebb*. The witness perfectly understood Mr. Elliot; he understands Moors perfectly.

Mr. *Weston*, one of the jury, well conversant in the language, being asked whether he thought the witness understood Mr. Elliot, answered, he certainly understood him, he understands Moors perfectly well, and speaks it better than he does Bengally.

Mr. *Jebb* interpreted to him, in Bengally, all the questions that had been put to him in Moors, respecting the sum of the bond, to which he answered,

A. When the bond was read in Persian by Bollakey Doss, as I did not understand Persian, I asked the amount of the bond, and Bollakey Doss told me it was more than 40,000 and under 50,000 rupees.

Did Bollakey Doss do any thing more than put his seal to it?—No.

Did the others?—Both the witnesses, whose seals are there, wrote something over their seals.

Do you know what they wrote?—No.

Did they write much?—No.

Have you Bollakey Doss's seal?—No: the papers sealed were in the possession of Pudmohun Doss.

Did Maha Rajah readily agree to take the bond?—He did.

Was he asked more than once to take it?—Maha Rajah pressed him to give money; he said, he could not give money, but that he would give a bond.

Did Maha Rajah, without repetition, or pressing, agree to take it?—He did.

Did Bollakey Doss put his hands together in a supplicating posture?—He put his hands thus, [joining them], and said, I cannot pay money, take my bond; and he agreed to it.

In what room of Bollakey Doss's was the bond executed?—In the room where he sits; a long room.

Who produced the ink?—Bollakey Doss went half a gurry before: when we came, a Sicca dewat was by him; nobody went for it.

What sort of an ink-stand?—A silver octagon Sicca dewat; it was neither large nor small.

Do you remember Bollakey Doss's seal?—If I was to see it, I should know it.

Should you know the impression?—I should.

Should you know the impression of Mahomed Commaul's, if you saw it?—I should.

Should you know that of Matheb Roy?—I should.

By what means should you know Bollakey Doss's seal?—I took particular notice of it, at that time, and should know it.

Should you know it upon any paper?—Not upon any other paper; upon the bond I should.

When the Mohurir read the Persian bond, was Bollakey attentive?—He listened with attention.

When he said, Very well, did he appear satisfied?—He seemed, I thought, pleased and contented.

What was the size of the bond?—I have taken an oath; I cannot speak with certainty: if I was to see the bond, I should know it.

Do not you recollect the size?—I do not; I have taken an oath.

How come you to remember that one of the seals was smaller than the other?—With my own eyes I saw that the seal of Mahomed Commaul was smaller than that of Matheb Roy.

Did you not see the bond with your own eyes?—I saw the bond; I saw also the seal.

What was the size of it?—How can I remember? a bond may be large, or it may be small.

[A bond shewn him.]

Is this it?—No.

Was it larger or smaller than that?—Shew me the bond, and I shall be able to tell.

How can you know that bond from another by the impression of the seal, if you do not know those seals upon another paper?—There is Sielabut's hand-writing, and two seals besides Bollakey Doss's: by these marks I know it.

[An impression shewn him of Matheb Roy's seal.]

Do you know this?—I do know it.

[An impression of the seal of Commaul O'Dien shewn him.]

Do you know this?—I do not know it.

Lolkra Doman Sing sworn.

Did you know Bollakey Doss?—I did.

Did you ever know Bollakey Doss execute any bond?—How can I know any thing of former works?

[Question repeated.]—This I have seen.

[Question again repeated.]—Yes, I did see him one time.

Do you recollect at what time you saw him execute a bond?—I do not remember the date.

Do you mean the particular day or particular time?—It is ten years ago: how should I remember the time?

In whose name, or for whom, was the bond you saw executed?—In my presence he wrote a bond in the name of Maha Rajah Nundocomar.

Did you see him execute it?—I did with my own eyes.

Were there any witnesses to the bond you saw executed?—There were.

Who were they?—One Mahomed Commaul, one Matheb Roy, and Seilabut.

Did you see them witness it?—Yes; I did.

Do you remember the amount of the bond?—It is ten or twelve years ago, it is impossible to tell exactly: I can tell by guess.

Tell by guess.—I think 46 or 48,000 rupees.

Did you know a person of the name of Commaul O'Dien Ally Cawn?—Yes; he is here.

Is Commaul O'Dien Ally Cawn the man you mentioned by the name of Mahomed Commaul?—That was another man: I saw him before I saw this now.

Cross-Examination.

What are you?—I am in service.

Whose service are you in now?—I go through question and answer with Roy Radachurn: [the son-in-law of Maha Rajah Nundocomar] I am in his service.

What do you mean by going through question and answer with Roy Radachurn?—I go through question and answer with Rajah Bussan Roy.

What do you mean by going through question and answer?—When Rajah Bussan Roy sends letters, I deliver them to the governor, or general, and get the answers.

[Question repeated.]—I can say no more.

Court to Mr. Elliot. What do you understand by question and answer?—*A.* I understand the words he makes use of 'jewaub sowaul' to be a conversation: it is commonly used for an examination, but is never applied to a correspondence.

Q. Who is Raja Bussan Roy?

[Mr. *Elliot* says he was the person mentioned by Commaul O'Dien Cawn, as a relation of Ramnarrain Roy.]

How long have you been in the service of Roy Radachurn?—Eighteen or 19 months.

How often have you been in Calcutta?—I have often been in Calcutta.

Where were you born?—At Patna.

When did you first come to Calcutta?—In the year 1172.

With whom did you come?—I came alone.

Whose servant were you when you first came?—I was in the service of Rajah Durriek Narrain.

Was Rajah Durriek Narrain in Calcutta?—No; he was at Patna.

Into whose service did you enter when you came to Calcutta?—Rajah Durriek sent me down.

How long did you remain in his service?—Two years since he died.

Into whose service did you enter at his death?—When he died I went to my own house.

Where was that?—At Patna.

How long did you stay at Patna?—When the governor, Mr. Hastings, went to Benares,

[qu. Benares] I went with him: I then came to Patna, staid there as long as the Governor did, and then returned to Calcutta: it was a month more than two years.

What were you employed in, all the eight years from your coming to Calcutta?—I was in the service of Rajah Derrick.

How were you employed?—I returned to Patna in 1172, in the month of Carteckt, a particular feast of the Hindoos.

Can you read Persian?—I can.

In what month were you here?—I do not remember whether it was in Bysack, or in Joite, it was one of them: it was in the rainy season.

What business did you come to Calcutta upon?—I was sent to Maha Rajah Nundocomar.

What house did you live in at Calcutta?—At Joorabadun.

Where did you see this bond executed that you speak of?—At the house of Huzzrey Mull.

Did Huzzrey Mull live in the house?—Bollakey Doss lived there.

How came you in the house?—I frequently went backwards and forwards there.

What kind of a man was Bollakey Doss?—Of a yellow colour, and old.

Who were present at the execution of the bond?—Mahomed Commaul, Joydeb Chowbee, Choyton Naut, Shakeer Mahomed, Seilabut, Matheb Roy, and myself.

Was nobody else present?—There was a writer.

What was his name?—It is many years ago: I have forgot.

Did you ever know it?—I have forgot.

Were you acquainted with all the people you named?—I knew them all before, except the writer.

How long did you know Mahomed Commaul?—I did not know him before I used to see him sometimes at the house of Maha Rajah.

Did the writer belong to Bollakey Doss?—I do not know.

How came you to the house of Bollakey Doss that day?—I used now and then to go; it happened I went then.

Had you any particular reason to go?—I went by chance: as I used to go before, so I went then.

Who was there when you went?—Matheb Roy and Seilabut.

What time of the day was it?—Before mid-day.

Was any other person in the room when you went?—Nobody but Matheb Roy and Seilabut.

Was it near mid-day when you went?—It was.

Were Matheb Roy and Sielabut in the room that the bond was executed in?—They were.

Was Bollakey Doss there when you first came?—No.

Was the writer there?—No.

When did Bollakey Doss come?—It might be one gurree, or one gurree and a half, that I was there before he came.

Did any one come to them before Bollakey Doss came?—No.

Who came with Bollakey Doss?—He came alone, only his kidmutgar.

Did any one else come with him?—No.

What did he do when he came? did he speak to you?—He did not speak to any body: he took off his clothes and sat down.

When did the writer come?—After Bollakey Doss had arrived, half a gurree after Mahomed Commaul and the others came.

Did they come before the writer, or after?—When Bollakey Doss arrived, he called for the writer, and the writer first arrived.

Did any conversation pass between the writer and Bollakey Doss?—No conversation passed.

Do you know that for certain?—I tell it for certainty.

Are you very positive there was no conversation between Bollakey Doss and the writer?—There was no question and answer between them; there was no words between them.

When Bollakey Doss came into the house, did he come directly into the room where you were?—He came directly to the place where he sat.

Are you sure he went to no other room?—I was sitting in the place where Bollakey Doss afterwards sat: I saw him sit down.

Did you see him enter the doors and come up stairs?—I was sitting above stairs; I did not see him come up stairs, or come into the doors of the house.

Did he come in a palanquin?—I was within; I did not see.

Did you hear the noise of sewarry?—He was not of so much rank that he should make so much noise.

When did the writer come in?—When Bollakey Doss came into the house, he sat down, and ordered the writer to be called.

Who did Bollakey Doss send for the writer?—His kidmutgar.

What did he say to him?—It is long ago: I do not remember.

How long was it before the writer came?—I do not know exactly, it was a little time.

Did they mention his name?—I do not remember their sending for the writer by name.

Jury. Did the writer live in the house, or out of the house?—*A.* I do not know.

Could Seilabut write Persian?—He could.

Did Bollakey Doss send for the writer directly when he came into the room?—No, he sat down a little, said a few words, and then sent for him.

How long?—He sat down, spoke two or four words to Seilabut, then sent for the writer.

What did he say to the writer?—After his arrival Mahomed Commaul and the other persons before mentioned came.

Did Bollakey Doss give any directions to the

writer before they came in?---After they came, he ordered him to write.

Did he before?---No orders were given before they came.

What did he order him to write?---After they came, Bollakey Doss gave directions to the writer.

What directions did he give?---What the writer wrote in the bond.

What was that?---I do not remember: it may be seen in the bond.

Do you remember what Bollakey Doss told the writer?---He told him the subject of the bond in the Moor language.

What was that?---I do not remember; it is what is in the bond: if I remembered it, why should I keep it with me?

Do you remember nothing that was in the bond?---I know nothing at all, not a word.

How long was the writer writing the bond?---About a gurry.

Did Bollakey Doss repeat once or twice, or how often, what was to be wrote in the bond?---As far as I can recollect, he told him to write a bond, to this particular purpose; and then directed what he was to write.

What was the sum?---About 47 or 48,000 rupees.

Was any mention of interest, or any thing else, in the bond?---I do not well remember.

Do you remember at all?---I do not.

After the bond was wrote, what passed?---Having prepared and finished it, he put it in the hands of Bollakey Doss. Bollakey Doss returned it to him, and said, Do you read it over; he then read it once in Persian, and gave it to Bollakey Doss.

Was it read more than once?---It was not.

Are you sure it was read in Persian?---I am.

Did any thing farther pass?---Mahomed Commaul was sitting next to Bollakey Doss: he said, Do you witness, Mahomed Commaul put his seal: he said to Matheb Roy, Do you likewise witness it; and he sealed it: he likewise said to Seillabut, Do you likewise witness this; and he signed it.

Did any body else write on the bond?---Nobody else.

Did Bollakey Doss seal the bond?---He did.

When did he seal it?---He first put his seal to it, and then the witnesses.

Who sealed the bond first?---Mahomed Commaul.

Are you certain?---I was sitting, and saw him.

Are you certain?---I say so.

Who sealed next?---Matheb Roy.

Do you speak with certainty?---I do speak with certainty.

Who sealed next?---Seillabut then signed.

Are you certain?---I am; I speak with certainty.

Are you sure, that nobody else wrote after Seillabut?---Nobody else wrote but Seillabut and the writer.

Did nobody else use a pen?---No: nobody else.

What! nobody but Seillabut and the writer?---No.

What place was the bond sealed in?---As is customary in Persian bonds.

What is that custom?---They write this way (obliquely). The right hand is the place for the seals.

Show the position of the seals on paper.---The bond was wrote obliquely, from right hand to left; the seals in a line, on the margin.

Whereabouts did Seillabut sign?---Near Mahomed Commaul's seal, he signed it.

Do you know Bollakey Doss's seal?---I do.

How do you know it?---I knew it, because he used to write letters to my former master Roy Derrick.

Do you know Mahomed Commaul's seal?---I do: I frequently saw it on his finger.

Should you know it, if on any other paper than the bond?---I certainly should know the impression of the seal wherever I saw it.

What shape is it?---A four-cornered seal.

How often did you see Mahomed Commaul before he signed this deed?---When I went to Maha Rajah's, I sometimes saw him, and sometimes did not.

How often have you seen him?---I cannot count how often I have seen him.

Have you seen him twice?---I cannot say I have seen him twice. Why should I say twice? I have seen him many times.

Did you often see his seal?---I used to see it on his fingers.

Did you ever take it off his finger, and examine it?---I have seen the seal on his finger. I never took it off to examine it. Why should I take off the seal of another man?

Then you never did take it off to examine it?---I did not. Why should I take the seal of another man?

Do you mean that, if you saw the impression, you should be able to read the name; or should you know it from any other circumstance?---When I see it, I will think of it. I shall be able to tell.

[The question was several times repeated, but no answer could be procured.]

Do you know Matheb Roy's seal?---I know it a little: if I was to see it on the bond, I should know it.

Should you know it on any other paper than the bond?---I shall be able to tell when you try me.

Do you believe you should?

Interpreter. He does not chuse to answer the question. I can procure no answer from him.

Q. Should you know the seals from their places on the bond, or from the seals themselves?---[No answer could be procured.]

[Question repeated.]---I before said, Shew me the bond, and I will tell.

Will you say, whether you should know the seals from their place on the bond, or from the seals themselves?---What I know I say: if you shew me the bond, I think I should know the seals.

What size was Matheb Roy's seal?--It was larger than the seal of Mahomed Commaul.

Shew how large the seal was. [A paper given him to describe on.]---I am not a seal-cutter. How should I mark it? Having sworn, I will say what I remember; I cannot say what I do not.

Making a mark is not speaking words. [He is again asked to make a mark.]

Witness. Observe that you order me to make a mark. [He makes a mark near the size of the seal.]

What was the shape of Bollakey Doss's seal?---A buddamee seal.

How large was that seal?---Not very large, nor very small.

Who brought the inkstand?---His kidmutgar.

Are you certain he brought it in?---Very certain.

Was he sent for it?---The kidmutgar brought it.

Was it before Mahomed Commaul, or the witness came?---Before.

What was the sicca dewat made of?---Silver.

What size?---The size they generally are.

What size is that?---[He describes by his finger as before described.]

What size is the bond?---I remember thereabout half a cubit, nearly the size of the bond.

What was done with the bond?---When the bond was executed, he gave it to Mahomed Commaul, whom he sent with Seillabut, to give it to Maha Rajah Nundocomar.

Where did the witness go to?---A little after the departure of Mahomed Commaul, and Seillabut, Shaik Mahomed, Choyton Naut, and Chowdeb Chowbee, having got their admission, went away. Half a gurry after that, I went away too.

Was there any conversation passed, whilst the writer signed the bond?—Before the writing of the bond some conversation passed between Matheb Roy, Bollakey Doss, and myself.

What was it?---I will relate to you what I remember. Bollakey Doss said to Seillabut, I have been to Maha Rajah Nundocomar; and we have settled every thing about the jewels. He is my patron, and I have done according to his pleasure. For such a business as this, it is not proper to have any difference with him. I am therefore to write out a bond. Seillabut and Matheb Roy said, You have done right. He is your patron; it is proper you should not do any thing contrary to what he says. After that they called for the writer.

Were Joydeb Chowbee, and Mahomed Commaul there?---No: they came after.

Did you mention this conversation to any one before?---I never did.

Was there no mention of these jewels in the bond?---It may be; but I do not remember.

Was Bollakey Doss pleased when the bond was read?---He was pleased, and satisfied.

Did Bollakey Doss understand Persian?---He must have understood Persian; he said it was very well, but he did not write it; and I do not know that he could speak it: I never heard him.

Did you, by any other means, know whether he understood Persian or not?---I did not.

Did Mahomed Commaul say any thing?---He said nothing.

Are you sure?—He did not.

Did not Mahomed Commaul say it was very well?---I do not remember.

[He proves a seal of Bollakey Doss to three envelopes, which had been opened, and which the counsel for the prisoner offered in evidence, but was overruled by the Court, there being no signature from Bollakey Doss to the papers inclosed, nor any proof, whose handwriting they were, or that those papers were originally inclosed in the envelopes; because, if they were allowed to be given in evidence, they might impose what papers they pleased on the Court, by putting them into the envelopes. The jury having desired to look at the papers, the foreman observed on inspecting them, that it was an insult to their understanding, to offer those papers in evidence, as papers of the date which they purported to be of.

The Counsel for the Prisoner speaking in a warm and improper manner to the jury,

Court. This is a manner in which the jury ought not, and shall not be spoke to. The prisoner ought not to suffer from the intemperance of his advocate. You, gentlemen of the jury, ought not to receive any prejudice to the prisoner on that account, nor from the papers themselves, which not having been admitted in evidence, you should not have seen; and having seen, whatever observation you have made, you should forget: it is from what is given in evidence only, that you are to determine.

Jury. We will receive no prejudice from it. We shall consider it the same, as if we had not seen it: we will only determine by the evidence produced.]

Meer Ussud Ally called.

Did you know Bollakey Doss Seat?—Yes. Meer Cossim Ally Cawn sent me with treasure from Rotas to Bollakey Doss Seat. I delivered the treasure to him, and took his receipt for it.

Where was Bollakey Doss at that time?---At a place called Dues Gauty.

Where is that place?---To the westward of Sasserum.

Is there any seal to that receipt?---There was one seal of his to it.

Where has that receipt been ever since?---With me ever since. [He produced a paper, wrapped in a wax-cloth, closely pressed and doubled into the size of less than an inch square, bound tightly down with a string, which was cut open, and the paper carefully unfolded, and produced as the original receipt.]

Did you see Bollakey Doss affix his seal to the paper?---If you want to know, there is an-

other gomastah of Bollakey Doss's in court; call him.

[Question repeated.]—I did see it with my own eyes.

How long ago is it?—Look at the paper, you will see the date there.

Court. You must give a positive answer.—*A.* It is ten or twelve years ago; it was in the time of Cossim Ally.

What are you at this time?—I am at present in no business: I come to seek employment in this part of the country.

How long have you been here?—About two months.

From whence came you last?—From Patna.

What were you there?—In service.

In what capacity?—With Shetab Roy; I was Daroga of the Mint.

What was your business immediately before your leaving Patna?—I was out of employment, and obliged to come here to seek it.

How long since you left Patna?—About six months past.

When were you last in service?—Since I left Shetab Roy, I have entirely been out of service.

To whom have you applied for employment since you came to Calcutta?—It is now eight years since I came to Calcutta: I had an interview with Maha Rajah Nundocomar, who promised me that, God willing, when he got employment, I should.

What employment did you want?—I wanted an appointment under Molauck ul Dowlah, that I might receive some monthly wages.

When did you first see Maha Rajah Nundocomar?—When Major Munro brought me to Calcutta, I first saw the Maha Rajah.

How soon did you see him after you came to Calcutta?—About four days.

Are you sure of that?—Can there be any advantage in telling a lie on this occasion?

In whose service were you before you served Shetab Roy?—I was formerly a servant of the king at Delhi when he came to Bengal: I was afterwards in the service of Meer Cossim Ally, and after that with Jaffier Ally.

When you came from Patna, why did you bring this paper with you?—No no; I was at Muxadavad, when hearing of this affair, I told to some body, I had a paper with Bollakey Doss's seal to it.

Who did you tell so?—I said no such thing; I never heard of this affair at Muxadavad.

Did you know any thing of this affair when you left Patna?—No.

How came you to say you know this affair? was it at Muxadavad that you told the man you had this receipt?—I left Muxadavad in the month of Maharun.

Did you mention any thing of this paper to any person?—No; why should I mention any thing of a paper of my old master's?

Think well, and say whether you ever mentioned having this paper to the Maha Rajah, or to any other person?—Why should I tell any one I had such a receipt? if any one can say that I did, I deserve punishment: I had a receipt of my old master's in my possession; if I had given it to any one, and my children had fallen into the hands of my master, they would have been slain.

Who desired you to bring this receipt here?—Maha Rajah Nundocomar asked if I had such a receipt; I told him I had, and he desired me to bring it here.

Are you very sure you never told any person of a receipt, that could tell Maha Rajah Nundocomar?—I told no one of the circumstances of the receipt.

How did Maha Rajah know you had a receipt?—In the course of conversation, he mentioned to me the circumstances of the persecution I told him I had a paper with a Persian seal to it, and this was the paper.

Can you shew in Bollakey Doss's books any account of the receipt of this money?

Court. Look for it.

Witness. I said I had a receipt of Bollakey Doss's; this is the paper.

Did you, at that time, tell the Maha Rajah any thing more than that you had a Persian seal?—I said that I had the impression of the seal of Bollakey Doss.

What did you mean, when asked if you told Maha Rajah Nundocomar, that you said particularly you did not?—I excepted Maha Rajah Nundocomar.

Court to Mr. Elliot. Did he or not?—*A.* He did not.

Q. to Witness. Why did you bring the receipt to Calcutta?—*A.* I did not bring it to Calcutta; I left it at Muxadavad: when I told Maha Rajah I had such a receipt, he desired I would send for it: I sent a servant of my own, of the name of Berzey, to Muxadavad.

Have you a house at Muxadavad?—I have.

Why did you say you came from Patna?—I went from Patna to Muxadavad.

How long had you been at Muxadavad before you left it the last time?—I arrived at Muxadavad on the month Zeehidjah; I left it in the month of Mahaurrun this year.

When did you come last to Muxadavad?—I arrived there on the tenth of Zeehidjah, and left it on the 22nd of Mahaurrun.

In whose possession did you leave the seal at Muxadavad?—I left a little box with my wife, in which was this paper.

Did you send to your wife for the receipt?—Yes.

Did you send a verbal or a written message?—I wrote a note.

In what language?—My own was in Persian.

What countrywoman is your wife?—A Bengal woman; a native of this country.

Does your wife understand Persian?—No; how should she?

What did you write to her in the note?—I wrote to her to send the receipt in the Tavuze bauzu.

What is the meaning of Tavuze bauzu?—It

is what is kept under the jamma, bound round the arm: the receipt was shut up in the Tavuze bauzu.

What answer did your wife send?—She sent the Tavuze bauzu, and a note informing me she had sent it.

Did you read it?—Does not a man read a note he receives?

In what language was it written?—In Persian.

Did she write it herself?—Do women know how to write?

Does any body in the house write Persian?—She would probably send for a Mulla* to read my note, and get the answer wrote: I am a poor man, and have no servant of that sort.

Were you used to wear this Tavuze bauzu about your arm?—I formerly did, but since my master was gone I threw it into a little box.

Why did you?—My master, to whom it belonged, being gone, I threw it into the box: why should I keep it any longer?

Did you then consider it of any further value when your master was gone?—When my master was gone, I was at Rotasgur, where my master had sent me: I kept it out of fear.

Why did not you give it your master?—I did: he said, Keep it yourself, and I will take it of you hereafter: it remained with me.

What did the treasure consist of, you carried to Bollakey Doss?—They were bags of rupees which I paid to Bollakey Doss.

How many?—It is impossible to say how many bags in so large a sum. There were many bags containing 2,000 rupees; some might contain more.

Where did you carry it from?—Rotasgur.

To what place?—I was carrying it from Rotasgur to the Nabob Cossim Ally Cawn: he ordered me to carry it to Bollakey Doss.

Where was Bollakey Doss?—In a tent at Doorgauty.

How far was that from Rotasgur?—It is 12 coss from Sassiram, and that is three days journey to Rotasgur.

Who went with you?—My own people.

How many?—150 horsemen, and 150 peons.

Can you produce one?—I cannot tell where to find one. Some are at Muxadavad, some at Patna, and some dead.

Cannot you produce one?—How should I? I know of none.

Where is the man that brought the receipt to you from Muxadavad?—In town: I will bring him to-morrow.

What is his name?—Buzzoo.

What sort of a man is he?—A poor man; young, not old, and shaves his beard; of a middling size, neither fat nor thin.

Is he your servant, or any other person's?—He is a raffeek of mine; what I get he eats with me.

If he is a raffeek, why did you before say you sent your servant?—He is called servant sometimes, sometimes a raffeek, and sometimes a brother.

How many servants do you keep?—I have likewise a slave boy; he and I eat rice together.

Have you any other servant?—I have no power to have servants.

What religion are you of?—A Mussulman.

What is Buzzoo?—A Shaik (Mussulman.)

Have you ever had any promise for coming here?—I have not received the smallest thing from him; [pointing to the prisoner] he only said he would procure me to be a servant of the Nabob's.

When were you to enter into your employment at the Nabob's?—When he (Maha Rajah) should be released and sent to his own house, he would give it me.

At whose expence have you lived since you have been at Calcutta?—The circumstance is this; I brought some rupees with me to Calcutta.

You have been long out of employment; how have you subsisted?—I had jewels and valuables; I have sold them all, and by that means maintained myself. Major Munro gave me 2,000 rupees.

Was Bollakey Doss the usual Shroff of Cossim Ally Cawn?—If he was not, why should he pay the money to him?

Did you know of Cossim Ally paying any other sum of money to Bollakey Doss?—No; I was a servant, and did only as I was ordered.

Did you ever pay any money to Bollakey Doss for Cossim Ally before?—I never did.

How do you know he was a banker?—I had two bills on him from Cossim Ally.

Whose province was it to settle the accounts with his banker?—How should I know? I was a poor man.

[Question repeated.] The name of the office is Mustoufah: his name is Mustowaffee.

How could the Mustowaffee settle the Nabob's accounts without this receipt?—At that time the country was in great troubles: his household was in great disorder, and the Nabob ran away.

What part of Calcutta do you live in now?—I live on the Subah Buzar.

In your own house?—In a religious house, in which I live for nothing.

Did you, or not, know of this affair at Muxadavad?—No.

[Mr. *Elliot*. I cannot be positive that he said that he heard it at Muxadavad; and that may serve to clear up the inconsistency, in his saying he had told no one, as he had not at that time told the Maha Rajah.

Q. to Mr. Elliot. How long is it since the date of that receipt?—*A*. I believe ten years and two days; but I cannot be certain without calculation.]

Kissen Juan Doss examined.

Do you know any thing of this transaction?—No.

* A schoolmaster, or learned man; an Arabic term.

Meer Ussud Alli. You were present when the money was paid.

Q. to Kissen Juan Doss. Do you know any thing of it?—*A.* I do not remember.

Had you been present when so large a sum of money was paid by the prince of the country, should you not have known it?—I don't remember: great sums of money were paid in the house, from 25 to 50 lacks: I can't remember all.

Q. to Ussud Alli. Have you been at Patna since Shetab Roy died?—*A.* No: I have been to Calcutta, also to Purnea, and other places, in search of employment.

Q. to Kissen Juan Doss. Is there a separate account of Cossim Ally Cawn?—*A.* There is.

Why did you look over this book, knowing it in the other?—It would likewise have been in this book: I could find easier in the other.

June 13th, 1775.

Mr. *Elliot* examined.

Q. What is the Persian word for 40,000?—*A.* 'Chekill hazuar:' in Moors it is 'chaleese hazaar.'

What is 50,000?—It is 'pinjaw hazuar' in Persian, and 'putchus hazaar' in Moors.

Mr. Weston, one of the jury, added, that in Bengallee the sums were the same as in Moors.

Colonel *Goddard* examined.

Were you the officer who took Rotasgur?—I was.

What year was it?—I don't recollect the year by the Hegira: I can tell by that of our Lord: it was in 1764.

When did Cossim Ally leave Rotargur?—I cannot ascertain when he left it: I believe he never was there: he was not there when I took it.

Were you at the battle of Muxat* ?—No.

When was it fought?—The 22nd or 23rd of October, 1764.

Had Cossim Ally then left the provinces?—After taking Patna, in 1763, Cossim Ally had no place of strength left in the provinces, excepting Rotas.

Can you tell where he fled across the Caramanassa?—I was wounded, and left at Patna: he passed the Caramanassa at that time: after the reduction of Patna, the army passed into the Caramanassa, following Cossim Ally.

When did he return?—He returned into the provinces in 1764.

Mr. *Hurst* examined.

Mr. *Hurst.* We took Patna in November, 1763: our army marched immediately to the Caramanassa: Cossim Ally and the troops with him passed the Caramanassa at that time: about November or December, 1763, he returned to the provinces, with Sujah ul Dowlah: about April, 1764, our army retreated to Patna: the cannonade from Sujah ul Dowlah was the 3d of May, 1764: Cossim Ally and Sujah ul Dowlah retreated from, and Cossim Ally never returned again to, the provinces. Buxar indeed is just within the provinces. The battle of Buxar was fought the 23d of October.

Major *Auckmuty* examined.

Court. Do you remember where Cossim Ally was encamped, three weeks or a fortnight before the battle of Buxar?—I think at Buxar.

In going to Buxar, do you not go through Jassuram?—You do.

Had Cossim Ally any fixed camp after his departure from Patna, till the entrenchment at Buxar?—I believe he had not any camp: he was with Sujah ul Dowlah's army.

Had they any camp at Doorgolly?—I do not know of any: I think they would neither of them leave the body of the army. Jassaram is inland. Buxar is on the river. I cannot say but he might have had a camp at Doorgotty.

Mr. *Elliot.* I can now ascertain the date of the receipt produced to the Court by Meer Assad Ally. I can swear to the date by the records of the khalsa.

Have you examined the records of the khalsa?—I have; and find that the 14th of Rubussanee, in 1178, Hegira, which is the date of the receipt now produced, answers to the 28th of Assum, 1174, Bengal year; which is exactly 10 years, 8 months, and 5 days, from this time, (13th June, 1775,) I mean calendar months, which brings the date of the receipt to the 8th of October, 1764. [N. B. 15 days before the battle of Buxar.]

From what place is the receipt dated?—It is not dated from any place: Dorgolly is mentioned in the paper.

Kissen Juan Doss examined.

Court. Have you examined, and do you find these and the books produced last night to be all the books in which Cossim Ally's accounts with Bollakey Doss are contained?—*A.* They are all, and I have examined them: I did not look over the books yesterday so carefully: one book contains all the accounts between Bollakey Doss and Cossim Ally.

Does that book contain the whole of the accounts between Cossim Ally and Bollakey Doss?—It does.

What are the periods when the accounts in these books begin, and when they end?—They begin in Babuzanee, 1175, and end in the month of Saubem Nagree, 1821.

Is there any mention of such an account as this mentioned in the receipt?—There is no such entry: it is certainly not in the books: I cannot ascertain when the books close.

Is the date of the beginning of the transactions in the books regularly entered there?—It is.

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* Qy. Is this a misprint for 'Buxar' or 'Buxar?'

Captain *Carmac* examined.

Were you with the army in 1764?---I was.

Do you remember Sujah Dowlah and Cossim Ally's retreating from Patna in that year?---Their army was defeated before the walls of Patna: 3d May, 1764, they retreated to Banaras, and continued there.

How far is Rotargur from Doorgolly?---I believe Doorgolly is a town on the banks of the Soame: there is more than one place of that name.

Is there a river called Doorgotty?---There is: I apprehend you cross it in going from Jasseram to Buxar. It falls into the Soam.

How far is Jasseram from Rotasgur?---It is esteemed 12 coss.

Did you ever travel it?---I have.

In how many hours?---I set out early in the morning, and breakfasted there, I apprehend, about 10 o'clock. I rode very hard: they are long cosses, and through a hilly country: it was in the cold weather.

Can you tell where the army of Sujah Dowlah and Cossim Ally were, 14 days before the battle of Buxar?---I believe, encamped at Buxar.

Kissen Juan Doss re-examined.

What is the last date mentioned in the books?---The last date mentioned in the books is taken from a teep, or promissory note: I entered it long after the date of the receipt: I entered it at Calcutta. It was after the return of Bollakey Doss from the army.

Were you with Bollakey Doss with the army?---I was.

Do you know the river Doorgotty?---I do.

Was Bollakey Doss in a tent near that river, about the 14th of Rabusanee, 1178?---He was with the army: I know not when.

Was Bollakey Doss with the body of Cossim Ally's army, a little before the battle of Buxar?---He was.

Where was the army 14 days before the battle?---A month before that battle they were in cantonments at Buxar.

Did the river Doorgotty run near Buxar?---The army was once near the river Doorgotty; but not when they were encamped at Buxar.

Captain *Carmac* examined.

Do you know Buxar?---I do.

How far is the river Doorgotty from it?---I do not know.

Kissen Juan Doss re-examined.

When the army was near Doorgotty, do you remember a man coming with treasures, escorted by 300 men on account of Cossim Ally?---I do not remember any thing of it.

If such a transaction had happened, must it not appear in Cossim Ally's account?---Such matters were always minuted in the Persian office: when any treasure was brought, it was kept in this book; but no account at large was kept at Patna.

Was the teep you referred to in the book, paid in Calcutta, or only entered there after the transaction?---The entry was made by Bollakey Doss: I can give no more particular account.

Mr. *Elliot*. I understand that these books end in 1176, Hegira.

Do you apprehend that any part of the army with which Bollakey Doss might be, would be detached to the river Doorgotty, within a month of the battle of Buxar?---I know of no such detachment.

Do you remember when the body of the army was there?---The army was frequently in motion. I can give no account of the time of its being there. When the army was in the field, it was expected the rain would come on: the army went to the cantonments at Buxar.

Was the army at Buxar before the rains?---I cannot speak to the motions of the army.

Were the rains set in when the army went to the cantonments at Buxar?---I can't tell whether it rained any one day.

Was it, or was it not, before the rains, that the army came there?---Ten or twelve days after our arrival, I remember it rained.

Had the rainy season set in?---I don't mean to say that the rainy season began 10 days before, or 10 days after our arrival.

Mr. *Hurst* examined.

About what time does the rainy season set in at Buxar?---It generally sets in the latter end of June, or beginning of July.

Does it hold up 10 or 12 days, during the rainy season?---There are instances of it.

When does the rainy season end there?---The rainy season generally ends in the month of September, or in the beginning of October.

Kissen Juan Doss re-examined.

Were you at the battle of Buxar?---I was. I have reason to remember it. I was, after the battle, flung into confinement.

Did the army, or any part of it, after its first going into cantonments, move towards Doorgotty?---I am not well acquainted with the circumstances. I was confined before the battle. All Cossim Ally's people were confined by Sujah Dowlah.

Was Bollakey Doss also confined?---He was.

How long before the battle was Bollakey Doss confined?---I believe above a month, perhaps six weeks.

Did Bollakey Doss act as a shroft for Cossim Ally during his confinement?---What kind of question is that? Cossim Ally himself was in confinement. Where should he have money to send to his shroft?

What kind of confinement was Cossim Ally in?---In a tent near Sujah Dowlah: his own attendants were removed, and chokies* put over him.

What confinement was Bollakey Doss under?---I have taken an oath, and I will tell the truth. The Nabob, Sujah Dowlah, wanted to get money from Bollakey Doss, in con-

* Guards or watchmen.

fining him first, before the rest of Cossim Ally's servants. The treasurer of Sujah Dowlah (Collic Joqu) desired the Nabob to put Bollakey Doss under his charge; and promised to get money from him. Sujah Dowlah likewise plundered all the goods and effects of Cossim Ally: he even infringed the rights of his zenana. It was not till after the battle of Buxar, Cossim Ally obtained his liberty: they did not think it of consequence enough to confine me at first with my master. I was confined 14 or 15 days after the confinement of Bollakey Doss.

How many days were you confined?—Twenty-one days.

Did you ever, to the best of your recollection, see Meer Hussud Alli before yesterday?—I have often seen him lately going about in Calcutta; but never before.

Have you seen him with the army?—I have seen many thousands whom I do not recollect: I know nothing of him.

Did you see Cossim Ally's principal servants?—I did not know them. I sat in my tent.

In case any treasures had come to Cossim Alley, or Bollakey Doss, during their confinement, what would become of it?—When a man is in confinement, he who confines him will take it: whatever Bollakey Doss had, Collic Joqu took from him.

Did Collic Joqu give a receipt for the money he plundered?—I don't understand such conversation.

If any treasures had come to Bollakey Doss, which Collic Joqu had taken, would Bollakey Doss have given a receipt for it?—Why should I suppose treasure would come at that time, or why should he give a receipt for it?

Can you take upon you to swear that no such treasure arrived?—From the time that I was in confinement, I can take upon me to swear that no treasure was brought.

Was Cossim Ally Cawn, and Bollakey Doss in the same army together?—Bollakey Doss was in the same army with him.

Mr. *Williams* examined.

Do you know the river Doorgotty?—I do not know the names of the rivers in that country.

Do you know at what time the army of Sujah Dowlah entered their cantonments at Buxar?—They cannonaded Patna in May: I can only answer for the motions of our own army. The battle of Buxar was the 23rd of October.

Kissen Juan Doss re-examined.

Jury. For how long a time have you seen Meer Hussud Alli about Calcutta?—Ten or fifteen days from this time.

How often have you seen him?—About twice.

Did you talk with him?—No.

How came you to know him?—I saw him once on horseback. He said I know you, you were Bollakey Doss's servant; I answered, Very probably: there was a servant of mine with me.

What is his name?—I do not know.

Had you ever seen him before?—Once: nothing then passed between us.

How came you to know his name?—I did not know his name when I saw him in court.

Did you go to the house of Maha Rajah Nundocomar?—I never went near him. I like to sit in my own house.

Was there more than one body of the army at Buxar?—The two armies were separate: there might be a coss or a coss and a half betwixt. Cossim Ally carried equal army from hence; but at the time of the battle, I believe Cossim Ally had not more than from 500 to 2,000 men belonging to him.

Was Cossim Ally close confined on the day of the battle?—He was; and at the end of his confinement, he could not be said to have any army at all; several were gone, and he had given dismission to others: he had dismissed Sumroo: Cossim Ally was not released till after the battle.

Shaik Ear Mahomed examined.

Do you know Mahomed Commaul?—I did.

Do you know more than one of that name?

[The question was repeated several times, but no answer could be produced.]

Mr. *Elliot.* It is impossible he can mistake me: he will give no answer.

At last the witness said, I did not know any other Mahomed Commaul.

Do you know Commaul O'Dien Ally Cawn?—I did.

Is the Mahomed Commaul you speak of, and Commaul O'Dien the same person?—They were different.

Is the Mahomed Commaul you speak of alive or dead?—Dead.

How do you know?—I buried him.

When did he die?—Five or six years ago: I do not remember exactly.

Where did he die?—He died in the house of Maha Rajah Nundocomar, in Calcutta.

Where did he usually reside while living?—In a little place separate from the house of Maha Rajah: when he came from Muxadavad, Maha Rajah put him there.

Do you know whether that Mahomed ever witnessed any bond to Maha Rajah Nundocomar?—I saw him witness it with my own eyes: I saw him put his seal to it.

Who gave the bond to Maha Rajah Nundocomar?—Bollakey Doss.

Do you know who were the other witnesses?—Matheb Roy, a kittree, and Sielabut the vakeel of Bollakey Doss: those three.

Do you recollect for what sum of money it was?—I remember it was for 48,021 sicca rupees.

Cross-Examination.

Whose servant were you?—I am not a servant; I used, a long time ago, to trade in salt:

I am no one's servant: I go back and forwards to Maha Rajah: my uncle has a house at Siedabad, where we have carried on business for a long space of time: my uncle used frequently to go to Maha Rajah's: when I was little I used to go with him: I have now been ten or fifteen years in Calcutta, and always with the Maha Rajah.

How came you to see the bond executed?---Mahomed Commaul, Joydeb Chowbee, Choytou Naut, and myself were sitting in the house of Lucky Caunto Seat, in the Borrabonnah with Maha Rajah: Bollakey Doss likewise came in, and sat down by us: Maha Rajah Nundocomar lived in that house: having sat down, Maha Rajah Nundocomar said to Bollakey Doss, You have for a long time had my money; it shall remain no longer with you; now pay it me: then Bollakey Doss answered Nundocomar, My money, which was in the house of Muxadavad and Decca, has been plundered; I have not now the power of paying the money; a great sum of money is due to me from the English Company; having received that money, I will pay you first, and after that will pay others: I will now give you a bond for that money, do you take it from me. He then pressed Maha Rajah very much, with his hands joined, to take the bond. Maha Rajah consented, and said, Very well, write a bond: he then said, Give me Mahomed Commaul with me, and I having gone to my own house, will write out a bond, seal it, and get proper witnesses to it, and send it back by Mahomed Commaul: Maha Rajah Nundocomar said, Very well. Bollakey Doss, taking Mahomed Commaul with him, obtained dismission: Maha Rajah then got up, and we three likewise took our leaves: when we went into an outer house, Seat Bollakey Doss said to me, Do you likewise come along with me; and I having gotten a bond written out and sealed, you will see it done: he having said this, I agreed; he having got into his palanquin went away, we four people followed him, he having gone with his palanquin, half a gurry after we followed him, we likewise arrived at his house. We saw Bollakey Doss sitting, and along with him Matheb Roy, Sillabut Lallo Doman Sing, and a Mohurir: we sat down. Bollakey Doss said to his writer, Write out a bond for 48,021 sicca rupees, in the name of Maha Rajah Nundocomar: he wrote out a bond in Persian, and the Mohurir having read it, Bollakey Doss heard it, and took it into his hands, and having taken it in his hands, he took off a ring, which was on his finger, and when he had taken it off, he dipped it in a sicca dewat (ink stand) which was lying before him, and affixed the seal to the paper which was lying before him, and having sealed it, he said to Mahomed Commaul, Do you likewise be a witness to it, and gave the bond into his hands. He having likewise taken his seal off his finger, affixed it to the bond as a witness. Bollakey Doss then said to Matheb Roy, Baboo Matheb Roy, Do you likewise witness it; Matheb Roy likewise, having taken his seal from his finger, affixed it, and was a witness. He then said to Seilabut, his vakeel, Do you likewise be a witness to this bond; who having taken the ink-stand in his hand, wrote his name in Persian, as a witness: Bollakey Doss then took the bond in his hand: then Bollakey Doss put the bond into the hands of Mahomed Commaul, and said to Seillabut, Do you likewise accompany Mahomed Commaul, and deliver this bond to Maha Rajah Nundocomar. Mahomed Commaul and Seillabut having taken the bond, went to the house of Maha Rajah Nundocomar: I likewise went to my own house. Of the bond being sealed and executed, I know this.

When Bollakey Doss came to Maha Rajah Nundocomar, had he any servants?---He had peons and kidmutgars; I could not them: one kidmutgar went up for his shoes.

How many?---I cannot tell.

Were any on horseback?---No.

Were there five or six?---I cannot tell their number.

What did Maha Rajah Nundocomar say, when first he came to his house?---He said what I have given in evidence.

What did he first say?---It has already been written.

[Question repeated.] I have related every thing, from the time he came, to the end.

[Question again repeated.] If I begin at the beginning, I can tell, I cannot begin in the middle.

Court. Let him begin again.

A. Joydeb Chowbee, Choytou Naut, Mahomed Commaul, and myself were sitting in the house of Luckycaunt Seat, with Maha Rajah, Seat Bollakey Doss likewise came, he likewise sat down by Maha Rajah: Maha Rajah said to Bollakey Doss, There has been money of mine a long time with you; it shall not remain longer; you now pay it me: Bollakey Boss answered, My house at Muxadavad and Decca have been plundered; I have not now the power of paying it, there is a great sum of money due to me by the English company; when I have received that money, I will pay you first, and will after pay others: I will now write out a bond for you, do you take it; and he pressed him very much to take it. Maha Rajah consented: Bollakey Doss then said to Maha Rajah, Give me Mahomed Commaul along with me, and having gone to my own house, and having written out a bond, and having got it sealed and properly witnessed, I will send it to you by Mahomed Commaul. Having said this, he obtained dismission.

[*Question to Mr. Elliot.* Does he repeat in the same words?

A. The paragraph is repeated in the same words.]

Witness. Maha Rajah likewise got up; and we likewise too took leave. Having gone into an out-house, Bollakey Doss said to me, Do you likewise come along with me to my house: he having got into his palanquin, he went before

us. We four men, Mahomed Commaul, Joydeb Chowbee, Choyton Naut, and myself, went half a gurree afterwards. I cannot tell the same words.

Court. You need not tell the same words: tell only the substance. We had rather you repeat it in other words.

Witness. We arrived there. Bollakey Doss was before sitting there, and Matheb Roy, Seillabut, Lalloo Doman Sing, and a Mohurir were there. We four people likewise sat down: Seat Bollakey Doss said to his Mohurir, Write out a bond to Maha Rajah Nundocomar for 48,021 rupees. Having written out a Persian bond, and read it to him, he gave it into the hands of Bollakey Doss: he having taken off a ring from his finger, dipt it into the sicca dewat, which was before him, and fixt it to the bond; and he put it into the hand of Mahomed Commaul; and said, Do you likewise be a witness to it. Then Mahomed Commaul, having likewise taken off his seal from his finger, dipt it in the sicca dewat; and affixed it on the bond. Then Bollakey Doss said to Baboo Matheb Roy, Be you likewise a witness to this: he likewise having affixed his seal to it, was a witness. He likewise then said to his Vakeel Seillabut, Do you likewise be a witness: he likewise having taken the ink-stand into his hand, wrote his name in Persian; and became likewise a witness. Seillabut then put the bond into the hands of Bollakey Doss. Bollakey Doss gave the bond into the hands of Mahomed Commaul; and said to Seillabut, Do you go along with Mahomed Commaul, and give this bond to Maha Rajah Nundocomar. Seillabut and Mahomed Commaul having taken the bond, went away; and I likewise went to my own house. This is what I know about witnessing it.

How long is it since you were acquainted with Mahomed Commaul?—About a month or two before this bond being executed. He used to go backwards and forwards to the Maha Rajah Nundocomar. I likewise went backwards and forwards.

Was he the servant of Maha Rajah Nundocomar?—He was not servant of Maha Rajah Nundocomar; he had been the servant of Maha Rajah's father, and went backwards and forwards at Maha Rajah's. He remained sometimes two, three, or four months afterwards here, and went to Muxadabad.

When did he come back?—About four or five years after.

[Mr. *Elliot.* I bid him not repeat so often; he says he repeats that he may be sure.]

Did he stay at Muxadabad four or five years?—He came back four or five years after signing the bond; and then I saw him at Maha Rajah's.

Was he a servant of Maha Rajah's?—I know when a man comes backwards and forwards; but I do not know if he is a servant.

Where did he live?—When he returned from Muxadabad, Maha Rajah Nundocomar gave him a place near his own house to live in.

Was he long ill before his death?—He was well for three or four months: after that he was sick; and then he died.

What was the situation of the place he had given him?—It was within the four walls of Maha Rajah's house, and belonged to the house.

What sort of a place was it?—It is here in Calcutta. I can shew it if you will go.

In the mean time, do you describe it.—It is raised upon a terrass, [chund.] There is a Chubbuckin under it; there were three openings: one to the southward; one to the westward, which Maha Rajah Nundocomar ordered to be filled up with mats; and left the other opening for the door.

Was the third opening to the north, or to the east?—To the east.

How large was the place?—I cannot tell how many cubits it is. That place yet remains.

Who lives in that place now?—Maha Rajah Nundocomar's peons, kidmutgars, &c. It is not appointed for the use of any particular persons, as in Mahomed Commaul's time.

Are the kidmutgars, &c. of the Maha Rajah's, Mussulmen or Hindoos?—They are both one and the other.

Do any of them sleep there?—How can I tell whether they sleep there? I see them sit in the day time.

How came you then to know, that Mahomed Commaul slept there, and the orders given about it?—I saw Maha Rajah with my own eyes, order the house to be fitted out for him; and he lived there.

Did you use to go backwards and forwards, at that time and place?—As I went to Maha Rajah's durbar, I used to pass by the place, and made my salam to him.

Did you see him when he was sick?—I did: I saw that physic from Maha Rajah was sent him.

What year did he die?—I do not know the month or year; it was in the rainy season.

Who was at his burial?—I carried him out to be buried: other people likewise went out.

Who else was there?—Many people, Shah Mahomed, Chawn abb Chubdar, Rund Mutt, Cawn Jemut, Jummiatt Cawn, Ika Cawn, Cawn Mahomed, and five or six coolies; nobody else.

Were these all who were there?—Except the coolies, there was no one else. I speak with certainty.

Did you ever attend the burial of any body else?—It is a custom among us Mussulmen to go out with the bodies of any of our friends and relations, when they die. Since I came to the age of maturity, I believe I have attended 200 or 300 of them.

Court. Tell the names of some.—*A.* I went out with Shau Mahomed, Cawn abb Chubdar, Bullah Cawn. Need I mention any more?

Who were the other persons that attended?—Mussulmen of the Maha Rajah's family.

How came you to remember their names so

exactly?—The morning after the night of his death, Maha Rajah was informed of it; the burial was made, and I remember these people.

[The witness having been pressed with this question over and over again, Mr. Elliot said, I cannot get him to give any reason.]

Did you see any of your acquaintance that morning?—No: it rained very hard.

How long have you been acquainted with Choyton Naut?—Ten or eleven years.

How long have you been acquainted with Joydeb Chowbee?—As long as I know Choyton Naut.

Were you first acquainted with them both in the same place?—I was: they used to come backwards and forwards to Maha Rajah's.

Did you see Joydeb Chowbee the day of the funeral?—They both used to come to Maha Rajah's Durbar: I do not recollect, with respect to that day in particular.

How long have you been attending at the Maha Rajah's?—I have before said, I came to Calcutta twelve or thirteen years ago.

Did Joydeb Chowbee and Choyton Naut come to Maha Rajah's together?—I did not say that: I said, when I came to Maha Rajah I saw them.

What conversation passed at the house of Bollakey Doss Seat?—I have kept no account of it. He spoke what I said to the Mohurir.

Had that Mohurir any papers or accounts with him?—No: he was sitting without any.

Do you understand Persian?—I do understand it little, but do not write it well.

Were you asked to witness the bond?—He desired nobody, but who are already named.

When the writer read the bond to Bollakey Doss, what did he, Bollakey Doss, say?—Nothing, except well, or some such word.

Did any body present ask Bollakey Doss the amount of the bond?—No one asked, as I recollect. I think I speak with certainty. I do not remember it.

Did Bollakey Doss Seat mention the particular sum the Mohurir was to make the bond for?—He did.

Do you know Bollakey Doss Seat? Was you well acquainted with him?—I knew him very well.

Did Bollakey Doss give that order in Persian?—No, in Moors.

Court. Repeat that order. [He repeats the same in Persian.]

[Mr. *Elliot.* I examine him in Moors, he always repeats the words of the sum in Persian, which is contrary to the usual manner of speaking; for those who speak in Persian, when they come to sums, almost always mention them in Moors. He now repeats it in Moors.]

How came you always to mention that sum in Persian, which Bollakey Doss gave orders for in Moors?—I spoke it for your information. [Addressing himself to Mr. Elliot.]

[Mr. *Elliot.* If you did that for my information, why not every part of your evidence in Persian, as I am to interpret the whole to the Court?—*A.* I happened to say it: I did not say it for your information.]

How came you to do so three times over?—For your information. [To Mr. Elliot.]

Court. Was it, or was it not, for the information of the interpreter?—*A.* There was no particular reason.

How came you to be so particular in your account of the sum?—I remember it from the long dispute there has been about the bond.

When did you first hear of the dispute about the bond?—I do not mean in particular the bond. I know it; because Mohun Persaud and Gungabissen proceeded against Maha Rajah, in the court of Cutcherry, in the time of Mr. Palk, and also in Mr. Rous's Cutcherry.

For what sum was that complaint?—They complained for 129,000 rupees, on account of a deposit.

Why do you give that as a reason for knowing the bond was for 48,021 rupees?—I never gave that reason for remembering it. I know it from the mouth of Bollakey Doss Seat.

[Question repeated.]—*A.* I never said so.

[Mr. Elliot and Mr. Jackson both depose, that he did give that reason. Mr. Weston, (a gentleman of the jury,) also says that he did so.]

[Question again repeated.]—*A.* I never said that Mohun Persaud and Gungabissen sued Maha Rajah Nundocomar for 48,021 rupees, in the Cutcherry.

How long ago was this suit in the Cutcherry?—About three years ago.

In which did it commence? Whose court?—Mr. Palk's.

Do you know any dispute in the mayor's court, about this matter?—I do not know of any.

Did you give evidence in that cause?—In the time of Mr. Rous I did give evidence.

In your evidence, did you mention the sum of 48,021 rupees?—No mention was made of it.

Have you ever, from the time of executing the bond to this time, mentioned the sum of that bond to any body?—Nobody ever mentioned that sum to me, nor did I mention it.

What, never since Maha Rajah has been confined? Not to any body?—I do not remember telling to any body.

Did you never tell the sum to Mr. Jarret, nor any body concerned for Maha Rajah?—When Mr. Jarret asked me about this business, I told him of it; I gave account of it, and Mr. Jarret wrote it down.

Did you never mention it to this gentleman? [Pointing to Mr. Farrer.]

Never. I never did? [Mr. Farrer confirms what he said.] When Maha Rajah was put into confinement, he desired me to go to Mr. Jarret, and give him what information I could. Nobody else asked me about it.

Did you tell Maha Rajah himself?—I did not.

How came you to mention so exactly the sum?—I heard it from the mouth of Seat Bollakey Doss.

Did Bollakey Doss Seat mention it in Persian?---No: in Hindostan.

Have you never since heard it from any other person?---When Maha Rajah was first thrown into confinement, he told me, it was on account of a forged bond, which I had been present at the execution of. I have not heard of it from the time I heard it of Bollakey Doss till now. I told him, that the complaint was an unjust one, as I was present at the execution of the bond; and that the gentlemen of the Audawlet would do him justice.

Were you at the execution of any other bond?---No: I had not much business with Bollakey Doss Seat. I never was at the execution of any other.

Or of any other person's bond?---Yes: many.

Do you mean to Maha Rajah Nundocomar?---No: I have seen bonds of his; but not seen them executed.

Have you seen any other bond executed?---I have seen several; but do not remember the persons.

Court. Name the name of any person you last saw execute a bond?---*A.* I have seen persons sign and seal bonds; but do not recollect whom or when.

Have you, since this bond was executed? Say to whom; and who were witnesses?---Yes: I certainly have; but how should I know who the witnesses were, or whom in favour of?

If you are so particular in your recollection of this bond, and its sum, how comes it that you cannot remember any thing concerning the others you have been present at?---In my presence a great many bonds have been signed; and witnesses have affixed their seals to them since that of Bollakey Doss's.

Name the names of those witnesses.---I did not mean I saw bonds executed: I spoke of the custom of the country. I thought you asked me as to the custom of the country, from my having seen bonds executed.

Have you, or have you not, been present at the execution of any bond, since that of Bollakey Doss's? If you do not give a plain answer to a plain question, you will be committed.---You are my masters: you may punish me as you please.

[Mr. *Elliot* being called upon, declares: his words were, "in my presence, bonds have been frequently signed, and witnesses have affixed their seals to them, since the bond which we have been speaking of." He now says, that he answered without understanding what was said to him; and that he thought I asked him as to the custom of the country; but this pretence cannot be true, because he first gave me a relation of the custom with respect to sealing bonds. I stopped him, and told him, I did not ask him to the custom; but whether before his face any bond had been sealed and signed? He asked me, whether I meant to know, if he had seen any sealed before his face: on my answering, Yes, he gave the answer above rehearsed.]

Court. Have you seen any other bonds executed since this of Bollakey Doss? Now you understand the question: answer it.---*A.* I do not recollect to have been present at the executing of any bond. I know the custom of executing bonds.

[Question repeated.]---I thought you asked what the custom of the country was, as to executing bonds from my own knowledge, and having seen them.

Do you know the custom? What is it?---I know the custom of executing bonds: one puts a seal here, another there. I have been present.

How should you know the custom of the country, if you have never seen bonds executed?

Mr. *Elliot.* He will not give an answer.

[Question again repeated.]---I have been in trade for many years, and have seen many bonds signed and executed to myself.

When was the last?---I am speaking of 15 or 20 years ago; or when I was 15 or 20 years of age.

Have you never seen any bonds executed, but the bond in question, and those to yourself?---I do not remember; I cannot remember; I cannot pretend to say.

You say that you have seen bonds executed; but do not remember to whom, and in whose favour. How came you not to remember those to yourself?

[No precise answer could be obtained.

Court. Does he appear intimidated?

Mr. *Elliot* and Mr. *Jackson.* He does not appear the least intimidated.

Jury. He certainly is not intimidated. He understands the question.

Mr. *Elliot.* He said that he had seen bonds executed since this; but could not remember the persons who were present at the execution. I asked him if he knew any of the persons who were present at the execution, he having said that he had seen many since.]

How came you to recollect the precise sum of Bollakey Doss's bond?---In my presence Bollakey Doss ordered the Mohurir to make out a bond for that amount.

How came you to remember the exact sum of a bond executed so long ago?---What is in my remembrance, I remember. What I have forgot, I have forgot.

Why do not you then remember the sums in others?---This one I remember. Why do not you ask me why I have not forgot it?

Why have you not forgot it?---If I forget a thing, I must be content with it. This I remember perfectly well: what answer shall I give to, Why I have not forgot?

What reason have you for remembering it?---I remember it, because I remember it. What I have forgot, I forgot.

Have you, or have you not, any reason for

remembering it?—I remember: therefore I have told you I have no reason.

Do you recollect any sum of money you ever saw a bond given for, since that time?—I remember one Mr. Morrison taking 15,000 rupees from Maha Rajah Nundocomar, and giving his bond for it.

Were you a witness to it?—No.

When was it?—I only remember the sum: I do not remember the date.

Was it since this bond?—Yes.

How long ago was it?—Something above six years.

Were you present at the execution of Mr. Morrison's bond?—I saw him sign: Maha Rajah sent me for it.

Who were the witnesses?—He signed it before none. I do not know who were the witnesses.

Was it in English?—Yes, it was early in the morning; nobody was there: he put a seal of wax, and signed it: he told me he was making out a bond to Maha Rajah, and said, Do you take it.

In what language did you tell it him?—I told him in Persian.

Who was this Mr. Morrison?—He was Chootan Saheb (second in rank) at Muxadavad.

Where was the bond given?—At Calcutta.

Jury. Might the name of the person you call Morrison be Maddison?—I know not: they called him Morrison.

What sort of a man was he?—A little short man, and wore spectacles.

Jury. From the similarity of the sounds, and the description of the person, it is evident the witness must mean Mr. Maddison.

Did you ever see any other bond executed?—I never did see any other bond executed: I have no remembrance: what shall I tell you?

Did you know Bollakey Doss very well?—Yes.

Did Bollakey Doss wear ear-rings in his ears?—I saw no ear-rings in his ears: whether he wore them or not I cannot tell; but I did not see them.

Do you know his seal?—I have seen three or four letters of Bollakey Doss, that came to Maha Rajah Nundocomar's, with seals; and by comparing them with the bond, I shall be able to tell.

How came you to see these letters?—When Bollakey Doss wrote a letter to Maha Rajah Nundocomar from Chinsura, I was there, and saw the seal, and one more seal of a letter of Bollakey Doss, which Maha Rajah sent to Mr. Jarret.

How came you to see that letter that was sent to Mr. Jarret?—Joydeb Chowbee carried it from Maha Rajah's to Mr. Jarret: I was then at Mr. Jarret's house, and saw it in the hands of Joydeb Chowbee. I saw it in his hands, and asked, what letter was that? he said, Bollakey Doss's. I looked at the seal, and saw it was Bollakey Doss's.

How came you to remember the seal?—I had in my mind a letter Bollakey Doss wrote from Chinsura: I remember that, and seeing that in Joydeb Chowbee's hand, I saw they were both alike. I saw him put it to that bond: I have seen him put it to several other papers, at a distance.

What do you mean by a distance, and what distance?—It was at the distance of five or six cubits, (or hauts).

What paper have you seen Bollakey Doss put his seal to, besides that bond?—I have seen it only upon these two letters and that bond.

What are the papers which you have seen him put his seal to at the distance of five or six cubits?—I have seen his seal only three times: once to the bond; I was then at the distance of five or six cubits (or hauts): the second time I saw it, was that on the letter wrote from Chinsurah; the other was that I saw at Mr. Jarret's, that Joydeb Chowbee carried.

How many other papers have you, with your own eyes, seen him put his seal to?—I never saw Bollakey Doss, with my own eyes, put his seal to any other paper than the bond: the appearance of the seal and that of the two letters agree.

Did you take the bond into your hand to examine the seal?—I saw when Bollakey Doss gave it into the hands of Mahomed Commaul; when he gave it into the hands of Matheb Roy, and told him to witness it. I likewise saw it when he gave it into Seillabut's hands. I likewise saw it when I did not take the bond into my hands.

What distance were you from it when it was put into the hands of Mahomed Commaul?—It may be at the distance of three or four hands or cubits.

What distance were you when it was put into the hands of Matheb Roy?—I was rather nearer to him than to Mahomed Commaul.

At what distance was you when it was put into the hands of Seillabut?—I was near Seillabut: I cannot be exact as to the distance.

Which were you nearer to, Matheb Roy or Seillabut?—Matheb Roy was near.

Court. Tell us the position in which they were?—*A.* Matheb Roy, Seillabut, Doman Sing, were all with their faces to the southward; Seillabut in the middle, Matheb Roy on the right, Doman Sing on the left: we four, Mahomed Commaul, Joydeb Chowbee, Choyton Naut, and I, had our faces to the north: Bollakey Doss with his face to the west, and back to the east.

Who was on the right hand of Bollakey Doss?—Doman Sing was on the right hand, and Mahomed Commaul on the left.

What was the month?—It was the rainy season: I do not remember the month.

If you remember so particularly the places of all these persons, how came you not to remember the month in which it was executed?—I do not remember the month: I had no

reason to remember that: I am positive to the situation of the persons: they certainly sat in that position.

Jury. If you were to see the bond at the distance of three or four cubits, would you know it?---I should not possibly know it, for this reason: I was not a witness to the bond: if I was to put my own seal, or write my own name, and if I had read the bond, on seeing it again I should know it.

Do you mean to say, that if this bond was put into your hands, you should immediately know it to be that bond?---By the appearance of the seal, and the signature of the witnesses, I should be able to guess; but would not positively say, that was the bond.

Did you ever put your name as a witness to a bond?---I very well remember I never put my name or seal, as a witness, to any bond since the time of the above: whether I did before or not, I cannot tell.

Court. Take a pen, and write the name of the Company.

[He writes a very bad hand, not like that of the bond.]

You say you know Mahomed Commaul's seal: would you know it again, if you was to see it?---I have not sworn that I should know Mahomed Commaul's seal.

Do you remember any other circumstances of the bond and the sum?---I do not: what Bollakey Doss said, I remember.

Was it a simple bond for the payment of money?---What I heard from Bollakey Doss I know: I know nothing else that the bond was about: it might be as well one thing as another.

Do you know any particular circumstance being mentioned in the bond, when you heard it read?---I did not say that I heard it read: his writer went close to him, and read it gently to him: I was at a distance, and did not hear it.

Did Seillabut read it?---He might have read it to himself: I did not hear him: he did not read it aloud.

Did any body write any thing with a pen on the bond, except Seillabut?---I saw with my own eyes Bollakey Doss, Mahomed Commaul, and Matheb Roy, put their seals; and Seillabut wrote his name.

Did any other person make use of a pen?---No.

Are you sure?---I heard it with my ears, and saw it with my eyes.

Are you very sure?---Very sure. I am certain.

After Seillabut signed it, what was done with it immediately?---Seillabut gave it to Bollakey Doss: Bollakey Doss gave it to Mahomed Commaul, &c. as before.

You say, the writer read the bond low: was it so low that you could not hear what was said?---When the Mohurir had wrote the bond, and carried it to Bollakey Doss, he gave to Bollakey Doss, to hear it in the customary way.

At what time of the day was it, when the first conversation passed at the Maha Rajah's?---About noon.

Was the bond read so low that you could not hear it?---I could not hear it well.

Did not you hear one word?---If I did not hear, how can I say I did hear?

Did you hear nothing of the contents?---I heard nothing of the contents.

What, not a word?---What else shall I say? I did not hear a word.

Were you deaf, or had you any disease in your ear?---I was neither deaf, nor had I any disease in my ears.

How then came you not to hear a word?---I did not pay so strict attention, nor did he read it in so high a voice, that I should hear it.

Did any body else hear it but Bollakey Doss?---I cannot tell.

Did you know the Mohurir?---I saw his face then: he was no friend of mine.

How came you to go to Bollakey Doss's house then?---I went that time, and now and then went at other times.

Did you ever see the Mohurir before or since?---Neither before nor since have I seen him: I only saw him that time.

June 14th, 1775.

Kissen Juan Doss examined.

Do you know Bollakey Doss?---I was his chief gomastah: I used to superintend his other gomastahs, and sometimes write myself.

Do you know of all the accounts that have ever passed between Bollakey Doss and Maha Raja Nundocomar?---I know all the accounts that were entered in the books at Calcutta. I likewise am acquainted with the accounts of Pudmohun Doss.

Do you know of any accounts respecting jewels?---I do not know any thing of jewels between Bollakey Doss and Maha Rajah Nundocomar.

Did you see, in the hands of Bollakey Doss, any papers concerning his accounts with Maha Rajah Nundocomar?---When I drew up the accounts of the Roze Nama, there was at that time no account of any jewels of the Maha Rajah's. I asked Pudmohun Doss, Where is the account of the jewels for which we are now paying a bond? make my mind easy. Pudmohun Doss then said to me, When Maha Rajah Nundocomar gave the jewels to Bollakey Doss, you was not his servant.

Court. This is no evidence.

Did Pudmohun Doss then shew you any papers?---He did shew me a canatama, wrote by Pudmohun Doss, and signed by Bollakey Doss.

Are you sure Bollakey Doss's hand was signed to it?---I saw with my own eyes, that the hand-writing of Bollakey Doss was to it.

Was his name signed to it?---These are the words written in the hand-writing of Bollakey Doss: "It is written by Bollakey Doss;

written above by Padmohun Doss, the space of six months."

Have you ever seen that paper in any body's hands?---After having written from that paper myself, I have not seen it in the hands of any body.

How long ago is it since you saw it?---About four years: I speak from guess.

How long has Padmohun Doss been dead?---Three years and seven months.

Are there any entries made of this transaction in the books of Bollakey Doss, taken from the contents of that paper?---Yes; there was an account for 69,730 rupees, 7, on account of a bond, the date of which is entered in those books.

In the Corra Nama is there any mention of a bond, or only of jewels?—I will inform you of what I know. It is first written, that a sum of money, the amount of which I do not recollect, was to be paid to the Governor and Mr. Pearson; 3,500 rupees on account of teeps; mention of a bond on account of jewels is made, in which it is specified that no interest is to be paid.

Court. Repeat what you before said about interest?---To which I can pay no interest, and therefore pay it without (sewawy.)

Mr. *Jackson.* The meaning of 'sewawy' is, that at that time he could not pay interest: he was to pay four annas.

Mr. *Weston, one of the Jury.* By 'sewawy' he means, that as he could pay no interest, he was to pay an additional quarter rupee.

Foreman. I understand the word 'sewawy' as used, to be, "I can pay no interest now, but will pay a fourth more, as a premium for lending the money, as it would be a long space of time from the date of the bond before it would be paid."

Mr. *Elliot* says, That when a bond is given, and it is expected to be so long a time before it is paid as to double the sum, it is settled 'sewawy,' to pay a quarter more as a premium, instead of interest.

Did you, from the date of that paper, make any entry in the books?---Yes.

[Books produced, and the following entry made.] "In the private account of Bollakey Doss, the sum of 129,620 : 7 is the jummah side of the account of Maha Rajah Nundocomar Gee: the particulars of which are on the credit side of the account given on inspecting a dust avaize: the receipt is taken, and it is written on the credit, 'Maha Rajah Nundocomar's account with you.'"

Was the entry made after the death of Bollakey Doss?---It was.

How came it to be entered in the accounts "with you?" [Meaning Bollakey Doss after his death.] I had seen that Corranama; and Pudmohun Doss having told me the accounts were settled in that manner, I made it after his death.

What was the date of the entry?---There is no date to that particular entry.

What is the date of the transaction before or after it?---The thirtieth of Cheit, 1827, is the date of the one before the account: the last entry is taken from the date of a note of hand: there is no date after: it is not the date of the transaction; it is only the date of the note.

What is the date next preceding the note?---That which I have mentioned is the date next preceding.

Were there any accounts after the note?---Many.

As the account was entered after the death of Bollakey Doss, how came you to say "with you?"---They are the books of Bollakey Doss; it is customary to address yourself to the person in whose name the book stands.

What! after their death?---Yes.

Is there any other account entered in the book after the death of Bollakey Doss, where it is said "an account with you?" [The books were inspected, and it appeared there was.]

These are the particulars on the credit side.

"The jummah of Mahah Rajah, 69,630 : 7, the bond of which Bollakey Doss wrote the particulars, 48,021 rupees, a bond bearing date 7th August, 1765, in English words, but Nagree characters: the date of the bond is the 7th Bandon, 1172, Bengal style; 1,205 : 4; the account of interest sewawy has been settled: which sums cast up, make 60,026 : 14—9,604 : 3 : 16 per cent. on account of sicca rupees added to that, makes 69,630 : 7; there is an end of the account."

Was this entry made before or after the bond was paid?---It was made long after: I did not know when the bond was paid: when the papers were called for by the Audawlet, I entered it.

Did you make the entry from the inspection of the dustavaize immediately after, or from an account in the adawlut?---I saw it the same day I saw the dustavaize.

What did you mean by the expression "for which we are now paying the bond?"---I only meant "for which a bond has been paid."

[Mr. *Elliot* says one word makes the difference; the difference is only as between 'dixit' and dicit.'

Foreman, The entry ought to be made "when the bond was paid."]

Why, instead of describing the bond, by "the bond of which Bollakey Doss had wrote the particulars," you did not describe it by the name of the Persian bond, which having been paid, must be in their possession?---They did not shew me the bond: I was dependant upon them: they did not shew me the original bond, but only the corra nama: I obeyed their orders.

Who do you mean by they?---Mohun Persaud, Pudmohun Doss, and Gungabissen.

Were they all there?---No, Mohun Persaud was not present: I went to ask him: he said, Pudmohun Doss is the head man, go to him.

Do you know if Mohun Persaud and Gungabissen were ever acquainted with this transac-

tion at the time of the entry?---I cannot say they knew of it at the time of the entry.

Did they ever after?---They knew afterwards.

How soon afterwards?---How can I tell when they knew of it first? they must have known it by the paper in the dewanny adawlet.

Do you know whether Gungabissen, or Mohun Persaud, ever saw this entry in the accounts?---I do not know: I can tell I wrote it; that is a fact to which I can speak; but I cannot say whether they read it or no.

Did you ever tell them, or either of them, about the entry?---I did inform them of it: Pudmohun Doss was privy to all accounts and papers of the deceased: Gungabissen and Mohun Persaud were not acquainted with the accounts.

Do you mean you said both, or either, and whom?---Why should not I have told them? they said the papers were wanted in adawlet, and told me to draw them up.

What did you say in particular?---I went and informed them I had entered the accounts as they desired, and that they were ready for the adawlet. When Bollakey Doss died, Mohun Persaud and Pudmohun Doss transacted all the business: Gungabissen is in reality master: Mohun Persaud and Pudmohun Doss at first agreed on the accounts that were to be sent to the Adawlet. Afterwards Mohun Persaud would not agree. Pudmohun signed it alone, and it was sent into the Adawlet.

Do you know of their signing more than one account?---Yesterday, when I looked over the papers, I saw a paper signed by them both; therefore there must have been two.

In the account you saw the other day, was there any mention of these accounts?---There is no account in that paper of the bond.

What did they say when you told them of the entries?---When I first informed Mohun Persaud and Gungabissen of entering these accounts, they said nothing: after that, Mohun Persaud settled the accounts of Gossein, and they jointly gave a promissory note in the account so settled, and paid him the whole but 15 or 16,000 rupees, and told him they would pay him the balance: after Mohun Persaud told Gossein to receive the money from Pudmohun Doss: the amount of the was about 36 or 38,000 rupees; but afterwards, Pudmohun Doss said to him, I have not money, but out-standing balances which I have not received, due to the estate, which I shall receive: for the sums which have already been paid to different people, you will demand receipts: if you will stay, I will pay you whatever sum the balance amounts to: Pudmohun Doss, Mohun Persaud, and Gungabissen separated, and God knows what they said after; Mohun Persaud and Gungabissen complained against Pudmohun Doss, and then all the papers were brought to the Adawlet: these three people, Gossein, Gungabissen, and Mohun Persaud, joined together in counsel to complain; but only Gossein complained: Gossein's name is Bridjoo Ibishes Gee: I do not say exactly who complained with Adawlet; that will appear by the proceedings.

What distance of time, as near as you can recollect, between making entries in Bollakey Doss's books and the complaint in the Adawlet?---I made the entries about four years and a half ago, as nearly as I can remember.

[Mr. *Farrer* produces an office copy of the executors accounts, delivered in by Pudmohun, filed the 1st of October, 1774.]

Can you be certain that it is about four years and a half ago?---I believe it is, but cannot speak precisely.

Can you speak to half a year?---I believe it was four years ago, but will not swear to a paper that has no date to it: there is no date to the entry, I cannot be any ways certain.

Will you swear it was more than three years?---If I thought I should be questioned by such gentlemen as you, I would have wrote down what I was to say: I can swear to this, That I first entered this account a little time after the accounts came into the Adawlet: by a little time, I mean two or three months, or any thing under a twelvemonth.

Are there any articles without?---Yes, I can show you fifty.

Do you know of any objection made by Mohun Persaud and Gungabissen, at the time of your writing the accounts, to the time they were delivered in?---I do not know whether they were displeased or no; I know they were in counsel with Gossein, who afterwards complained; but what their counsel was I do not know.

Were you ever with Bollakey Doss at the army?---I was.

How long ago?---About ten years ago.

When you were with him, do you know any thing of his being plundered?---I have before said that he was plundered at Buxar of every thing.

Tell as near as you can the particulars of what he lost?---A little trunk of private papers, which he never showed to any body: how can I remember what was taken from him? his tents were taken; nothing was left him but his jamma.

Do you know of his having jewels at that time?---He was not plundered of any jewels at Buxar: I have heard that at Muxadavad he lost a small quantity of jewels mortgaged to him: I was not there myself.

How long since did you hear it, and from whom?---The Gomastah who had absconded from Muxadavad during the troubles, came in to Bollakey Doss, and informed him of it: I was present when the Gomastah said they were plundered.

What quantity did he say, and whose property?---A very small quantity, not above 2 or 3,000 rupees worth. A Shroff at Muxadavad had taken a small quantity of money from Bollakey Doss, and pledged these jewels.

Do you know of Bollakey Doss's having

been plundered of any jewels at any other time?---I have heard of no other jewels: I have told you all I know about jewels: I never heard any word of his being plundered of any other jewels.

Do you know of any money being recovered by means of Maha Rajah Nundocomar from the Company for any person?---Pudmohun Doss used always to attend at Mr. Verelst's with Maha Rajah Nundocomar: when the governor was going to Europe, he was at Belvidere: Pudmohun Doss went with Maha Rajah Nundocomar to wait upon him, and occasioned the Company's bonds to be paid to Gungabissen.

When Maha Rajah Nundocomar's accounts were settled, do you know of the balances having been paid him?---I do not know if the balance ever was paid him or not.

Were you present at Belvidere with these persons and Mr. Verelst?—I was not: I knew of their going there for the purpose of getting the bonds: I saw them set out, and saw them return.

Court. Give evidence of nothing but what you know of your own knowledge.---*A.* This I know, that a man was sent to call Gungabissen and Pudmohun Doss: one went in a palanquin: the other in a carriage: they brought Company's bonds; they told me they were going to Belvidere, that Maha Rajah called them to go along with him.

When they set off, do you know where they were going?---They told me they were going there: Maha Rajah sent for them.

Do you know the papers for which they were going?---The payment of the money had been daily expected: they went to get the Company's bonds: Pudmohun Doss and Gungabissen said the governor was going in a few days, and they certainly should get the Company's bonds. Upon their return, they brought the bonds and carried them to the widow of Bollakey Doss: a few days after the governor went away.

Do you know of any of these bonds being paid to Maha Rajah Nundocomar, for a debt due to him by Bollakey Doss?---The widow of Bollakey Doss, when the bonds were brought, desired that they might be carried to Maha Rajah Nundocomar; because, she said, they had been obtained by his means: I was present: I heard her with my own ears: she said he had been very generous to her, and had shewn great attention: she added having first settled with him, she would afterwards settle the other accounts of the house. Pudmohun Doss delivered an account to Gungabissen: Pudmohun Doss sitting down, ordered me to write out the account of Maha Rajah Nundocomar with the deceased: this was in the presence of the widow: they gave the accounts to the widow of Bollakey Doss; a person of the name of Durhamchurn, desired her to make herself mistress of the business of those accounts: Durhamchurn told me so.

Court. You must not mention what Durhamchurn told you.

Did you see the widow?---I did see her.

Did she seem pleased or displeased with the accounts?---I cannot tell whether she was pleased or no.

Did she read the accounts herself?---She could not read: Pudmohun Doss might have explained it to her.

Where is the widow now?---She is at Benares.

How long has she been at Benares?---About a month or two after receiving the Company's bonds, she went there: Pudmohun Doss accompanied her part of the way.

Is Benares within the jurisdiction of the Court?---No.

[The Counsel for the Prisoner insisted upon giving parole evidence of the contents of the account given to her.—Mr. Justice Lemaitre objected, that such evidence could not be admitted, as no proof was produced, to shew that any endeavours were made for the attendance of the widow, or the original papers in her possession; to which objection the Court acceded, but allowed the evidence in favour of the Prisoner.]

Was there any mention in that account of the bond?---There was no mention made of this bond in that paper: it was only a gross sum.

What was it an account of?---It was not an account, it was only a fird, containing an account of money received from the Company, which was obtained by means of Maha Rajah Nundocomar: there is an account of the different sums due to the creditors, and a balance of 60,000 rupees.

Was it after paying Maha Rajah his demand?---After paying all the creditors, that balance remained due.

Do you mean that Maha Rajah's account was included in it?---Yes.

Do you know of Bollakey Doss's being confined in prison?---He was confined in the Court of Cutcherry one night and one day: when the summons was issued against him, he went to Chandernagore.

Do you know any thing of the death of Bollakey Doss?---He arrived the 1st day of Assen, six or seven years ago; Bollakey Doss was then very sick: Maha Rajah came to his house to see him about three or four days after his arrival: Bollakey Doss's wife and daughter, Pudmohun Doss, and many other people; and I likewise was there. Bollakey Doss said to Maha Rajah, "Here is my wife and daughter, and Pudmohun Doss; I recommend them to your care, and I wish you to behave to them as you have behaved to me; Pudmohun Doss has the management of all my business of whatever nature, I recommend him to you." I then went away to my own house to eat.

When did Bollakey Doss die?---He died on the 11th of Assen.

Did Bollakey Doss understand Persian?---He could neither read nor write it; nor do I

know whether he understood it: he went to the Durbar; what he spoke there I know not.

Had Bollakey Doss a Persian seal?---He had one; but I do not know that I should be able to know it if I saw it.

Cross-Examination.

In what language did Bollakey Doss generally do his business?---Bollakey Doss never executed any Persian bonds in my presence: he had Persian writers; whatever he did in that way, must have been with them: I can answer to any of his Nagree business.

Were you with Bollakey Doss in 1172? [Bengal year.]---When he first arrived here, I went to Benares to a marriage: I came to Calcutta with Bollakey Doss: some months after I went to Benares, I staid there a year, and then came back.

Were you at Calcutta the year in which the bond was executed?---I do not know whether I was, or was not; I can find out by the books, when I came, [looked at books] I arrived the 1st of Srawon, 1822. [Nagree æra.]

How long did you stay in Calcutta before you went to Benares?---Four or five months.

Had Bollakey Doss any Munshy?---He had a Munshy called Balkopen; he had also a Vakeel called Seillabut.

Do you know what is become of Balkopen?---I understood he died at Jaggernaut.

Where did Seillabut die?---In Calcutta.

Where did Bollakey Doss live in Calcutta?---Baboo Hazzreymull gave him his house in the Burra Buzar: he lived there.

Had Bollakey Doss another house?---Bollakey Doss had a house at Muxadabad; when he was a little man, he was in business with Durramchund, and Kissenchund, the father of Diachund: the business was carried on in that house; it was a great while ago; it was before any thing you have heard; when he became a great man, and had the business of Cossim Ally, he bought a house at Muxadabad, of Durramchund, where he settled the accounts with Kissenchund and Durramchund; the house was not his own before he settled with them.

Was it a house of much business?---All the world, at that time, knew that to be a house of Bollakey Doss's: it was a house of much business.

Do you know whether he kept jewels, or other valuable effects there?---I only know of his having some money, and those jewels I mentioned: I know of no others.

Do you know Roy Jaggernaut Jew?---I do not.

Where are the accounts of that house?---I know nothing of the accounts of that house.

Do you believe that jewels to a very great amount could have been taken from that house without your hearing of it?---I must have known of it, in case any jewels to a great amount had been plundered; a thousand people must have known it.

Did you ever see Bollakey Doss put a chop or seal to any bond?---If he executed any paper of this kind, his Munshy would have known it.

Have you any paper of Bollakey Doss's writing?---I have not.

Do you know any person in Calcutta that is acquainted with the hand-writing of his Munshy?---I do not.

How long did he live with him?---I can shew how long he lived with him by my books.

Have you any paper of his writing?---No.

Do you know any body that has?---No, I do not understand Persian, and therefore did not trouble myself with his hand-writing.

Do you know whether there are any of that Munshy's writing among the papers?---No.

Did you ever know Bollakey Doss give a Persian bond?---When Bollakey Doss, in the course of business, gave any bonds, he ordered a writer to write them in Nagree, and signed them with his own hand.

Do you remember, in the whole course of his business, his ever giving a Persian bond?---I do not remember; if any thing of that sort passed in Persian, it must have been in the Persian office: I never was present when he executed any Persian bond.

If any bond had been given in Persian, must not you have known it, to have entered it in the books?---The accounts were regularly kept; but if a bond was given, I do not know whether it was particularly specified: but if the bond came to be paid, it would be paid if regularly executed.

Was ever a Persian bond brought you to be paid?---I never saw any Persian bond of Bollakey Doss's.

How came you not to mention the bond in the account?---If my master received any money, and gave a bond, I entered the receipt of the money, but did not enter the bond into the book till it was paid.

Do you believe, that if a bond for so large a sum had been given by Bollakey Doss, about eight or nine days after he came from Benares, you should not have known it?---When I first came to Calcutta, I roved about the town to see every thing I could see. I do not know.

How could the accounts be regularly kept, or Bollakey Doss know what he was worth, if only the money received, and not the bond, was entered?---He may, or may not mention the bond, without being irregular.

Suppose a Persian bond is brought to your master to be paid; he orders you to pay it: how would you enter that in the books?---According to the orders of my master: if he simply bid me pay 1,000 rupees, I should: if he ordered me to take notice of it, I should: I should search the debit side of my master's account, and see if I could find such an account.

If money is paid in, and a bond given, do you make no memorandum of the bond?---I make no memorandum; if money is first paid in, and afterwards asked for; if it is desired to be kept, and the answer is, that then it must be upon

interest, and a bond given; I should not enter that last transaction.

Do not Nagree merchants enter bonds in their books?—Some do, and some not.

Do Nagree merchants ever give Persian bonds?—Nagree merchants of rank may give Persian bonds.

[Bond shewn him.] Can you tell which is Bollakey Doss's seal?—I cannot tell which is the seal; I see seals I do not know.

Did you know Bollakey Doss's seal?—I see seals I do not know; it was round silver set in gold: all I know of it is, it was round silver set in gold.

Do you know if it is either of those on the bond?—I know it is not one of the square ones; the other it may be.

Where did Bollakey Doss keep the seal?—When Bollakey Doss was with the Nabob, he wore the seal on his finger: when he came to Calcutta, he kept it in his ink stand.

Have you often seen the seal of Bollakey Doss on his finger?—I have often seen it, but I should not know it.

Did not you frequently see him put it to the outside of letters?—When he used to write to the Nabob, and great people, he used to put his seal to the letter: I have seen him.

You hear that there are several witnesses, that have seen the seal of other people two or three times upon their fingers, that are able to swear to the impressions; cannot you recollect, that have seen it so much oftener?—They have excellent memories; I am not blessed with such a one.

Was Pudmohun Doss any natural relation of Bollakey Doss?—No: nor was he of the same cast; but he had a very great liking to him; if he pleased, he might make use of a lack of rupees: Pudmohun Doss was another Bollakey Doss.

Was he his adopted son?—He called him his son, but he was not his adopted son.

[Sheer Ulla Cawn, and Nuzzer o Dien, two Munshies, being called upon by the Court to compare accurately the original bond with the bond laid in the indictment, having compared the same, are sworn.]

Nuzzer o Dien examined.

Did you read the original bond, word by word, while Sheer Ulla Cawn read the several parts of the indictment wherein it is recited?—I did.

Is the bond the same in all respects, and in every part as that laid in the indictment?—There is some variance.

Sheer Ulla Cawn examined.

Did you read what was in the record accurately?—I did.

Is there any variance?—On the record there are two marks under the word "nittan wadisteer:" in the original, there are no such marks.

Mr. *Elliot* examined.

What are those marks?—They are merely dots, called nochkts.

Are those dots material?—I take it they are not. Persian papers are wrote sometimes with them, and sometimes without them: if the omission or insertion of those dots was to be deemed a mistake, there would always be at least 20 mistakes in every 10 lines of Persian.

Are they understood to be material?—They never are so understood: nor is the Persian language ever wrote with that accuracy.

Don't the insertion of the nochkts, make the distinction of singular and plural in this case?—They do.

Is it the custom in Persian to speak of every body, even yourself, in the plural number?—I think it is: I must correct myself as to speaking of one's self; I am not so clear as to that.

Does this variance run through all the counts?—No.

To which count does it apply?—To the fifth only.

What is the fifth count for?—For forging, with an intent to defraud Bollakey Doss.

To Munshy. Is there any other variance?—*A.* The words, "nocklie tamasook" (i. e. copy of bond) are wrote in Persian, on the top, in every count.

[The Counsel for the Prisoner insisted on this being a material variance; but the Court over-ruled the objection, thinking it to be no more than a repetition in Persian, that it was the tenor of the bond, and not meant to be laid as any part of the bond.]

Mr. *Driver* examined.

Whom were the bonds and other papers belonging to Bollakey Doss's estate delivered to?—To Gungabissen.

Mr. *Sealy*, late Register of the Mayor's Court, examined.

Do you know of any application, either to this court or to the mayor's court, to get the papers out of the Register's hands?—There was an application made to the Mayor's court by Mr. Driver for these papers, and rejected.

The Foreman of the Grand Jury, who had been one of the aldermen, and served the office of mayor, desired that the records of the mayor's court might be produced; they were produced accordingly by Mr. M'Veagh, the keeper of the records of this court, and the several extracts, herein after mentioned, were had at his desire, for the purpose of proving, that Gungabissen had ever been treated in the proceedings of the mayor's court as a weak man, incapable of transacting his own business.

"On the 8th of November, 1769, a motion was made and agreed to, that the will of Bollakey Doss should be deposited in the court.

"13th November, 1770. A citation issued, for the executors to bring in their accounts, together with the balance of the estate, and to deposit the same in the Company's cash.

"1st October, 1771. It being suggested to the court, that Pudmohun Doss had conveyed away several books and papers belonging to the

estate of Bollakey Doss; the court ordered, that Pudmohun Doss should deliver, or deposit in the registry of the court, all such books, papers, and vouchers, touching, or any way relating to the accounts of the estate of Bollakey Doss, deceased; and that the said Pudmohun Doss shall be permitted to attend his own affairs, under the custody of proper sheriff's peons, until the said accounts are carefully examined.

"14th January, 1772. Ghosaine by his attorney, William Magee, informed the court, that Pudmohun Doss, one of the executors of the last will and testament of Bollakey Doss, was lately dead, and that Gungabissen and his brother Hingoo Lollan, who is at Patna, are the remaining executors; and that Gungabissen is incapable of taking charge of the affairs of the said Bollakey Doss. Ordered, that William Magee, register of this court, shall forthwith take charge of the books and papers of the estate of the said Bollakey Doss, deceased, and settle the same, and report to this court a true settlement thereof.

"January 21st, 1773. Ordered, that a citation shall issue against Bridjoo Rotoon Doss, Kebolram Ponda, and Gungaboss, requiring them to be, and appear before the court, on Tuesday next, to shew cause, if they have any, why they should not deliver over unto Mr. William Magee, register of this court, the books, papers of accounts and others, belonging to the estate of Bollakey Doss, deceased, conformable to the order of this court of the 14th instant.

"January the 28th, 1773. The sheriff's officers returned the citation against Bridjoo Rotoun Doss, Kebolram Ponda and Gonga Bose executed.

"Whereas Pudmohun Doss, one of the executors or trustees of Bollakey Doss, deceased, on the 1st day of October last, was ordered to deposit in the registry of this court, all the books, and papers of accounts belonging to the estate of the said Bollakey Doss, deceased; in consequence whereof, the said books and papers were deposited in a room of the house of the said Pudmohun Doss, in order to be perused and examined, which room was secured with two locks; the key of one of which locks was in the possession of Balgovin, and the other in the care of the said Pudmohun Doss's people. Balgovin this day appearing in court upon oath, declared, that one day, when he went up to the said room, he found the door had been opened, and that his lock, together with a knot he had tied upon it, had been opened, and on going into the room, he found that the greatest part of the papers were taken away, together with some other things of value. That upon making an exclamation, and threatening to come to court to complain, one Kebolram Ponda, then in the house, requested him to be quiet, and not to go to complain to the court, but go and speak to the widow; and soon after Mohun Persaud came in, when he and the said Kebolram Ponda went near the widow, and spoke to her something which he this deponent could not hear, as he stood at some distance from them; and soon after Mohun Persaud, and the said Kebolram Ponda came to the place where he was, and begged him not to expose her, and that she would deliver up all such papers as remained in her possession, and accordingly the said Kebolram Ponda went and dug the ground in the compound, and got some books and papers out of it, and delivered the same to this deponent, which he put into a chest, and locked up: and whereas the said Pudmohun Doss having lately departed this life intestate, and no one having yet petitioned this court for letters of administration of the estate of the said Pudmohun Doss, deceased:

"Ordered, that public notices be affixed, at public places of this town, notifying, that, if some person or persons do not within 14 days from this day, petition the court for letters of administration of the said Pudmohun Doss, deceased, the Court shall appoint a proper person to take charge thereof.

"July 2nd 1771. It was ordered, that the papers of Pudmohun Doss should be separated from those of Bollakey Doss.

"This order was not carried into execution, till the 27th April, 1773.

"25th March, 1774. Mr. *Driver*, attorney for Gungabissen, read a petition from him, stating, that by the order of the court all the papers belonging to the estate of Bollakey Doss, were deposited in the court, among which were 28 bonds, receipts, and vouchers; that he had commenced suits in the Dewannee Adawlet; and wanted the said bonds, receipts, and other vouchers, in order to establish the same: and praying, that they may be delivered to him, giving the usual receipt for the same.

"The court deferred the consideration of the said petition till next court day.

"Ordered, that an officer of the said Dewannee Adawlet be permitted to attend at the register's office, to inspect the books, papers, and vouchers aforesaid.

"25th day of January, 1775. Mr. *Farrer*, advocate for Gungabissen, surviving executor of Bollakey Doss, deceased, moves, that two chests, containing papers, accounts, and vouchers, relative to the accounts of the estate of the said Bollakey Doss, deceased; and also 28 bonds and receipts, belonging to the said estate, which were deposited in the registry of the late mayor's court, at the instance of William Magee, who was constituted attorney of Bridjoo Seer Goshain, a legatee named in the will of the said deceased, may be delivered to the said Gungabissen.

"Ordered, that the register do look into the proceedings of the late mayor's court relative to the above papers, accounts and vouchers; and inform the court thereof, on Monday next the 30th instant.

"January 30, 1775. Mr. *Farrer*, advocate for Gungabissen, surviving executor of Bollakey Doss, deceased, moves, That two chests,

containing papers, accounts and vouchers, relative to the accounts of the estate of the said Bollakey Doss, deceased, and also twenty-eight bonds and receipts belonging to the said estate, which were deposited in the registry of the late mayor's court, as mentioned to this court, on the 25th instant, may be delivered to the said Gungabissen.

"Mr. *Brix*, advocate for Seebnaut Doss and Lauchmon Doss, administrators of Pudmohun Doss, deceased, who was one of the executors of the said Bollakey Doss, deceased, objects thereto.

"It is ordered, That the Register do, in presence, and with the assistance of Huzzeremaul Baboo, and Cossenaut Baboo, both of Calcutta, examine the said papers, accounts, and vouchers, bonds and receipts; and separate such as appear to belong to the estate of the said Bollakey Doss, deceased, from those which appear to belong to the estate of the said Pudmohun Doss, deceased; and that he do deliver the former unto the said Gungabissen, and the latter unto the said Seebnaut Doss.

"March 24, 1775. Mr. *Farrer*, advocate for Gungabissen, surviving executor of Bollakey Doss, deceased, moves, That two chests containing papers, accounts and vouchers, relative to the accounts of the estate of the said Bollakey Doss, deceased; and also 28 bonds and receipts belonging to the said estate, which were deposited in the registry of the late mayor's court, may be delivered to the said Gungabissen; they not having yet been examined, pursuant to the order of this Court, of the 30th day of January last, owing to Cossinaut Baboo's not attending.

"Mr. *Brix*, advocate for Seebnaut Doss and Lauchmon Doss, administrators of Pudmohun Doss, deceased, who was one of the executors of the said Bollakey Doss, deceased, objects thereto.

"It is peremptorily ordered, That the Register do, in presence, and with the assistance of Huzzermaul Baboo, and the said Cossenaut Baboo, in case they both attend, or if one of them only attends, then in presence, and with the assistance of such one, examine the said papers, accounts, and vouchers, bonds and receipts; and separate such as appear to belong to the estate of the said Bollakey Doss, deceased, from those which appear to belong to the estate of the said Pudmohun Doss, deceased; and that he do deliver the former unto the said Gungabissen; and the latter, unto the said Seebnaut Doss and Lauchmon Doss, administrators of the said Pudmohun Doss, deceased, within one month from this day; and in case neither of them, the said Huzzermaul Baboo, and Cossenaut Baboo, do attend, that the Register do examine, and separate them in the best manner he can, and deliver such of them to the said parties respectively, as he shall think right, within the time aforesaid."

Mr. *Sealy* examined.

Did you, in consequence of the last order of the Court, examine and separate the papers?---I did, after having examined them with and without Cossinaut and Huzzermaul, by the agreement of the parties.

When did you deliver the bonds, and the other papers, relating to Bollakey Doss's estate, to Gungabissen?---About 27th April last.

Lauchmon Doss examined.

Did you know Bollakey Doss?---I knew Bollakey Doss when I was young.

Did you stay with Bollakey Doss?---Yes.

How many years?---One year.

Have you ever seen him execute any papers?---I have seen him sign and seal many papers.

Were you his servant?---I was.

Have you seen him sign any papers?---I used to see him sign Nagree papers, and seal Persian. I have seen him with my own eyes.

Have you ever had a brother?---I had two.

Was Pudmohun Doss your brother?---Yes.

Were you his administrator?---His affairs and effects are in my hands.

Have you obtained an order of Court to be his administrator?---I have.

Where is it?---Mr. Jarret has it. [Letters of administration produced to him and Seebnaut Doss, his father.]

[Mr. Jarret proves service of notice on the witness, to produce a Nagree paper given to Pudmohun Doss by Maha Rajah Nundocomar, when Mohun Persaud, Gungabissen, and Pudmohun Doss, were at his house, in Bollakey Doss's own writing, dated about the 9th of Poose. He likewise proves the same notice on Seebnaut Doss.]

Seebnaut Doss examined.

Have you any paper belonging to your late son Pudmohun Doss?---I was at Patna, when he died. I have never had any of his papers.

Lauchmon Doss examined.

Have you any papers belonging to Pudmohun Doss?---Both Pudmohun Doss's private papers, and those of Bollakey Doss were in the court. Gungabissen has taken away Bollakey Doss's papers. Pudmohun Doss's remain there. I arrived here eight months after the death of Pudmohun Doss. That paper was not in my possession.

Have you looked over the papers in court?---I have not.

Kissen Juan Doss examined.

When you went with Mr. Sealey, what papers did you look for?---I looked for a paper wrote in Bollakey Doss's hand, signed by Pudmohun Doss. It was a paper, in which all the agreement was drawn.

Did you look over every paper?---I looked over every one paper, and can swear it was not among them.

Jury. Would not the Curra Nama have been given up, on a bond given to perform the

contract?—*A.* It is the custom to take away the first contract, when the second is given.

Lauchmon Doss examined.

Did you know Bollakey Doss's seal?—From seeing it I shall know whether it is such as he used; but I do not understand Persian. I should know whether the seal was like it from the shape.

Cross-Examination.

Did Bollakey Doss sign, when he sealed Persian papers?—He did not.

What part of the paper did he seal on?—I have seen him seal many papers. He used to put his seal to letters and papers.

What servant were you?—I used to write letters. I had charge of the treasury.

Jury. Did you ever see Bollakey Doss write or seal?—He has signed his name on Nagree, and put his seal on Persian papers.

How near were you, when you saw his seal?—I have seen his seal on his finger very near. When the Sepoys used to bring drafts for their pay from the Nabob, Bollakey Doss used to take from the Sepoys the draft, and give them a paper in Persian, on which he put his seal.

Did you ever see him put it to a bond?—I never did.

Mr. *Sealey* examined.

Were you present with Kissen Juan Doss, when he looked over the papers?—Yes.

Did he look at all the papers?—No. He would not look at some, because of the indorsement, and some because they were old, and some because he tied them up himself. I apprehend the papers could not be examined in less than three days.

Kissen Juan Doss examined.

Did you examine every bundle?—There were several large bundles of papers of old accounts, that I did not examine, thinking them of no use.

Court. This will not entitle you to read any paper, or make what Kissen Juan Doss said evidence. But though it is not strictly so, I will nevertheless leave it to the jury.

Monohur Munshy examined.

Do you know Mohun Persaud?—I do.

Has he ever sent for you lately?—He has.

Did he shew you some papers?—He did.

In what language?—In Persian.

Tell the Court truly what passed on that occasion?—He called me three days before Maha Rajah was put in gaol: it was about six gurree of the day when he sent for me (half past nine): he sent a man with his salam, who desired me to come to Mohun Persaud, for he had a great deal to say to me. I said, I could not come now; I had business: I will go at noon. At noon I went to his house: he was very glad to see me. When I arrived at his house, he bid me sit down by him: we two sat down together: there was nobody else. After we sat down, he took out some papers: he first took out two teeps that were torn at the top: he said, I have heard these are in your hand-writing. I said, Give them to me, and I will look at them. I took them, looked at them, and said, They are not my hand-writing. He said, You were before a servant of Maha Rajah; I have heard they were of your hand-writing: I said, They are not of my hand-writing; if they were, I would tell you. After that he took out a bond (tamasook) and said, I have also heard this was your hand-writing; look at it. I looked at it, and read it, and said, Neither is this of my hand-writing: in that bond something is wrote about pearls. He said, I heard this is your hand-writing: there is a friendship between you and me: why do not you tell about this? I again said, they are not my hand-writing. Mohun Persaud said, If you will say they are of your hand-writing, Maha Rajah will be a great liar, and will meet with great punishment. I do not want you to tell for nothing; I will give you 4 or 5,000 rupees. I said, I cannot tell such words as these; it is not my hand-writing: how can I tell it is? He then said, Well, if you will not say it is your hand-writing, find out a man that will say it is his hand-writing: whatever is to be given I will give him; I will likewise make you joyful. Mohun Persaud said, Enquire for such a man: I answered, I cannot do this: I said that he was advising me to do a very bad business, and I went from thence.

Did you relate this to any one, upon your getting home?—It is a month and ten or eleven days ago, since this happened: how many men have asked me about this I know not, it is so long ago: as I mentioned, many friends and relations have asked: how can I tell any one in particular?

Have you told it to any body?—I mentioned it to nobody immediately.

Did you tell any body that day?—I did not.

Did you the next day?—I do not know: [he recollects] upon the evening of that day I mentioned it to Permanund Mokerjee.

Cross-Examination.

Who was at Mohun Persaud's house when you went there?—I saw Kissen Juan Doss; he also saw me; but in the room into which I was carried, there was nobody but Mohun Persaud and myself.

Were none of Mohun Persaud's people there?—I went up stairs: I saw Kissen Juan Doss sitting there: I saw no one else.

When Mohun Persaud spoke to you, did you understand that he wanted you to tell whether you had wrote it or not, or to say that you had absolutely wrote it if you had not?—How can I tell what passed in his heart: I tell what happened: I have taken an oath: you have put questions to me: what I know I told you.

What did he say to you?—"If you do say it, Maha Rajah will be proved a liar, and will have great punishment. You will not say it for nothing; you will have 4 or 5,000 rupees."

Did Mohun Persaud mean to get the man that wrote it, or one who did not, but would swear he did?—He said, "If it is not your hand-writing, find out such a man for me, who will say, These are my letters: what is proper to give I will give; and I will render you joyful."

Where does Permanund Mokerjee live?—In the same compound with me.

What is his employment?—He is in no employment.

Did Permanund Mokerjee ask you, or did you tell him?—He asked me.

How came he to ask you?—Because he saw the peon come, he asked me why Mohun Persaud sent for me?

What was the peon's name?—I asked his name: I do not well remember; but I believe it was Cawota: he said he was Mohun Persaud's man.

Did the peon go with you to Mohun Persaud's?—He did not.

When did he call you?—At seven gurrees: I went after mid-day.

Had you ever been at Mohun Persaud's before?—I have, because I owed him 72 rupees: I never was in that room before.

Did you tell any body else that day?—I only told Permanund that day.

Did you tell any one the next day?—I did not that day: after that day it got wind, and a great many people asked me: I told them.

Did Mohun Persaud bid you keep it a secret?—No; but there was a great friendship between us.

Whom did you tell it to next, after you told it to Permanund?—I cannot remember: many people asked me, and I told them.

Whom did you tell it to besides?—I told it Mr. Durham.

How came you to tell Mr. Durham?—Mr. Durham asked me, who was my master?

Did you tell any other Englishman?—No: what have I to do with Englishmen?

Did you never tell it to Mr. Jarret?—He asked me in this court: I did not tell all.

To how many black people did you tell it?—I do not remember.

Did you ever tell it to Kissen Juan Doss?—I did not: I do not remember any other black man I told it to.

Do you remember any other person that asked you about it?—I do not remember one that asked me: there were a great many, but I do not remember them.

As many witnesses remember accurately for 14 or 15 years, cannot you remember for a month?—I am a Company's servant: why should I take such pains about it?

Whom do you keep company with?—Mr. Durham.

Can't you remember any one that has asked you?—I cannot remember one.

Do you go to make salams to Maha Rajah?—Since he has been confined in gaol I have not paid salams: I used before.

Are you sure you have not visited him since he has been in gaol?—I do not remember that I have visited him in gaol.

[Question repeated.]—*A.* The gaol is the same street with the Cutcherry: I went to the gaol one day. I heard Rajah Nobkissen and several persons of rank had been to pay salams: I likewise went to pay salam: I did not see him: I never went but that time.

Yeandel, (Gaoler) sworn.

Did you ever see this man at the gaol?—I think I have seen him about the gaol.

Did you ever see him more than once?—I cannot say with precision: I think I have seen him once, and remember him well.

Monohur Metre examined.

Did any body else shew you these Persian papers?—Yes, Mr. Durham also shewed me the teeps: I do not remember whether he shewed the bond: he asked me if they were in my hand writing?

Was Mohun Persaud present?—Yes.

Was this before or after what passed at Mohun Persaud's house?—It was after.

Did Mr. Durham shew you the bond?—I remember the teeps: I do not remember the other. Mohun Persaud shewed me three papers.

How long after the conversation at Mohun Persaud's did Mr. Durham shew them to you?—It was one or two days after Mohun Persaud had shewn them to me.

Did you tell Mr. Durham any thing of Mohun Persaud's offer?—No.

Relate what passed at Mr. Durham's.—Mr. Durham looked at those papers, and asked me if they were of my hand-writing: he desired me to be certain, and speak the truth. I told him I would shew him my hand-writing in the book of the Cutcherry: when they were compared they were found not to agree.

Who were present beside Mr. Durham?—Mohun Persaud and Jaggutchund, the son-in-law of Maha Rajah.

Did you then say that Mohun Persaud had asked you the same questions before?—No: why should I do more than answer his questions?

Did you any other time tell Mr. Durham of the offer made you by Mohun Persaud?—Another time Mr. Durham sent to me, and asked if Mohun Persaud had offered me any money: I told him what I have before related.

How long is it since Mr. Durham sent for you?—It was before the grand jury met.

How long before?—About four or five days: I can't tell with certainty.

Did you come when Mr. Durham sent for you first?—A man came to me about mid-day: I said I was sick, I would come the next day.

Were you really sick?—I was feverish, and had a purge.

What conversation passed between you and Mr. Durham?—He asked me if Mohun Persaud had offered me money: I asked what, as

what manner; and told him what I have before related.

Mr. *Durham* sworn.

I was told by my sircar, about three days after the commitment of Maha Rajah, that the man that wrote the bond was the Munshy of the Cutcherry, and that he had been at that time Munshy to Maha Rajah. I shewed him the bond, and asked him, in the presence of Jaggutchund and Mohun Persaud: he took the bond and read it; looked at it long and accurately: I gave him all three; I do not know which first. He looked accurately at the first, and then said it was not his hand. I desired him to be exact, to recollect himself, and if he had wrote it to tell: he still said it was not his hand. I then bid him bring me the Cutcherry, which he brought immediately: from my idea of Persian I did not think them the same hand. Mohun Persaud insisted they were, from his idea of Persian. He knew as little of Persian as I did myself. Not a word passed of any offer from Mohun Persaud, or his having seen the papers before: every day after that he was at my house; he never mentioned a word of any offer from Mohun Persaud: one of the Mollavees of the Cutcherry told me he was to say so. I sent for Monohur, and he told me just what he has now related.

[Memorandum. Two of the witnesses, Ramnaut and Bolgovind, that were on the back of the indictment, not having been called by the prosecutor, and it having been observed by the Court, and the counsel for the prisoner being told that they might call for them, the counsel for the prisoner said, he was well acquainted with, and could give the reasons why the counsel for the prosecution had not called them, and that he should immediately call them.]

Ramnaut examined.

Do you know Mohun Persaud?---I do.

Were you present when Maha Rajah was examined for the forgery before the judges?---I was examined that day.

When was it?---It was on Saturday: it was upwards of a month ago.

What day of the month was it?---I do not know.

What induced you to go there then?---There was formerly a great friendship between Maha Rajah and Mohun Persaud: they both took a great deal of notice of me about that time they quarrelled, and I went equally to both when they were separated.

At what time was this?---I remember the time, when Maha Rajah one day said to me, You know I like no one better than Mohun Persaud, except my son: now he wishes to ruin me in this affair of Bollakey Doss; he is only an attorney in this affair: tell him he cannot get more than 5, 7, or 10,000 rupees, by succeeding in this affair; tell him, if he pleases, I will give him 15 or 20,000 to desist from this prosecution; I told Mohun Persaud, and Mohun Persaud said, I have told a great many English gentlemen of it; I cannot desist.

When was this conversation?---It was nine or ten months before I gave evidence of this affair before the judges. There was a suit, at that time, in the Dewannee Adawlut. Mohun Persaud having heard what I related about Maha Rajah Nundocomar, asked me about it, and desired me to come, and give evidence of it on the water of the Ganges.

Do you understand English?---No, I do not.

When did Mohun Persaud first hear what you have said?---I have before said, it was nine or ten months, before I gave evidence before the judges: he desired me to give evidence, respecting this business. I believe it was in the month of Assen.

When?---When this affair was coming into the Adawlut (this Court,) he said, You remember what passed between you and Maha Rajah; you must give evidence of it.

How long was this before you gave evidence?---About ten or twelve months before I gave evidence. There are accounts, payments, and receipts between us.

Did this conversation pass at this time?---I went one day to his house; and he there desired me to give evidence of what passed between me and the Maha Rajah.

Who was present?---This is God's Adawlet, and I will tell no lies. I went upon business to his house, and nobody was present.

At what time of the day was it?---About three or four gurries of the day remained.

In what room of Mohun Persaud's house was it?---On a terrass, up stairs, there is an upper room, where Gungabissen lives: on the outside of that, there is a gunja, where we sat.

Were you sitting at that time?---We were sitting.

Who got up first?---I got up first; and got my dismission and went away.

How long was he there?---Three gurries of the day remained, when I went there; and when I went away the lamp was lighted. Gungabissen was asleep upon his cott; there were two or three servants there.

Where did you see these servants?---In Gungabissen's room. I went out of the room, they were there.

Be particular in telling Mohun Persaud's answer.---When I delivered the message from Maha Rajah, he said, I have told a great many English gentlemen of this affair, and cannot desist.

Did he say any thing else to him?---He said, I have told many English gentlemen; think within yourself, how can I desist.

Did not Mohun Persaud say, if I had known this sooner, it might have been done?---He said no more: he said he had told many gentlemen: think within yourself, how can I desist?

Did Mohun Persaud say, if this affair had been mentioned before, it would have been possible to have done it.

[He gives the same answer, and says, these

are the words. Mohun Persaud spoke as I have related.

[No further answer could be obtained; being threatened with commitment, he said, These are the words Mohun Persaud spoke; what more should he say?]

Was the lamp lighted before you went away from Mohun Persaud's?---Yes: the lamp was lighted before I went away.

How long?---I went at the time the lamp was lighted, or about a minute or two afterwards.

Who lighted the lamp?---There was no lamp where we were: the lamp was in Gungabissen's room.

What kind of a day? was it fair or not?---It was a rainy day: I went with my shoes on: I walked there.

Was not this 15 days before Maha Rajah was taken up?---I said it was 10 or 12 days.

Had you ever afterwards any conversation with Mohun Persaud on this subject?---I used almost every day to go to Mohun Persaud's. I went after that on my own business; there was no other conversation on this subject, till I came here. I have myself a suit in this court, and come almost every day. He told me the morning of the day I gave evidence, to come here. I came here in the morning; the first sight I had of him, was in the Adawlet.

Do you mean the first or second time you were examined?---I was examined before those gentlemen the first day. [Pointing to Mr. Lemaistre and Mr. Hyde.]

Where did you see Mohun Persaud, after you gave the evidence?---The first sight I had of him was here.

Whom do you come to at the Adawlet?---I always come to that gentleman.---[Pointing to the Under Sheriff.]

When did you see Mohun Persaud, after you gave your evidence the first time?---I used to see him every day.

When did he tell you to come here?---He told me, the day I conversed with him on the subject, that I was to give evidence here. He said, I must be there on Saturday se'nnight. How should I have known when to come, if Mohun Persaud had not told me?

When he told you so, was it the first time he was examined?---It was the first time he was examined.

Did Mohun Persaud offer to give you any money before the judges?---Why should he give me rupees in such a case? Why should you ask me such a question? I am not worthy such suspicion, as the gentlemen of the council, and all the principal people in Calcutta, well know. I am much engaged in business with Mohun Persaud, 13,000 rupees is due to me. I gave Mohun Persaud a writing, that when I received it, I would give Mohun Persaud four annas in the rupee; this was, if Mohun Persaud would give me 500 rupees, in ready money. I have not received all the money.

Did Mohun Persaud never make you any promise, in consequence of giving your evidence?---He never did.

Do you know Gopenaut Doss?---I do not.

Do you know Rada Cunt Róy?---I do not.

Do you know Gungadar?---I do not.

Had you ever any conversation with Gopenaut Doss, at the time you examined before the Grand Jury, or before Mr. Justice Lemaistre, or Mr. Justice Hyde?---I do not know him. I do not recollect having any conversation with such a person.

Have you any relation of the name of Gopenaut Doss?---My house is at Malda. I do not know I have any relation in Calcutta of that name. There is a Gopenaut Doss at Malda, who is a relation of mine. He is of my cast.

[A man is produced; and the witness is asked, if he knows him.]---I do: his name is Gopenaut Nazzer.

[The man being sworn, is asked his name.]

A. My name is Gopenaut Doss.

Ramnaut's Examination continued.

Ramnaut. Every body calls him Gopenaut Nazzer. He one day asked me, if I would enter into friendship with him. He asked me if I would have a farm; and said, Come to my house, if you will do these things, it will be better for you. I answered, I do not know your house. On another day he sent a man to me: I then sent an Adawlet Peon with him, to see where his house was. I did not want any thing with him: I did not go to his house.

What did he say to you?---He said, Will you have a farm? Will you come to my house? There are some persons, whose business it is to be witnesses.

What was his reason for coming to the house?---He put his palanquin down at my door. I don't know his reason.

What did he say to you?---He told me what I have said; if I have told you wrong you punish me. I know of the state of this man.

Why did he offer the farm?---I never knew the man: I had no conversation with him; I wondered he should offer me the farm. I believe he is a farmer, a native, collector, and a nazzer.*

Whose nazzer is he?---I have heard him called Gopel Mezer. I don't know whose nazzer he is.

Is he any relation of yours?---He is no relation of mine: a great many things of this sort will come out. I was standing at the door of Mr. Killican: Sheck Mahomed Gellamey began to say to me, Maha Rajah is a Brahmin, he will now be ruined. Do you save him; you owe Maha Rajah money. That he will excuse you.

[The Court here interrupts him; saying he must not tell what another man had said to him, and telling the jury to take no notice of it.]

When was the offer of the farm?---It was after Maha Rajah was in confinement.

* Properly *nazir*, an inspector or supervisor.

Do you know of Gowanny Chun Nag?---No.

Do you know Ram Gopaul Goss?---No.

Do you know Hurrikissen Muckerjee?---I know him: I believe he is the brother of Harry Cunt Muckerjee.

Did you make him write any paper?---I did occasion him to write a paper; but if you can prove that I offered or gave money to any one to swear, let me be punished; they occasioned Muckerjee to write it. I went to the house of Mr. Driver; Hurrykissen Muckerjee was there. I said to the three men, two of them were my men, that were witnesses in the affair of Mahomed Gullamee. I said to them, Whatever you know about this affair, give me in writing. They said to Hurrykissen, Write to me. The paper had been wrote. They two, Govin Sing, and Gundaram Roy, signed it. I said to Hurrykissen, These men have given me a paper, witness it: he said, I will not be a witness to the paper: I shall be called into the Adawlet, if I am. There was another sircar there; and that paper being torn, the sircar wrote out another.

Gorpe Naut Doss examined.

Do you know Ramnaut?---I know him.

How long have you known him?---I have seen him in Calcutta four or five years. I saw him when Mr. Hastings first came to the government.

Had you any conversation with him about any evidence against Maha Rajah Nundocomar?---I had.

Relate it.---On the 9th day of Choite, I was going to the house of Mr. Cottrell: I saw him to the south of this house; he made a salam: I asked him where he was going; he said, I have taken a buzar in farm. He was on horseback, and I was in my palanquin; we kept company on the road. I asked him what became of the evidence he gave in Maha Rajah's affairs: he said to me, Mohun Persaud has paid the expence of my house, and given me 300 rupees to give evidence. I said, if you have done this, you have done a bad affair; no words are secret in the Adawlet. He went one way, and I went another.

Ramnaut. He says he was in a palanquin, and I was on horseback: is it likely such a conversation should pass?

Attaram Bose examined.

Do you know Mohun Persaud?---I do.

How long have you known him?---Fifteen or twenty years.

What is his character?---I know nothing of his character.

What do people say of him?---Nobody speaks well of him.

Do they speak ill of him?

Court. You should ask, whether he is to be believed upon his oath or not.

Nemo Doss examined.

How long have you known Mohun Persaud?---Twenty or twenty-five years.

What do people say of him?---They speak ill of him.

Is he to be believed upon his oath?---I cannot say he is not to be believed upon his oath.

Mohun Persaud examined.

[Shewn exhibit marked M.] [For a copy of this, vide p. 982.]

On what occasion was this paper drawn out?---To shew to Bollakey Doss's wife.

Were the papers shewn to Maha Rajah Nundocomar?---No: never.

Was it, when drawn out, represented to Bollakey Doss's wife?---Pudmohun Doss alone signed it, and carried it away.

When did you yourself sign it?---When there was a dispute between Bollakey Doss's widow, and Pudmohun Doss, I signed it.

Was this after you settled Maha Rajah Nundocomar's account?---Long after.

How long?---Eighteen or twenty days after Maha Rajah received the bond.

With what view did you sign it?---When Bollakey Doss's widow called me to her, she observed my signature was not to it: upon which Pudmohun Doss observed, that the widow of Bollakey Doss had taken notice of my signature not being to it. He said, "Here is no name, no teepa, no account; only put your name to this. Why do you make any doubt about it? only sign it, and I will give it you back."

Is this Maha Rajah Nundocomar's account, or not?---Look if you can find his name to it.

Is it his account or not?---It is not his account.

Do you mean that this paper does not contain the account of Maha Rajah Nundocomar?---No; the name of Maha Rajah Nundocomar is not in it, nor was it delivered to him.

Does any part of this paper constitute Maha Rajah's account?---It is Maha Rajah's account: the Durbar Karrutch is there; he took the bond for 169,000 rupees, and obtained 60,000 rupees for Durbar expences.

Will you swear positively that this account was settled at the Maha Rajah's house, in the presence of Choyton Naut and others?---No, it was not.

Was it never settled, either in writing or verbally, at the Maha Rajah's house, when you was present?---It was never settled when I was at the Maha Rajah's house.

You have mentioned the Durbar charges: are the other articles right and true?---I have not said the 60,000 rupees were either right or wrong.

What do you say now, were they right or wrong?---There was not a cowrie expended in Durbar expences.

How can you possibly know, that the Maha Rajah never paid any Durbar charges?---He may upon his own account; not upon this.

When was it you first suspected this account?---When Maha Rajah first mentioned

to me, that some Durbar expences would arise, I from that time had doubts.

When did you first suspect the bond to be forged?---Four days after, Maha Rajah Nundcomar himself said to me, We have prepared three papers.

Was not that at the time the bonds were paid?---He had the money in his possession. The bonds were with Maha Rajah, when Pudmohun Doss said, Let us get the bonds.

When did Pudmohun Doss first inform you of it?---When the bonds were put into the possession of Maha Rajah.

Why did you not begin this prosecution sooner then?---I had very little power in the business of the deceased. Pudmohun Doss was the master.

When did you begin to have the management of the business?---Upon the death of Pudmohun Doss.

When was that?---In the month of Castick, 1180, [Nagree year.] about four years ago.

Did you ever mention your apprehensions of forgery to Pudmohun Doss, and advise him to prosecute?---When Pudmohun Doss brought the bond from Maha Rajah Nundcomar in the night, and read it to me: I asked him the following morning if he had brought all the bonds. He shewed me the three papers, and had the Persian read to me: I said, nothing was due on those papers: what did they mean? Pudmohun Doss said, Remain quiet, and I will inform you of the circumstances of it. After that, the widow of Bollakey Doss complained to Mr. Russel through Cossinaut: Goshein likewise complained in the adawlet (*i. e.* Mayor's court, and made Mr. Magee one attorney, and Mr. Sealy his law attorney.

Did Pudmohun Doss ever after give you satisfactory accounts of these bonds?—No: he always put me off, by saying he would inform me of the circumstances.

Did you apply often to him for that purpose?—I did not press him much: Goshein did: and Pudmohun Doss, in consequence, was thrown into confinement.

If you suspected forgery, why did you not press him?—He used always to put me off, by saying he would tell me the circumstances.

You ought to have pressed him much; why did you not?—I and Bollakey Doss's widow, Goshein, Gungabissen, and Ballgovin, used always to be pressing Pudmohun Doss to settle the accounts, and deliver them over.

Did you ever mention your suspicions to the widow?—I did not with my own mouth, because I was not with her, but by the means of Durhamchurn I did.

Did you ever by those means inform her, that you thought it a forged bond?—What I told her through Durhamchund was, that the Durbar expences charged in the account were unjust.

Tell at what time you first suspected forgery of the bond; and that the seal of Bollakey Doss was improperly made use of.—Maha Rajah mentioned to me the bond, and then I suspected.

How soon?—The morning after the night the bond was sent.

What did you see to make you suspect it?—I had before reason to suspect it, because Bollakey Doss kept regular accounts, and that no mention had been made of it in his accounts: I had never heard it from Bollakey Doss: I had seen the letter of attorney, in which 10,000 rupees were mentioned as a balance.

Did you see upon the face of the bond any thing to make you suspect it?—It was not signed by Bollakey Doss, and I knew that Seillabut was dead a year and a half before.

Before what?—A year or two before Bollakey Doss died.

What objection could his death be to the witnessing a bond in seventy-two? [Bengal year.]—A man may write a bond and antedate it.

When were you so far certain as to prosecute?—When I saw the account of jewels, the name of Rogobaut, and the mention of plunder, I knew it was forged, and from the nature of the bond, which is not regular in itself, being conditional: bonds are not commonly made out so when money is received.

Was it from the sight of the seals or signature, or the contents of the bonds, that made you first suspect?—All these circumstances together; I mentioned it often to Mahomed Commaul.

Are not the eight bonds on the Nagree account, charged by you and Pudmohun Doss to Bollakey Doss's estate?—I wrote nothing; Pudmohun Doss wrote every thing forcibly himself.

Are they not charged to Bollakey Doss's estate?—The books were in Pudmohun Doss's hands, he might enter what he pleased.

Were, or were not, the bonds charged to the estate?—Pudmohun Doss and I never acted in conjunction in such a business.

Then we are to understand that you did not charge it to the estate?---I was not permitted to see any thing.

What is the amount of those eight bonds?—One lack, 43,485 rupees.

Who brought the bond to your house the morning you first suspected?—Pudmohun Doss brought it.

Were you present, when Maha Rajah gave it to Pudmohun Doss?—I was, and so was Gungabissen.

Were any other bonds or teeps cancelled besides?—There were three papers cancelled, the bond and two teeps; two were for 35,000 rupees, the other for 48,021 sicca rupees, besides batta.

When did you first see this account [M]?—When it was signed, and afterwards in the Dewanny Adawlet, only those two times.

Where did you sign it?—At the house where I now live.

Are the other articles besides Durbar charges true?—It is no account at all: it is not regular.

Do you know of any of the sums in it?—Is

any one article right?—How can I tell if it is right?

Why then did you sign it?—To satisfy Pudmohun Doss and the widow.

Do you know Choyton Naut?—I do.

Who is he?—A servant of Maha Rajah's.

Look at the account, and say in what rupees it is?—It is not specified.

Look at the last line but one.—It is current rupees.

Do you know of an entry in the books of 129,630 rupees?—No, I do not.

Do you know of an article in the Curra Nama of 69,630 rupees, written by Pudmohun Doss, and signed by Bollakey Doss?—No.

Do you know Monohur Munshy?—I do.

Had you ever any conversation with him about any evidence he was to give in this cause, or about the bond, and what passed on that occasion?—I shewed the bond first to Juggutchund: I shewed it also to Coja Petruse; his Munshy read it: I then shewed it to Mr. Durham, to shew it to Mohonur; he accordingly did so.

Did you shew it to Monohur before Mr. Durham shewed it him?—It was not in my possession before; I could not shew it him; I shewed him a copy, which I also shewed to many people.

Did you not shew him the original, the day before you shewed it him, through Mr. Durham?—I can take my oath I never shewed him the original, before I shewed him the copy.

Where did you get the copy?—I took it out of the Mayor's court.

Did you ever send for Monohur to your house on this occasion?—He owes me 100 rupees. I have sent for him often on that account.

Did you ever send to him about the bond, and ask him if he wrote it?—I never sent to him purposely to shew him the copy,

Did you send to him, and did you shew him the copy?—It is two years since I shewed him the copy.

Have you not shewn the bond or copy, within these three months?—No.

Did you ever shew any teeps to Monohur?—Yes, in the house of Mr. Durham.

Did you not shew him the teeps about three days before Maha Rajah was in confinement?—No.

Did you never shew them to him, except at Mr. Durham's?—No.

Did you ever desire Monohur to say he wrote the bond?—No.

Did you ever ask him if he had written the bond or teeps?—Yes, a great while ago; not lately; two years, or two years and a half ago.

What answer did he make?—That it was a good while ago: he could not recollect, whether he had or had not; but when he should see them he might tell.

Did he ever say any thing of finding another person who had wrote them?—Yes, I told him, if he knew the person who wrote them, I wished he would bring him: he said that Maha Rajah seldom wrote different papers with the same Munshy, and that as I had got the original bond to shew, he should not be able to find out the persons who wrote them.

Did you make him any promise, in case he produced the man?—I did say, that if he would bring the man that really wrote the bond, I would give him a sum: he said to me, he thought the Munshy who wrote it was turned off from Maha Rajah, and gone to Moorshedabad.

Did you ask the name of that Munshy?—No: I did not ask.

Why not, if you wanted to procure him?—I did not, because Monohur promised to find out the man when he came back, and I might shew him the bond: a man of the name of Buboll Cawdy first directed me to Monohur, in consequence of which, I spoke to him.

How long ago?—About two years and a half.

Were you not acquainted with Monohur before?—Yes; long ago: he was a servant of Maha Rajah's.

Were not you and Maha Rajah once upon good terms together?—Yes; upon terms of strict friendship; he loved me as his son.

Was Kissen Juan Doss at your house, when you shewed the copy to Monohur?—It was a year, or a year and a half ago: I can't remember.

Has Kissen Juan Doss been at your house, a few days before the commitment of Maha Rajah; and was Monohur there at the same time?—Kissen Juan Doss, before Maha Rajah's confinement, always slept in Gungabissen's room; but since that time he has not: a great many people come to Gungabissen, whom I do not see: I did not see him at the time you mention.

How came you to quarrel with Maha Rajah?—About this business.

Did you see Monohur at your house, any time within a week, before the commitment of Maha Rajah?—I never did.

Kissen Juan Doss examined.

Do you remember being at Mohun Persaud's and seeing Monohur, and when?—On the other side of ten or twelve days of Maha Rajah's confinement, about noon, or two in the afternoon. One day I was walking before the door of Mohun Persaud's house. Monohur was at the door, and made his salam: I went and sat with Gungabissen: afterwards Mohun Persaud and Monohur came into the house; two or three gurries after that, Monohur went away.

Did you see any papers produced to Monohur?—I did not see any papers: they were in another room.

Monohur examined.

Was there any wax seal to the papers shewn you?—There was no wax seal: there were ink seals.

Are you sure it was three days before the commitment of Maha Rajah Nundocomar?—I am very clear it was three days.

Mr. *Durham*, I had the bonds in my possession, three days before the commitment of Maha Rajah.

June 15, 1775.

Mr. Farrer offers to read a paper, as a copy of the original paper, which the representatives of Pudmohun Doss had been served with notice to produce.

Court. You must prove service of notice on Gungabissen: Mohun Persaud said all the papers of Gungabsisen were in the hands of the register: if any paper was delivered to Maha Rajah Nundocomar, it was not in his presence.

Mohun Doss examined.

Do you know Gungabissen?—Yes.

Do you know Maha Rajah Nundocomar?—Yes.

Did you know Bollakey Doss?—Yes.

Did you ever see Bollakey Doss write?—No: I never saw him write on any paper whatsoever.

Did you copy any paper in the presence of Mohun Persaud, Gungabissen, and Pudmohun Doss?—Yes, I did, by order of Maha Rajah. [A paper is produced.]

Is this your hand-writing?—It is.

Was the original, of which this is a copy, delivered to any one?—Maha Rajah delivered a copy to Pudmohun Doss.

Was any objection made to signing the original papers, when delivered to Pudmohun Doss?—He said nothing: he signed, and I gave the copy to Maha Rajah.

Who are you? what is your business?—I am in trade.

Where do you live?—I have a house at Cossimbuzar: I have been there these two years: I have been going backwards and forwards, from Hugly and Chinsura to Calcutta, for 30 years past.

How came you at Maha Rajah's?—I used to go backwards and forwards to Maha Rajah's: at that time I went to pay salam.

Is the whole paper your hand-writing?—The body of the paper is my hand-writing, and my name is to it.

What became of the original?—Maha Rajah gave it to Pudmohun Doss, and kept the copy himself.

How long have you had a house at Cossimbuzar?—All my family are there: I went to Cossimbuzar at the time of the disputes between Meer Jaffier and Sujah ul Dowlah: I principally reside here.

Have you a house at Chinsura?—Yes, in the Ophium Buzar.

Have you a house any where else?—I principally reside at Calcutta: I formerly rented a house in Calcutta, which I have bought for 50 rupees: I used to pay seven rupees per month: I argued with myself, I had better buy it.

Do you pay a rent for your house at Calcutta?—It is my own property.

Is the house at Chinsura your property?—It is my own property.

What is your trade?—I trade in every thing: I trade in long cloth, lead, and every thing else: I am a merchant; for 30 years the place of my habitation has been in Chinsura.

You say, you trade in so many articles, and have different houses: do you carry your commodities with you?—I go backwards and forwards, once in two years: I send my Gomastah to those places.

Who is your Gomastah?—Kissenchund was my Gomastah: I have no Gomastah now.

What servants do you keep?—I keep servants in proportion to my income.

Is your income large?—My income is 1,000 rupees: or else how could I pay all my servants.

Describe where your house is in Calcutta?—The place I have in Calcutta is Huzreymull's, but I pay him a quit rent: my house is in Calcutta, in Huzreymull's garden, in the Buzar road.

Whom did you buy it of?—I bought it from a beetle merchant.

What is his name?—Rampursaude.

Have you got the potta?—No: I get a chit from Huzreymull.

How much do you pay Huzreymull?—One rupee per month.

What occasion have you for so many houses?—I live here now: I go sometimes to Chinsura; I do not like to hire one: at Cossimbuzar my family live.

Why do not you live with your family?—Women don't like travelling: they live at Cossimbuzar, where they get their livelihood easiest.

How many wives have you?—For a good man, one is enough.

What are you?—A Banian Nagree Wallah.

What was your business, the day you wrote the copy at Maha Rajah's?—I did not go particularly that day: I used to go backwards and forwards frequently to make salam.

Do you go to make salam to any other great man, besides Maha Rajah, in the town?—I go to no other great man: I am acquainted with no other.

Are you in any intimacy with Maha Rajah?—There is a friendship between us.

[Mr. *Elliot.* The word he uses does not convey so strong an idea as friendship, but means something beyond an acquaintance.]

Were you ever a servant of Maha Rajah's?—No: I am a merchant.

Do you know whether Maha Rajah kept any Nagree writer?—I do not know: there are a thousand people under him.

Did you, at any other time, write any paper for Maha Rajah, when you called in?—I never wrote any other paper for him.

Were you ever in the room before, when Maha Rajah transacted any private business?—I never was present, when he had any other private transaction.

How long ago was it since you wrote this paper?—About six years.

What time of the year was it?—Before the rains.

Was it morning or night?—Three or four gurries of the day were remaining.

How long were you writing that paper?---¼ or ½ a gurrey.

Are you sure it was so much?---It was ¼ of a gurry.

Are you sure it was quite a quarter of a gurry?---Try me.

Did you bring the pen with you?---No; it was in the house.

Was the ink-stand there?---Yes; Maha Rajah was sitting in the hall.

Did you write in the same room?---Yes.

Who brought you to Maha Rajah to write that paper?---Nobody called me.

Had you ever wrote in the same room where Maha Rajah was before?---No.

How came Maha Rajah to ask you to write?---I am a merchant; every body knows I can write.

Who was present besides Maha Rajah, Gongabissen, and Mohun Persaud, when you wrote the paper?---Choyton Naut, and another person, a Bramin.

Was any one else?---No one else.

Who was the other person?—I do not know.

What was his name?---I do not enquire the names of every body I see: I have heard his name is Sangoo Loll. He knows himself: I do not know.

Did Sangoo Loll come about business, or to pay salam?—I do not know; he came.

Was Sangoo Loll a servant of Maha Rajah's?---I do not know.

Were the whole company sitting, or standing?---All sitting together.

Did you ever sit in Maha Rajah's presence before this time?---I always sit in his presence.

Did any one write on the paper besides?---I wrote: they all signed it.

Who is 'all'?---Choyton Naut and Sangoo Loll.

Who wrote first?---Sangoo Loll first, after I had signed it.

Who desired Sangoo Loll to sign it?---All three of them desired of him; Gungabissen, Mohun Persaud, and Padmohun Doss.

Who desired Choyton Naut to sign?---The three men before mentioned.

Did Maha Rajah say any thing?---Yes: he desired them to witness the paper.

Did Maha Rajah desire any of them to sign it?---Maha Rajah said it was necessary to witness it to make it pukka; and they said so too, and then signed it.

Did Maha Rajah desire Padmohun Doss to sign it?---No: he did not ask Gungabissen, Padmohun Doss, or Mohun Persaud: he only desired it to be witnessed.

Do you ever pay any customs in the course of your trade?---I never paid any in Calcutta.

How came you not to pay customs in Calcutta for long cloth, lead, &c.?---I bring lead and long cloth into Calcutta, and send them out of Calcutta.

Name a person to whom you have sold commodities in Calcutta?---Ten or twelve years ago I bought a quantity of cloths from Jugal Latty.

Have you had any cloth since that time?---No.

Jugal Latty examined.

Do you know Mohun Doss?---I do.

What is he?---He is in business; I remember he bought some cloths from me when I was servant to Mr. Senior: he told me he had got some salt about a year and a half since.

Is he at present a principal merchant?---I know him very well: he and his brother were formerly deeply concerned.

Couns. for Pris. Do you think him a man of credit, when upon oath?---*A.* I do not know what passes in his mind.

Is he a man of credit?---He formerly was.

Was his name hurt, or not?

[No answer could be procured.]

Do you know any thing of him?---He is of a good cast: I know his brother is a good man.

Sango Loll examined.

Did you ever attest a copy of any paper at Maha Rajah Nundocomar's?---I did attest a copy of a curra nama.

Who were present?---Mohun Persaud, Gungabissen, Padmohun Doss, Choyton Naut, and Mohun Doss.

What do you know of the paper?---What should I know of the paper? I know it is my name at the bottom. Maha Rajah told Mohun Doss to take a copy of a paper; when Mohun Doss had taken a copy, he desired me to be a witness. I asked Padmohun Doss whether Bollakey Doss's name was to it: he said it was; and then witnessed it.

Who witnessed the paper besides Mohun Doss?—Choyton Naut.

What became of the original after it was copied?---I know nothing of the original: I know we three were witnesses to the copy: what do I know of the original?

Did you compare the copy with the original?—No, I did not.

Did you read the one or the other?---No, I did not: Padmohun Doss said they were the same.

Q. to Mohun Doss. Did you compare the original with the copy after you wrote it?---*A.* What words I did not understand, Padmohun Doss explained: after making the copy I read it, and the words that were wrong I altered.

Sango Loll cross-examined.

Did not you read the words over your name, which are, "I, Sango Loll, have examined the original, and attested this copy?"—I could not read it: I did not read it: I could not compare the paper: I cannot read it.

Could you read it at that time? Could you

read the original paper?—I cannot read others hand-writing, though I can read my own. I could not read the original.

What time of the day was it?—There were four gurries remaining when he began to write; and it was evening when he had done.

Was he four gurries in writing it?—I cannot say whether it was four gurries, or 4½ gurries; he began a very little time to write after I arrived.

Was he four gurries writing it?—I do not know how many gurries of the day it was when I went: four gurries remained when he began to write: it was the evening before he finished.

Did you see him write the whole?—Yes.

Did all the people who were present when he began, sit by him till he finished?—Every body.

Who are you?—I am a Bramin and a merchant.

How long have you been a merchant?—I have been ten years in this town.

Where do you live?—In the Burra Buzar.

What trade do you carry on?—I am a shopkeeper, and sell goods.

How long have you known Maha Rajah?—Ten years.

Are you well acquainted with him?—Very well.

Do you go often to visit him?—I do.

How came you to be there at that time?—I went to pay salam.

Did Mohun Doss copy it from the paper before him?—Mohun Doss copied it from seeing the original, but when he did not understand, he asked Pudmohun Doss.

What things do you deal in?—I sell China goods, sometimes fruit, and what I can get two rupees by.

Is your shop full of goods?—Yes.

What is the value of them?—They may be worth about 5 or 600 rupees.

Were you ever in any other way of business? why do you call yourself a merchant?—I never have been a merchant; I never made any great sum in Calcutta, to be called a merchant.

Can you write?—I can a little in my own business.

Did you ever attest any other paper at Maha Rajah's?—No.

Do you know Choyton Naut?—Yes.

Has he been examined in this cause?—Yes.

What is his business?—He is a servant of Maha Rajah.

Do you know where he came from?—I know he lives in Calcutta now.

Did he sign his name in Nagree or Bengal?—In Bengal.

Did you go to fetch Mohun Doss, or Mohun Doss go to fetch you?—Mohun Doss did not call me; I went to make salam.

Choyton Naut examined.

[The last witness says that this is the man.] Were you a witness to a paper with this man? [pointing to the last witness.]—I was.

In what characters did you sign your name?—In Bengal.

Do you understand Nagree?—No.

Do you talk Hindostan?—Yes.

Did you hear the Nagree paper, that you are a witness to, read?—Yes.

Who explained it to you in Bengally?—Pudmohun Doss.

Kissen Juan Doss examined.

[An account marked Q, is shewn him, found by him among the papers deposited in the court.]

Do you know that paper?—This account was written by me, and is signed by Pudmohun Doss and Mohun Persaud.

What does that account contain?—This account is not entered in the book, but was drawn out in a hurry to be delivered to the Adawlet.

What Adawlet?—The former Adawlet, not this.

Was there any account previous to this delivered into the Mayor's court?—There was an account given into the Mayor's court, of which this is a continuation.

Is the balance of that former account carried into this?—The balance that remained due in the former account, is brought over into this.

Who wrote the former Nagree account?—I did.

What is the reason Mohun Persaud returned to sign the account delivered into the Mayor's court?—After the confinement of Pudmohun Doss and Gungabissen, Pudmohun Doss set about drawing accounts preceding. This was at that time drawn out: after that, when Gungabissen was released, Gungabissen, Pudmohun Doss, and Mohun Persaud, met at the house of the late Bollakey Doss; and they jointly wrote out this account. Pudmohun Doss desired Mohun Persaud to sign it. Mohun Persaud, in answer, desired Pudmohun Doss first, and then Mohun Persaud.

Mohun Doss delivered in the Nagree paper [exhibit M.] which he had been copying, and it appeared that he had been one hour and a half in copying it.

EXHIBIT Q.

Dr.				Cr.		
23,817	5		Balance of precedent account.	38,854	10	2 Paid to different people as per following particulars, current rupees.
	7,500		Two bonds, by Baboo. Mohun Persaud.		5,800	paid to Mohun Persaud, balance of 11,262 8, which was to be paid as follows, 10,862 8, C. R. by order of Bollakey Doss, and 400 at different times in the lifetime of B. D. after the execution of the power of attorney,
	5,500		one bond Mr. Loose, writer.			
	2,000		Mr. Hare.			
	14,392	11	3 Bamboo Mohun Persaud.			
	1,924	9	1 Pudmohun Doss.			
23,817	5					

Dr.			Cr.		
20,400		Ct. Rs. borrowed from Coja Petruse, for which a bond was written, dated 7th May English, and for which the following things were pawned.			out of which 10,862 8——5,462 8, was paid in the lifetime of B. D.
		Purchase deeds of house, two bonds of Mr. Gulver, one for 7,639 4, one for 5,000.	2,000		Account sales of allum belonging to Mohun Persaud, brought to his credit on the house at Moorshedabad, and paid him here.
		One receipt of Magal Calustry, for 5,000.	29,164	2 2	Paid to Lewis Callustry, attorney to Mr. Sparks, the attorney agreeable to a decree of the Mayor's court.
6,947	2	Paid by Allumchund Cuttry, for which one bond was written, dated 7th May English; for current rupees.			21,850 Principal.
2,000		A debt discharged by Mr. Gulver, for current rupees.			6,059 8 1 Interest.
334		Paid by Lewis Calustry, the balance of accounts current rupees.			1,254 10 1 Exps. audawlet.
666	13 1	Sales of a sloop and Mussagur cloth, 140 arc. rups. four pieces of Mussagur at 35 rups.			29,164 2 2
		550 Ct. rups. sale of sloop.	——36,964	2 2	
		11 3 1 Batta on the 140 arc. at 8 per cent.			276 11 1 Paid Kissenchund, gomastah at Patna, acco. his wages
		701 3 1			176 11 1 at Patna.
		34 6 Duty on the sloop at the Custom-house			100 at Calcutta.
		666 13 1 at 6 4 per cent.			276 11 1
1,913		On account will.			1,550 Paid Meer Abdul Rupeel.
		1,400 Baboo Gungabissen gee			1,160 Principal.
		513 Sawon gee.			390 Int. and expences.
		1,913			1,550
159	6 2	The supposed amount sales of things from the house at Patna.			63 12 3 Paid Pottuck Gee acct. Bill 55 sicca rupees.
		40 Matta, two strings.			38,854 10 2
		14 8 2 Brass pot, in weight 9*p.* 11*ct.* at 1½ per seer.	2,484	10 2	Paid according to the will of B. D. as follows:
		104 14 Silver bullion.			C. R.
		159 6 2			500 Gurreeb Doss Pottock.
210	3 1	On account, outstanding balance at Dacca.			400 Moolychund, by the hands of Ruttun Chund.
		95 2 bills for sic. rps.			1,000 Kissen Juan Doss.
		100 account sundries ct. rps.			1,900
		15 3 1 Batta on 95 sic. rps. at 16 per cent.			562 12 3 Bahoo Gungabissen,
		210 3 1			21 15 3 Mootychund, by the hands of Ruttunchund.
111		Out-standing balance at Patna, paid by Oges Sein Gomastah.			2,484 10 2
			70		Goodun Doss acct. sloop expences from 17 May, to 2d of Baadoon.
56,558	14		209	5 3	Audawlet expences.
			4,665	1 1	For the expences of house, servants, &c.
			600	11 1	Acct. profit and loss, as by Partar in the books.
			47,071	15 1	
			9,486	14 3	
			56,558	14	Balance as follows,
					7,500 Two bonds, Mohun Persaud.
					1,936 3 3 Baboo Mohun Persaud.
					52 11 Pudmohun Doss.
					9,486 14 3

(Signed) Pudmohun Doss.
Mohun Persaud.

Mohun Persaud shown Exhibit Q.

Do you know that account?---It is an account settled; it is an account paid to different creditors.

Why did you sign it?---I signed it, because the monies were really paid to the different creditors. I do not know whether the former account was right.

Mr. *John Stewart* called in, to produce the books of the Council.

Have you brought the books you were required to bring?---I have no authority to carry books out of the office, or to produce them without order. I acquainted the board with the subpœna: the board desired me to acquaint the Court in their name, that they conceive it to be liable to many inconveniences and ill consequences to exhibit the proceedings of the council in an open court of justice, especially as they may sometimes contain secrets of the utmost importance to the interest, and even to the safety of the state, and as they conceive that if it was allowable in one instance, it would be a rule in all.

Court. In this, as well as in every other instance, we should consult the interest and convenience of the Company as much as possible. We are not surprised that the governor general and council should be desirous to prevent their books being examined, which might tend to the consequences they mention: it would be highly improper that their books should be wantonly subjected to curious and impertinent eyes; but, at the same time, it is a matter of justice, that if they contain evidence material to the parties in civil suits, that they may have an opportunity of availing themselves of it. Humanity requires it should be produced, when in favour of a criminal, justice when against him. The papers and records of all the public companies in England, of the Bank, South Sea House, and the East India House, are liable to be called for, where justice shall require copies of the records and proceedings, from the highest court of judicature, down to the court of Pie-Powder, and continually given in evidence. When it is necessary they should be produced, the Court will take care they are not made an improper use of. To wish the council to be put to the least inconvenience possible, we wish they would consider whether they think the inconvenience of the production of their books and proceedings, or the granting copies of such parts as may be required to be given in evidence, may be the least liable to objection. The bringing the books and papers may subject them to the hazard of being lost, and may impede the business. On the other hand, if copies are granted, the Court cannot hold so strict a hand over impertinent curiosity as they can, if the books and papers are produced in the open court: if copies are taken not relevant to the cause, the Court would most certainly censure the party offending therein; but the mischief might be done by having taken the copies. If they are produced in court, the Court will oblige the party to inform the Court of the matter proposed to be read, and will not allow it, except they see that it is applicable to the cause. I wish you to inform the governor general and council of what is now said, and let them know that we wish to accommodate our practice as far as possible to the convenience of the East India Company; we wish likewise that you would remind the governor general and council, how anxious we are that they should make application to the Court to have such of their officers excused from serving on juries, whose attendances in their several offices cannot be dispensed with, without detriment to the affairs of the Company. At the time of the application to us from the different servants to be excused from serving on juries, we mentioned how impossible it was for us to judge whom it might be necessary to excuse, and whom not. That we might err on the right side, and not prejudice the affairs of the Company, we were obliged to be liberal in allowing the excuses made; but we have since found that several of the persons excused have since owned, that there was little or no excuse for them, and that they did not expect it, but thought, when they saw others excused, they might put in their claim: we cannot do this in future, and therefore are very solicitous to be informed by the governor general and council, what servants they wish to have exempted from serving on juries, that neither the business of the Court, nor that of the Company, may suffer. The purpose for which the books were desired to be produced was to discredit Shaik Ear Mahomed, who, as the counsel for the crown stated, had been guilty of perjury before the council, and had been by them censured for the same. The Court was of opinion, that the evidence was not admissible, it being a particular fact, and not to general reputation; and that no perjury* could be committed, in swear-

* "Perjury, by the common law, seemeth to be a wilful false oath, by one who being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not.

"It seems to be clearly agreed, that all such false oaths, as are taken before those who are any ways intrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries; and it seems to have been holden by some, that all such false oaths as are taken before persons authorised by the king to examine witnesses in relation to any matter whatsoever, wherein his honour or interest are concerned, are also punishable as perjuries. And surely there can be no offence of this nature which will not justly deserve a public prosecution, inasmuch as if it should once prevail, it would make it impossible to have any law whatsoever duly executed, and expose the lives, liberties, and properties, of the most innocent, to the mercy

ing before the governor general and council, who do not constitute a court of record: if they were a court of record, the only proper evidence would have been a record of the conviction for the perjury; the books were therefore not desired to be produced.

[The Counsel for the Prisoner informed the Court that the Prisoner had something to say.]

Court. By all means; let us hear it: but would it not be more proper for you to ask him what it is, that you may judge of what he has to say?

Counsel. I know it is not improper.

Court. What is it?---*A.* The Maha Rajah desires that Kissen Juan Doss may be asked further as to the Curra Nama.

Court. Has he any thing else to say?---*A.* Nothing else.

Court. Do you choose to ask the question? or that Maha Rajah should ask them himself? You had better ask them.]

Kissen Juan Doss examined.

Did you ever explain the Curra Nama you spoke of to Mohun Persaud?---Mohun Persaud went in his palanquin to the house of Maha Rajah, and I followed after. I do not know what conversation passed between Maha Rajah and Mohun Persaud: Maha Rajah sent for the Curra Nama to his own house: Mohun Persaud was present when I read it. The Curra Nama was afterwards shewn to Pudmohun Doss.

When you shewed the Curra Nama to Mohun Persaud, what did he say?—He said nothing.

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of the greatest villains. And therefore it hath been holden, that not only such persons are indictable for perjury, who take a false oath in a court of record, upon an issue therein joined, but also all those who forswear themselves in a matter judicially depending before any court of equity, or spiritual court, or any other lawful court, whether the proceedings therein be of record or not, or whether they concern the interest of the king or subject. And it is said to be no way material, whether such false oath be taken in the face of a court, or persons authorised by it to examine a matter, the knowledge whereof is necessary for the right determination of a cause; and therefore, that a false oath before a sheriff, upon a writ of enquiry of damages, is as much punishable as if it were taken before the Court on a trial of the cause.

"Also it seemeth, that any false oath is punishable, as perjury, which tends to mislead the Court in any of their proceedings relating to a matter judicially before them, though it no way affect the principal judgment which is to be given in the cause; as where a person who offers himself to be bail for another, knowingly and wilfully swears that his substance is greater than it is. Also it hath been resolved, That not only such oaths as are taken upon judicial proceedings, but also all such as any way tend to abuse the administration of justice, are properly perjuries; as where one takes a false oath before a justice of peace, in order to induce him to compel another to find sureties for the peace, &c. or where a person forswears himself before commissioners appointed by the king to enquire of the forfeitures of his tenants estates, &c. whereby he makes them liable to be seized by exchequer process. Also it hath been said, that a false oath is punishable as perjury, in some cases, wherein the king's honour or interest is concerned, though it do not concern the administration of justice; as where one swears a false oath concerning the possession of lands, before commissioners appointed by the king to inquire of such persons whose titles to the lands in their possession are defective, and want the supply of the king's patents.

"It seemeth clear, that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority for their so doing, or before those who are legally authorised to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle.

"And from the same ground it seemeth also clearly to follow, That no false oath in an affidavit, made before persons falsely pretending to be authorized by a court of justice to take affidavits in relation to matters depending before such court, can properly be called perjury, because no affidavit is any way regarded, unless it be made before persons legally intrusted with a power to take it, as being both of sufficient ability to ask all proper questions of the party who shall make such affidavit, and also of such integrity as not to suffer any thing to be inserted therein, to the truth whereof the party hath not sworn. And though it may be said, that an affidavit taken before persons falsely pretending to be commissioned for such purpose by the courts of justice, doth directly tend to impose upon such courts, and may possibly happen through surprize to be read, and may also in its own nature be altogether heinous, as if it had been made before persons regularly impowered to take it; yet inasmuch as it is of itself of no manner of validity, and is no otherwise regarded, than as it hath the appearance of being sworn before persons legally commissioned, without which it would have no manner of credit, it seemeth that offences of this nature are most properly punished by severely chastising those who usurp such an authority of administering of oaths, without any legal warrant." Hawkins's Pleas of the Crown, vol 1, p. 318, *et seq.*

See, also, vol. 19, p. 1175.

Did he make no objection?---He did not say a word of it in my hearing. He only said the space of six months is written.

Did Mohun Persaud see Bollakey Doss's name written to it?---He did.

Why did Mohun Persaud desire you to go to Maha Rajah?---He desired me to go along with him.

Why?---He did not tell me any thing particular. I explained to him the Nagree paper.

Cross-Examination.

What was the sum mentioned in the Curra Nama?---I saw a promise in favour of the governor and Mr. Pearson: likewise account of a bond for jewels. There was some promise in favour of Maha Rajah; and lastly for 35,000 rupees, on account of teeps. To the article of the bond for jewels, no sum was specified. There were sums specified to the Maha Rajah and the governor; but I do not recollect what they were.

Is the Curra Nama you now mention the same you made up the books from?---It was the same, but I did not extract the account. Pudmohun Doss did.

Who produced the Curra Nama, Mohun Persaud, or Maha Rajah?---Maha Rajah sent for it from his house. There was another Persian letter.

Did you point out to Mohun Persaud the name of Bollakey Doss on that paper?---Mohun Persaud took the paper in his own hand, and read it.

Was this the first time you had seen the paper?---Mohun Persaud took me to the house Pudmohun Doss shewed me before.

Why did not you mention this before?---Mohun Persaud forbid me to mention it: he has given me no victuals for these four years.

Did you then remember it?---Mohun Persaud had forbid me to tell.

As you were sworn to tell the whole truth, and have mentioned this Curra Nama so often, why did you not mention this circumstance before?---If nobody asked me about it, why should I tell the bad actions of Mohun Persaud?

Court. Because it is to save the life of an innocent person.---*A.* Now you ask me the question, I recollect it; I did not before.

Whom have you conversed with since last night?---I went down to examine the papers; came here, went home, and did not see or converse with any one last night.

Have you spoke to any one to day?---I went to the house of Mr. Jarrett, to converse with a Nagree Mohurer.

Were there any other people at Mr. Jarrett's?---There were 10 or 12 people.

Did you converse with any of them?---I did not: I conversed with my own man.

Did you speak to your own man about the Curra Nama?---I did not speak to any one. I spoke to nobody but the Court.

Did not you send a written account to Maha Rajah of every thing that you knew?---I did write a Persian letter to Maha Rajah: Maha Rajah wrote a Persian letter to me. Having read it, I wrote him an account of books, and accounts, and a few words of circumstances that happened before Bollakey Doss's death.

Did you in that paper relate this circumstance?---So far as related to Pudmohun Doss, I did.

Did you write that paper for the purpose of acquainting the Maha Rajah of all you knew?---I did inform him of all the circumstances, but this.

Why did you not inform him of this?---Mohun Persaud desired me to say the words were erased and stratched out: and therefore I did not say any thing about it.

When did Mohun Persaud desire you to say this?---He told me a great while ago before Ballgovin of all the circumstances.

Did you mention in your letter, that you wrote to Maha Rajah, what Mohun Persaud had said to you?---No.

Why did you not? can you tell any honest reason?---Because I am a servant to Gungabissen, and Mohun Persaud is his attorney, and Gungabissen lives with Mohun Persaud.

Did you shew Mohun Persaud the letter you wrote to Maha Rajah?---I did not: I only wrote to Maha Rajah to acquaint him with the accounts.

Did you write nothing, but concerning accounts?---I must own the truth. I did not write to Maha Rajah any thing about this circumstance: Mohun Persaud is a great man; he told me not.

Was not Maha Rajah a greater man than Mohun Persaud?---I was much afraid of Mohun Persaud.

Did you recollect this circumstance at the time you wrote this letter?---I did not.

If you had recollected it, would you have wrote it?---I certainly should.

Then your being afraid of Mohun Persaud, was not the reason why you did not write it?---I am much afraid of Mohun Persaud.

[Question repeated.]---I was afraid of Mohun Persaud.

[Question again repeated.] I did not recollect it.

The being afraid of Mohun Persaud, and the not recollecting it, are two different reasons. Both of them cannot be true: was it because you were afraid of Mohun Persaud, or because you did not recollect it?---[No answer could be procured.]

When did Mohun Persaud first bid you mention it?---He took a written paper from me: in this written paper, he made me write ten words I did not know, and leave out ten words I did know.

Do you mean that Mohun Persaud occasioned you to write to Maha Rajah?---Mohun Persaud and I were on bad terms, when the affair was in the Adawlet. I gave evidence in favour of Maha Rajah: the complaint was, that Maha Rajah had taken money oppressively. I gave evidence that he did not.

Were you at that time afraid of Mohun Persaud?—No: I was not afraid at that time.

Were you afraid of Mohun Persaud, when you said that the books of the army were separated from Bollakey Doss's other papers by his order?—Mohun Persaud forbid me to tell. I am afraid of him.

When was it Mohun Persaud told you not to mention it?—I believe a year and a half, or two years ago. In the late prosecution Maha Rajah told me, if I would write out a paper, I should have my wages. I did write out a paper: I do not know the particulars.

Did that paper contain all you know of this transaction?—I wrote it out, and I copied it.

Did Mohun Persaud tell you what to write, or did you tell him?—Mohun Persaud wrote it out first: he used to tell me, when I wrote it out, he would pay me the wages; it remained 10 or 14 days on the bed of Gungabissen.

Did Mohun Persaud, at any other time, except the time last mentioned [*i. e.* about two years, or a year and a half ago] desire you not to mention it?—In the paper he gave me to copy this is not mentioned, which I observed could not add any thing to it.

[Question repeated.]—No; about two years, or two years and a half ago, he told me two or three times, but never told me since; I put him in mind I knew another circumstance.

Did he ever mention it but these times?—No.

When did you receive the letter from Maha Rajah?—It is eight, ten, or fifteen days since I got Maha Rajah's letter.

[Here the Evidence closed.]

Lord Chief Justice *Impey*:

The prisoner stands indicted for forging a Persian bond, with an intent to defraud Bollakey Doss; and also for publishing the same, knowing it to be forged. This offence is laid in several manners, by different counts in the indictment, sometimes calling it a 'writing obligatory,' and sometimes a 'promissory note;' and it is laid to be with an intent to defraud different people, differently interested.

I shall lay out of the case all those counts to which I think no evidence can be applied; and shall only mention those to which it may, and shall point out those to which it most particularly applies. I lay out of the case the counts where the publications is said to be to defraud Bollakey Doss, as the publication which is proved was after his death: as also those which charge it to be to defraud Pudmohun Doss and Gungabissen as joint executors, there being no proof that Pudmohun Doss ever was an executor.

The only counts to which any evidence, in my opinion, can be applied, are the first, fifth, ninth, and thirteenth, which charge this instrument to be forged with intent to defraud Bollakey Doss: the eighteenth, which charges it to be forged with intent to defraud Gungabissen and Hingoo Loll, nephews and trustees named in the will of Bollakey Doss: the nineteenth, to which the evidence most forcibly applies, for publishing the same knowing it to be forged, with intent to defraud Gungabissen and Hingoo Loll: the 20th and 21st, which charge the forgery and publication to be with intent to defraud Gungabissen, the surviving executor.

There has been no evidence at what time the instrument was actually forged; and therefore it may be difficult for you to ascertain whether it was in the life of Bollakey Doss, and consequently whether to defraud him, or such persons as had interest in his estate after his decease.

The publication was clearly after his decease; and therefore, if you should think the prisoner guilty of that, you would not have the same difficulty as to whom it was to defraud, as it must be his executors, or other persons who took benefit by his will. As the estate was distributed according to the division of the rupee, which is a custom in this country similar to that of the Romans dividing the as; there is no doubt it must have been to the prejudice of his nephews Gungabissen and Hingoo Loll.

I will however, after I have gone through the whole evidence, point out that part of it which applies to the actual forgery, and then what applies to the publication, knowing it to be forged.

As the trial has now taken so many days, and the evidence is so long, notwithstanding you have given an attention that I have never before seen in a jury through so long a trial; it will be necessary, for the purpose of bringing it together, and to refresh your memories as to those parts which passed early in the trial, to recapitulate the whole of the evidence.

[Here the Chief Justice read over the whole of the evidence, and then proceeded.]

By the laws of England, the counsel for prisoners charged with felony are not allowed to observe on the evidence to the jury, but are to confine themselves to matters of law: but I told them, that, if they would deliver to me any observations they wished to be made to the jury, I would submit them to you, and give them their full force; by which means they will have the same advantage as they would have had in a civil case.

Mr. Farrer has delivered me the following observations, which I read to you in his own words, and desire you to give them the full weight, which, on consideration, you may think they deserve.

'It is no forgery on Bollakey Doss, because 'it is not proved to have been forged in his life 'time.'

He is certainly right in the observation, that there is no proof adduced of the time of the actual forgery.

'No forgery on the executors, because the 'prosecutor's evidence prove that they were 'previously informed of the forgery, and volun-

'tarily paid the bond. Pudmohun Doss ex-
'pressly knew it.'

This will depend on the evidence, which I shall observe upon hereafter, whether Gungabissen was so informed. I think there is great reason to suspect that Pudmohun Doss was privy to the fraud, if any fraud has been. But I have laid those counts out of the case, which charge either the forgery, or the publication, knowing of the forgery, with an intent to defraud Pudmohun Doss and Gungabissen as joint executors, because the prosecutors have failed in this proof of Pudmohun Doss's being an executor. They produced no probate to Pudmohun Doss, and would have proved it by his having signed an account delivered into the Mayor's Court. This we did not think sufficient to prove him executor: Mohun Persaud by that means might likewise have been proved an executor; for he has signed an account which was delivered in to that court.

'No forgery upon the trustees, or residuary 'legatees, because they had only a contingent 'interest at the time of the publication, and not 'a vested one. It was not an interest 'debitum 'in præsenti, solvendum in futuro:' had they 'died before the contingency happened, the 'interest would not have gone to their repre-'sentatives as such, and as claiming under 'them, but to the next of kin of Bollakey Doss; 'therefore they could not be defrauded.'

This is a point of law, and I cannot help differing from Mr. Farrer in it; for in my opinion, and in all our opinions, the interests of the nephews and residuary legatees is a vested interest, and would, whenever the money due to Bollakey Doss from the Company should be paid, go to the representatives. The receipt of that money is, I suppose, what is understood by Mr. Farrer to be the contingency.

This objection seems to be made from misstating an observation made early in the cause by my brother Chambers, and which I was at first struck with; which was, That neither the appointment of executors, or any part of the will, was to take place till after the payment of the debt from the Company; that is, that Bollakey Doss considered himself worth nothing but that debt, and meant only to make a will in case that money should be recovered. But, on looking into the will, I pointed out to my brother Chambers that there were dispositions of other monies; and we are both satisfied that the appointment of executors would have taken place, and the will had sufficient to operate upon, though that money had not been paid; and that, if it was not, Bollakey Doss did not mean to die intestate. But, however, there is evidence that it has been satisfied by Company's bonds.

Mr. Farrer has likewise given me these further observations:

'Persian letters, sealed in the usual mode 'of the country, not allowed to be given in evi-'dence: by our laws, letters sealed in the 'usual mode in England would.'

You cast your eyes on those letters, and observed on the recency of the writing. You thought them an imposition; but, as they were not given in evidence, I desired you would not suffer it to make any impression on you. I have no apprehensions the laws of any country would permit them to be given in evidence. They were letters, enclosed in a cover, sealed with the seal of Bollakey Doss; but were separated from the covers, which had been opened. Any writings might have been put into those covers. There was no signature to the letters. There was no attempt to prove that the direction of the covers were of the same hand-writing with the letters themselves, or that they were the hand-writing of Bollakey Doss, or of any of his writers. If this was allowed, any evidence might be fabricated, to serve all purposes. Letters in England have the signature of the writer, and his hand-writing may be proved: it is impossible these could be given in evidence.

'The witnesses are dead, the transaction 'is stale, and long since known to the prose-'cutor.'

These are objections of weight, which you, gentlemen, ought carefully to attend to, when you take the whole of the evidence into consideration, for the purpose of forming the verdict; and I have no doubt you will attend to them.

'No evidence of defendant's having forged 'Bollakey Doss's seal, for which he alone 'stands indicted.'

There is clearly no direct evidence of his having actually forged the seal. But Mr. Farrer is mistaken, when he says the prisoner stands only indicted of forging the seal: he is inaccurate in saying he stands indicted of forging the seal; it is for forging the bond. But he does not stand indicted of that only: he is indicted for publishing it knowing it to be forged; and, as I shall hereafter shew, it is to that the evidence chiefly applies, and to which I must require your more immediate attention.

'The absurdity of the defendant's confessing 'a circumstance, which would endanger his 'life, to people with whom he was not in terms 'of confidence—his refusing, three months 'after, to become security for Comaul O'Deen 'in his farm; a thing trifling in its nature, 'when contrasted with the consequences which 'might naturally be expected from a refusal—'the small degree of credit due to a confession 'made only once, and nobody present but the 'party and the witness, which are the words of 'Comaul's evidence.'

It is highly proper you should take these circumstances into consideration; you will consider on what terms they were at the time of these conversations. Confessions of this nature are undoubtedly suspicious; and to which, except there are matters to corroborate them, you should be very cautious in giving too much credit.

'Nothing any ways extraordinary in Co-'maul's mentioning the circumstance of the 'defendant's confession; as it is well known

'that, in the most common occurrences, the 'natives of this country form the most iniquit- 'ous schemes, which are not brought to matu- 'rity, or disclosed to the public, for a much 'greater period of time than the present; and 'that their truth and falsehood are so artfully 'interwoven, that it is almost impossible to 'come at the truth.'

My residence in the country has been so short, and my experience so little, that I can form no judgment of the truth of this observation: it is an appeal to the notoriety of the dispositions of the natives. You have been resident long in the country: some I see who were born here; you know how far it is true, therefore I leave it entirely to you.

Mr. Brix has communicated to me the following observations:

'Improbability of the bond's being forged, 'from its being conditional only; for which 'there could be no necessity if it was forged, 'as it rendered the obligation less strong, with- 'out any apparent reason.'

It certainly would have been as easy to have forged an absolute bond. But there is no evidence when the bond was forged, if it was forged: it might have been after the payment of the debt due to Bollakey Doss: it might be to give an air of probability to it. But this is matter proper for you to judge upon.

'From the circumstance mentioned therein 'of the jewels being robbed, as that very cir- 'cumstance lessens the value of the obligation, 'it might entitle the deceased or his represen- 'tatives to relief in equity.'

This circumstance of mentioning the jewels is undoubtedly one that makes the transaction very suspicious, as there is no evidence given of any loss of jewels; and indeed the evidence that has been produced on that head goes a great way to prove that no such jewels had ever been lost. It is ingenious to turn this to the advantage of the prisoner. You will determine whether it can be so applied.

These are the observations made by the prisoner's counsel: you will consider them, together with the observations I have submitted to you upon them.

I shall now make some few observations on the evidence, both on the part of the crown and the prisoner; desiring, as I have frequently during the course of the trial, that you will not suffer your judgments to be biassed, or the prisoner to be any way prejudiced, from any thing that has past, nor by any matter whatsoever, which has not been given in evidence.

The evidence on the part of the crown to support the actual forgery, is that of Mohun Persaud, who says, that Maha Rajah Nundocomar declared, that he had prepared, or drawn out three papers, the amount of one of which was 48,021 rupees, which is the amount of the present bond, and is applied as a confession of the actual forging; but as the confession may bear a different interpretation, there being no distinction in general made in the interpretation of the evidence, between writing or causing to be wrote, drawing or causing to be drawn, it may mean, that he caused Bollakey Doss to draw or prepare the bond, and therefore I think the first would be a hard and rather a forced construction of his words; and indeed he did not actually specify this bond. Comaul O Deen also gives evidence that will apply to the forgery. Maha Rajah Nundocomar told him, That he had himself fixed Comaul O Deen's seal to the bond; and he proves a requisition from Maha Rajah Nundocomar, to give evidence, That he was a witness to the bond, and makes him promises if he will. This is the evidence of the forgery; but I think it will be more necessary to attend to the evidence in support of those counts which I have said the evidence may be applied to, and which charge the publication with an intent to defraud.

The evidence which applies to the actual forgery, applies likewise to the knowledge of its being forged. Mohun Persaud proves the bond produced by Maha Rajah Nundocomar. A receipt of Maha Rajah Nundocomar for the Company's bonds, paid in satisfaction of the bond in question, and the actual satisfaction received by Maha Rajah Nundocomar.

Two witnesses depose, That the name purporting to be in the hand-writing of Sillabut, is not of his hand-writing. Sabboot Pottack swears positively to this: he says, He was well acquainted with his writing; and speaks as to the usual manner of his attesting which he says, is different to that on this paper.

Rajah Nobkissen, on the paper being shown him, swore positively, that it was not the hand-writing of Sillabut; but afterwards retracted the positiveness of his opinion: but the circumstance of his immediate fixing on the three papers, which were before proved to be of Sillabut's writing, is a stronger proof of the knowledge of his hand-writing, than any positive oath.

I must again caution you against receiving any impression unfavourable to the prisoner, from the hesitation and doubts or exclamations of this witness, or from any other circumstances except what he actually deposed to.

Both these last witnesses agree, that the hand to this bond is better than Seellabut's hand.

Other circumstances are adduced to draw an imputation on this business. An account subsequent to the date of the bond, which is in 1772, is produced to show, that Bollakey Doss was at that time indebted to Maha Rajah Nundocomar only in the sum of 10,000 rupees; but I think no great stress can be laid on that, as it contains a reference to such other debts as may appear by his books.

The Counsel for the Crown have proved, that a draught for a large sum of money was paid at Benares, about the time of the bond given, on the credit of Bollakey Doss, in favor of lord Clive. This was adduced for the purpose of showing Bollakey Doss to be at that time in good circumstances, and to infer from thence an improbability of his entering into this bond: but I think it proves no such thing; a

much larger sum would no doubt have been paid on lord Clive's credit alone; and it is certain, that Bollakey Doss was at that time a debtor to Maha Rajah Nundocomar.

There is another circumstance; that Bollakey Doss had never mentioned either the deposit of the jewels, or the loss of them; and that there is no entry of it in his books.

Comaul O Deen produced a paper with the impression of his own seal, which he swears to be in the possession of Maha Rajah Nundocomar: you before said, you thought it to be the same with that to the bond; you will accurately examine it; I have not; I am told, there is a flaw in both the impressions.

Comaul O Deen accounts for his seal being in the possession of Maha Rajah Nundocomar, and swears he has not received it back: his evidence is supported by Coja Petruse, whose character you all know, and Moonshy Sudder O Deen, to whom he repeated the conversations with Maha Rajah Nundocomar, when they had recently past; you know the practices of the natives, and whether it is probable, as the counsel for the prisoner has suggested, that this is a deep-laid scene of villainy.

The character of Comaul O Deen was enquired into from Coja Petruse, and you have heard his answer.

Subornation of perjury was endeavoured to be fixed on him by the evidence of Hussein Alli; but as to Cawda Newas, nothing was proved: as to the seal-cutter, his conversation with him seems rather to strengthen than impeach his credit.

This bond was found cancelled among the papers delivered into the Mayor's court, as belonging to the estate of Bollakey Doss; but the papers of Pudmohun Doss and Bollakey Doss were mixed.

This is the substance of the evidence for the crown; and no doubt, if the witnesses are believed, whatsoever you may think of the forgery, there is evidence of publication, with knowledge of forgery.

On the other hand, if you believe the witnesses for the prisoner, a most complete answer is given to the charge.

There are no less than four witnesses present at the execution of the bond by Bollakey Doss, three of whom had been privy to a conversation at Maha Rajah Nundocomar's, when the consideration of the bond was acknowledged by Bollakey Doss: the same persons prove the attestation of the bond by the three witnesses thereto, who are all dead.

The brother of Matheb Roy is produced, who says, that Matheb Roy was well known to Huzree Mull and Cossinaut: Huzree Mull and Cossinaut did know a Matheb Roy; but it is clear, from their description of the person, that it is not the brother of the witness at the bar. However, Cossinaut gave an account of the family of the man he knew, whose father was Bungoo Loll; but said, there was another Bungoo Loll. It seems extraordinary that there should be two Bungoo Lolls, two Saheb Roys, and two Matheb Roys, in two different families: however, there is no doubt of the existence of two Bungoo Lolls and two Saheb Roys; the improbability then decreases, and both Tage Roy and Roopnerain swear to the existence of the other Matheb Roy. It is extraordinary, however, that this man, who is described by his brother to be a poor man, and servant to a prisoner in the gaol, and was not known to Cossinaut or Huzree Mull, should be described by the counsel for the prisoner as a man of note and family, and as being acquainted with Cossinaut and Huzree Mull.

In contradiction to what Commaul O Deen had said, the defence introduces another Comaul; and all the four witnesses swear positively to his attesting the bond. He is proved by two witnesses to be dead; one Joydeb Chowbee saw a man going to be buried, and was told it was Comaul.

The other, Sheekear Mahomed, actually attended his funeral.

Comaul O Deen swears positively it is his seal, and these witnesses swear to the attestation by another Comaul. Joydeb Chowbee mentions a circumstance by which he knew it to be the funeral of Comaul: he asked, Whether it was a funeral of a Bramin or a Mussulman? It seems, the mode of carrying out Mussulmen and Bramins differ. You must judge from his evidence, whether he must not have known whether it was a Mussulman or Bramin, without enquiry; indeed he has said, that he did; and the observation was so strong, that he after positively denies he ever said he made such enquiry.

As Comaul is said to have died in the house of Maha Rajah Nundocomar, it seems extraordinary, that no one but Sheekear Mahomed is brought to prove his actual death; it must have been easy to have brought many persons of Maha Rajah Nundocomar's family, especially as he mentions five persons by name that attended his funeral, besides cooleys; three indeed he has buried since, but there are two still alive. This must have been known to be very material, for this is not the first time that Comaul O Deen has given evidence concerning his seal.

It is admitted on both sides, that Seelabut is dead. It is remarkable, that no account whatsoever is given of the Mour who wrote the bond; he would have been a material witness: there is no proof whose writing it is: it is proved, that Bollakey Doss had at that time a writer whose name was Balkissen, who is dead: there is no evidence that it was of his hand; he was, I think, known to one of the witnesses to the execution of the bond.

A witness says, that Seelabut was a Persian writer as well as Vakeel to Bollakey Doss, and Kissen Juan Doss seems to confirm it; being asked, What Persian writer Bollakey Doss had at that time? he answers, "He had one named Balkissen, and Seelabut also understood Persian." It is not said to be of his writing; and if Seelabut acted in that capacity, what occa-

sion had Bollakey Doss to call for another writer?

There is no evidence of any particulars being mentioned to the writer who made out the bond, though it contains very special matter, except by one witness: all agree that no directions were given in the room before the people came from Maha Rajah Nundocomar to Bollakey Doss's; and all the witnesses, except one, deny any specific directions being given after. It is possible, he might have spoken to the Mour before his coming into the room, which the other witnesses at this distance of time might have forgot.

Though there are some variations in their evidence at the time of the execution, that is not at all extraordinary; what is most striking is, the very accurate memories which they preserve as to some circumstances, and their total forgetfulness as to others.

The most remarkable instance of their memory is the knowledge of the seals, which some of them swear to positively, only from having seen them three or four times on the fingers of the owners, from which (though the seals must be reversed when applied to paper, and though some of them do not understand Persian, and consequently not the characters engraved on the seal) they swear positively to their being able to know the impressions; and it is true, for they do point out to whom the impression of each particular seal on the bond does belong. Kissen Juan Doss, who must have seen Bollakey Doss's seal oftener than any of the witnesses, does not take upon him to remember the impression; and on being told the other witnesses did, he said, they had excellent memories; he was not blessed with such.

They are likewise uniformly accurate in describing the order in which the witnesses sealed and signed.

I shall make no observation on the variances of the witnesses to the execution; for, except in two instances, one of the witnesses, who remembered the sum in the bond, from its being explained in a language he did not understand, the other, Sheekear Mahomed, is the only witness that spoke with precision as to the sum. You heard him deliver his evidence, and will form your own judgment on that and on his whole evidence, in which he affirms and denies the same thing in the same breath.

As to the other, it was suggested, that the same words expressed the same sums in Moors and Persian, which drew on an enquiry; and we had the Persian and Moor words for the sums mentioned delivered in evidence; you will see how far you think they agree or disagree.

Nor shall I observe on the manner in which the witnesses on either side gave their testimony. You saw and remarked them. The jury having the opportunity to make their observations on the conduct of the witnesses, and of hearing the questions put as circumstances arise, is the great part of the benefit of a *vivâ voce* examination.

The defence does not attempt to prove either the deposit or the loss of jewels. And, indeed, Kissen Juan Doss, on whose evidence I shall hereafter observe, says, 'That he never heard 'of such a loss; had it happened, he must 'have heard it; and a thousand people must 'have known it.' He speaks of the loss of jewels to a trifling amount, but those belonged to another person. This, as I said before, is a suspicious circumstance. But if the jewels were actually deposited, of which there is no evidence, except what I am going to take notice of, the Kursa Nama: though they were not lost, Bollakey Doss might have told Maha Rajah Nundocomar that they were; and the Maha Rajah might give credit to Bollakey Doss; or might chuse rather to take a bond than enquire further into the matter. It might possibly have been a fraud on Maha Rajah Nundocomar.

Meer Assud's evidence may be very material. He produces a paper, purporting to be a receipt given by Bollakey Doss to him, for valuable effects of Cossim Alli, delivered by the witness to Bollakey Doss, which had the seal of Bollakey Doss to it. The impression you will examine; you will find it to be the same as is on the bond. This was for the purpose of proving the correspondence of the impression of the seal on this receipt, with the seal on the bond; and by that means to prove, that the seal to the bond was the identical seal of Bollakey Doss, not one that was forged. This transaction was said by the witness to be when Bollakey Doss was with the army at Durghotty. It seems clear beyond doubt, from the date of the receipt, from the place the army was then in, and from the circumstances that both Cossim Alli and Bollakey Doss were in at the time the receipt bears date, that the receipt could not have been given by Bollakey Doss, and that the whole is a fiction.

A very striking observation arises from this: it may account for the witnesses remembering the seals so accurately. Tage Roy says, He is in possession of Matheb Roy's seal. The seal of Comaul O Deen is proved to have been in the possession of Maha Rajah Nundocomar; and the person who fabricated this receipt must have had that seal which made the impression on the bond and the receipt. If the witnesses by any means have seen those seals, it is no longer surprising that they should be well acquainted with the impressions. This is a strong observation; but it is but an observation; I would have you consider it deliberately and maturely before you adopt it.

Kissen Juan Doss delivered all his evidence, till this morning, with such simplicity, and with such an air of candour and truth, that I gave full assent to every thing he said; and I am extremely chagrined that there has arisen any cause to suspect any part of his evidence. He mentioned a paper, which he calls a Kursa Nama, in which the whole of this transaction was wrote, and which was acknowledged and signed by Bollakey Doss. Though the entry

made in the book after the death of Bollakey Doss, by order of Pudmohun Doss, and purporting to be in the lifetime of Bollakey Doss, carried marks of suspicion with it; yet, I own, Kissen Juan Doss had so completely gained my confidence, that I gave implicit credit to him. Many attempts were made to establish it in evidence, which failed of legal proof; but as I thought so well of Kissen Juan Doss, and as it would have been extremely hard, if such a paper had existed, that the prisoner should be deprived of the benefit of it, I said (having first asked the consent of my brethren,) that, though it was not strictly evidence, I would leave it to you to give such weight to it as you thought it deserved. I still leave it to you; and if you believe that such a paper ever existed, it would be the highest injustice not to acquit the prisoner.

Attempts were made to bring this to the knowledge of Mohun Persaud; and if it did exist, and was in the knowledge of Mohun Persaud, this prosecution is most horrid and diabolical. Mohun Persaud is guilty of a crime, in my apprehension, of a nature more horrid than murder.

But, I own, what passed after the counsel for the prisoner had closed his evidence, has very much weakened the confidence I had in Kissen Juan Doss. The counsel did not desire that he should be called, assigning as is usual for their reason, that they had forgot to examine to any particular point which was contained in their instructions; but we are informed that the Maha Rajah had something to say. All that he says is, That he desires Kissen Juan Doss may be further interrogated as to the Kursa Nama. The question then is immediately put to him, Whether he ever explained the Kursa Nama to Mohun Persaud? and then he gives the account of Mohun Persaud's having seen it at Maha Rajah Nundocomar's.

When he is examined to the reason of his not having told it before, all that simplicity, all that air of truth and candour, which we had remarked in him, instantly vanished; his looks were cast down, his tongue faultered, he prevaricates, he contradicts himself, he did not seem the same man. 'He did not tell, because 'he was not asked.' 'He did not mention it 'to Maha Rajah Nundocomar in his letter, 'because he was afraid of Mohun Persaud.' 'He did not mention, because he did not recol-'lect it.' 'He did not deliver it in evidence, 'because afraid of Mohun Persaud.' Mohun Persaud is a great man. He was not afraid to write the letter. He did not shew the letter to Mohun Persaud: why should he be afraid to insert this circumstance? If he now stands in so much fear of Mohun Persaud as not to mention this in his evidence, was he so much afraid of him when he voluntarily and directly confronted him as to the army books?

All this fear arises from no recent threat: it is in consequence of a conversation at the distance of some years.

It is for you to determine how far he really stands in awe of Mohun Persaud, and what the effects of that intimidation was when he delivered his evidence.

It is strange, as the witness was so often examined, and so particularly to this Kursa Nama, that Maha Rajah Nundocomar never before suggested this matter to his counsel.

If this latter part of Kissen Juan's evidence is true, he must be either guilty of perjury or very strong prevarication in his former evidence. Being asked as to Mohun Persaud and Gungabissen's knowledge of the entry made from the Kursa Nama? He says, 'I cannot 'say that Mohun Persaud and Gungabissen 'knew of it at the time of the entry; they 'knew of it afterwards. How can I tell when 'they knew of it first? They must have known 'it from the papers in the Dewanny Audaulet; 'they were all called for there. I should tell, 'if I knew Gungabissen or Mohun Persaud 'knew of the entry.'

He must have known it was more material to prove that they knew of the Kursa Nama itself, in which the particulars of the account which formed the sum in the entry were wrote, and which Bollakey Doss had signed. But he presently afterwards positively says, That Mohun Persaud and Gungabissen were not acquainted with the accounts.

In another part of his evidence, he says to Pudmohun Doss, 'Make my mind easy about 'the bond we are now paying,' or (for there was a doubt in the interpretation) 'which we 'have paid.'

The time that this explanation was made at Maha Rajah Nundocomar's is not ascertained; but it must have been before the payment of the bond; for afterwards it could be of no use. If then Kissen Juan Doss had before seen this Kursa Nama, and explained it to Mohun Persaud, why did he demand that his mind should be made easy about the bond? and how was it made easy, only by the production of a paper that he had seen before.

I am much hurt, to be obliged to make these observations on the evidence of a man that I entertained so good an opinion of. I must desire you to recollect, with regard to this observation, and every one that I submit to you, that you are to make no farther use of them, than as they coincide with your opinions and observations; and when they do not, you should reject them; for it is you, not I, that are to decide upon the evidence.

Attempts were made, by means of Monohun and other witnesses, to impeach Mohun Persaud, by particular facts, of attempts to suborn, and by general character. You must judge how far they have succeeded. They totally failed in the same attempts, as to Commaul O'Dien.

It is to be observed, likewise, that no person has been called to impeach the witnesses brought by the defendant.

There are many observations to be made in favour of the prisoner; and I am sure your

humanity will prompt you to enforce them, as far as they will bear.

I before said, that the defence, if believed, was a full refutation of the charge; it is not only so, but it must fix an indelible mark of infamy on the prosecutor.

There are four positive witnesses of the actual execution of the bond by Bollakey Doss.

In opposition to Commaul's evidence, there are as many to prove, that the witness attesting was another Commaul.

Matheb Roy was not mentioned by the evidence for the crown. Four witnesses saw him attest it; and two other witnesses, one of them his brother, likewise prove that there was such a person.

In opposition to Rajah Nobkissen and Pattock, who swear the name Sillabut to the bond, is not of Sillabut's hand-writing; four witnesses swear positively to the having seen him write it.

Much depends in this prosecution on the evidence of Mohun Persaud: you must judge how far his credit has been shaken: most of you know him: you must determine how far he deserves credit; and how probable it is, that he would, through malice, or any other corrupt motive, accuse an innocent person of a capital crime. If you think him capable of it, you should not give the least attention to his evidence. He swore positively to the bond produced by Maha Rajah Nundocomar, and for which the Company's bonds were given, being the same bond that was produced in evidence; he said, he knew it from circumstances, but did not explain what those circumstances were; this I mention as going to his credit only; for the whole defence proceeds on identifying this bond, and proving it a true one.

You will judge how far he is contradicted by Kissen Juan Doss, as to the army books; and which of the two are to be believed.

An imputation was attempted to be thrown on Mohun Persaud, for preventing Gunga Visier from attending, who was said to be able and willing to appear as a witness: but that has been cleared up, to the full satisfaction of us; and, I do not doubt, to your satisfaction likewise. He could not be called by the prosecutor, on account of his interest; and no prejudice should accrue to the prisoner, for not calling him, for the same reason.

The counsel for the prisoner have urged the hardship of this prosecution being brought at this distance of time. You have heard when Mohun Persaud first suspected the forgery; and when, by Commaul's declaration, he had reason to be confirmed in the suspicion.

You have heard, when the papers were delivered out of the court; if there has been any designed delay, and you think Mohun Persaud had it in his power to carry on an effectual prosecution before he has; it is a great hardship to Maha Rajah Nundocomar, especially as the witnesses to the bond are all dead; and you ought to consider this among the other circumstances which are in his favour. Though, to be sure, this hardship is much diminished, as there were so many witnesses still alive, who were present at the execution of it,

There are two pieces of written evidence relied on by the prisoner: one, the entry in the book from the Kurra Nama, on account of the agreement of the sums; and you will find that the sums said by Kissen Juan Doss to be contained in the Kurra Nama; viz.

Durbar expences	6,000 R°
Bond Batta and premium .	69,630 7
do amount to the sum of .	75,630 7

which is the sum in the entry.

The other is the account delivered by Mohun Persaud and Pudmohun Doss, subsequent to the account delivered in by Pudmohun Doss, in which Pudmohun Doss had taken credit for this sum; and the subsequent account likewise contains it.

I do not think much can be drawn from this, for the sums had, as Mohun Persaud says, been paid, and therefore they certainly would take credit for them, to prevent their being charged with them; this they would do, were the monies properly or improperly paid.

There is certainly great improbability that a man of Maha Rajah Nundocomar's rank and fortune should be guilty of so mean an offence for so small a sum of money.

It is more improbable, as he is proved to have patronized and behaved with great kindness to Bollakey Doss in his life-time, that he should immediately after his decease plunder the widow and relations of his friend.

There does likewise appear to have been a suit in the Audaulet, which must have been a civil suit; but it does not indeed appear that Mohun Persaud was a party; and, indeed, for what reason I know not, neither side have thought fit to produce the proceedings.

I have made such observations on the evidence as the bulk of it, and the few minutes I had to recollect myself, would allow me to make.

You will consider the whole with that candour, impartiality, and attention, which has been so visible in every one of you during the many days you have sat on this cause.

You will consider on which side the weight of evidence lies; always remembering, that in criminal, and more especially in capital cases, you must not weigh the evidence in golden scales; there ought to be a great difference of weight in the opposite scale before you find the prisoner guilty. In cases of property, the stake on each side is equal, and the least preponderance of evidence ought to turn the scale; but in a capital case, as there can be nothing of equal value to life, you should be thoroughly convinced, that there does not remain a possibility of innocence before you give your verdict against the prisoner.

The nature of the defence in this case is such, that, if it is not believed, it must prove fatal to the party; for if you do not believe it,

you determine, that it is supported by perjury, and that of an aggravated kind, as it attempts to fix perjury and subornation of perjury on the prosecutor and his witnesses.

You will again and again consider the character of the prosecutor and his witnesses, the distance of the prosecution from the time the offence is supposed to be committed, the proof and nature of the confessions said to be made by the prisoner, his rank and fortune. These are all reasons to prevent your giving a hasty and precipitate belief to the charge brought against him; but, if you believe the facts sworn against him to be true, they cannot alter the nature of the facts themselves. Your sense of justice, and your own feelings, will not allow you to convict the prisoner, unless your consciences are fully satisfied beyond all doubt of his guilt. If they are not, you will bring in that verdict, which, from the dictates of humanity, you will be inclined to give; but, should your consciences be thoroughly convinced of his being guilty, no consideration, I am sure, will prevail on you not to give a verdict according to your oaths.

The Jury retired for about an hour; and brought in their verdict, Guilty.

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557. The Trial of Joseph Fowke, Francis Fowke, Maha Rajah Nundocomar, and Roy Rada Churn,* for a Conspiracy against Warren Hastings, esq. Governor General of the Presidency of Fort William in Bengal. At Calcutta or Fort William, in Bengal aforesaid: 15 George III. A. D. 1775. [Subjoined to the Trial of Nundocomar, for Forgery. Published by Authority of the Supreme Court of Judicature in Bengal. London: Printed for T. Cadell in the Strand, 1776.]

By way of Introduction to the Report of the Trials of Joseph Fowke and others, was published the following Account of certain Preliminary Measures. It is in itself not uninteresting.

DEPOSITIONS

CONCERNING

A CONSPIRACY AGAINST WARREN HASTINGS, Esq.

Calcutta, April 20, 1775.

On the 19th instant, about nine in the morning, Comaul O Deen Alli Cawn, the farmer of Hedgelee, came to Mr. Hastings, with a complaint against Mr. Joseph Fowke, for having extorted from him, by violence, accusations against Mr. Hastings and other persons. The particulars of his story will be related at large in his deposition. He said, he had that instant made his escape from the hands of Fowke and Nundocomar. His jamma was torn, his face pale, and he was, or appeared to be, out of breath. Mr. Hastings told him, he could afford him no redress; and referred him to the Chief Justice. He went. The Chief Justice having heard the complaint, summoned the other judges to meet him in the evening; and late that night Mr. Hastings received the following Letter from them:

"The Hon. Warren Hastings, esq.

"Sir; a charge having been exhibited, upon oath, before us, against Joseph and Francis Fowke, Maha Rajah Nundocomar, and Rada Churn, for a conspiracy against you and others; we have summoned the parties to appear tomorrow, at 10 o'clock in the forenoon, at the house of sir Elijah Impey, where we must require your attendance.—We are, Sir, your most obedient humble servants, E. Impey, Robert Chambers, S. C. Lemaistre, John Hyde."

"*Calcutta, April* 19, 1775."

The same intimation was sent, in the same form, to Mr. Barwell, Mr. Vansittart, Maha Rajah, Rajebullub, and Cantoo Baboo.

The next morning Mr. Hastings attended, as did the other persons named in the letter.

The persons examined as evidence on the charge, were Comaul O Dien, his Moonshy, Mathew Miranda and Timothy Pereira, two writers of Mr. Fowke, Akermannu a Gentoo, and a Moonshy, both servants of Mr. Fowke, and Yar Mahomed, a well-known servant of Nundocomar. The examination lasted till eleven at night.

It will be necessary, before we proceed, to remind the reader of a representation which was made to Mr. Hastings by Comaul O Deen, of the like attempt made by Mr. Fowke in December last, to extort accusations from him; and which was laid before the board on the 18th of that month. In the course of the late

*: See the preceding Case.

examination it appeared, that Mr. Fowke had sent to the Board of Revenue a letter, dated the 18th of April, accompanied by a paper, bearing the seal of Comaul O Deen, and containing a formal recantation of his former representation. Mr. Hastings had not yet seen these papers.

The following are copies of the Depositions which were taken before the Judges.

DEPOSITION of COMAUL O DEEN ALLI CAWN, upon oath.

"Having a demand on the Dewan of the Calcutta district, for the sum of 26,000 rupees, on account of the advances made on the collaries in the Hedgelee districts, which he had not paid to me; to frighten him I went to Maha Rajah Nundocomar, and gave him three arzees; two against the said Dewan, and the third against Mr. Archdekin, telling him to keep the two arzees against the Dewan in his own hands; and that when Moonshy Sudder O Deen should arrive from his house, and I should receive my money through his means, that I would make him (Nundocomar) a present of 6,000 rupees, and take back my arzees from him: I also desired, that he would lay the arzee which I had given him against Mr. Archdekin before the committee, and afford me his patronage. The said Rajah agreed to this, and dismissed me. Another day Maha Rajah told me, that his business depended on Mr. Fowke, whom I must visit. I answered, that in the month of Poos, a quarrel happened between that gentleman and me, and that I therefore could not go. He replied, It did not signify. At his desire, I accompanied Rada Churn to visit the said gentleman, who talked to me very friendly. In the mean time, Moonshy Sudder O Deen arrived, and told me to get back my arzees; and that he would settle my affairs with the aforesaid Dewan. I went to the Maha Rajah, and desired to have my arzees returned to me. Maha Rajah replied, Give me the 6,000 rupees, according to agreement; and take back your arzees. I said, I have not yet received the money; as soon as I have, I will assuredly give it you, and will give you a written agreement to this effect. He would not consent to this; and on the 5th of Bysaac said to me, In the month of Poos, you gave in an arzee of complaint against Mr. Fowke, on which account he is displeased with you, and will not return them to you. I replied, I gave the arzees in trust to you, and not to Mr. Fowke. He answered, Do one thing, and I will return your arzees: I will give you a draft of an arzee, which you must write, and present to the general, and agree, that when you are appointed to Poorniah, you will present this arzee against the governor to the council: if you do not agree to this, your arzees will not be returned. I said, Shall I give a false arzee to Mr. Fowke, to procure the return of my own arzees? He replied, You need not give this arzee, or put your seal to it; he only wants to hear the particulars of it once from you: this is of no consequence to you. Being remediless, I said, Give me whatever draft you please. Afterwards, at night of the 6th Bysaac, at his own office, he caused me to have it written by my own Moonshy, and took it from me; and on the 8th instant he sent me with Rada Churn to Mr. Fowke. The said gentleman called me into his chamber, and, placing two writers and two Bengallies over me, first of all asked of me, What sums did you give to the Governor, Mr. Barwell, Mr. Vansittart, &c. as bribes? I answered, I gave no bribes. Having heard this, he suddenly flew into a passion, and took up a book which lay near him, to strike me, saying, Do you desire your own welfare? Write what I desire you, and put your seal to this arzee. Being frightened, I put my seal to the arzee, and said, Tell me what you desire I should write, that I may write it. He said, Write that you have given 45,000 rupees, within three years, as bribes to Mr. Barwell, 15,000 rupees in nuzzies to the Governor, 12,000 to Mr. Vansittart, 7,000 to Maha Rajah Rajah Bullub, and 5,000 to Baboo Kissen Cantoo. I was confined in a chamber, without any power; and, being in fear of my reputation and life, I wrote what was desired of me with my own hand, and gave it, and thereby obtained my liberty; and when I got out of the chamber, I stood at the top of the stairs, and called aloud to Mr. Fowke's son and Rada Churn, "Give me back the falsities which I have been obliged to write, and have been taken from me; otherwise I will go and lodge a complaint before the Audaulet." Shimsheer Beg and his Moonshy are witnesses to the truth of this. Mr. Fowke's son, hearing, went to his father, and after much conversation came out, and said to me, Go for the present to your house; the Maha Rajah will come here to-morrow, do you come here at the same time; I will then satisfy you. Being remediless, I came to my own house, and went to Moonshy Sudder O Deen, and said, Do you go and give notice to Mr. Barwell and Mr. Vansittart, that Mr. Fowke has this day exercised great oppression on me, and has made me write a great number of falsities against the gentlemen, which he has taken from me; and that, whatever is to be done, will be executed to-morrow. This day, being the 9th of Bysaac, I came to Mr. Fowke's house, and saw that he, his son, and the Maha Rajah, were consulting together in his chamber, I stood without. About two gurries afterwards, the said gentleman, the Maha Rajah, &c. came out, and got into their palanquins. I came before them, and called for justice from the Council and Audaulet, and desired that they would return me the writing which they had yesterday forced me to write, and taken from me. The said gentleman and Maha Rajah, being enraged, told their people to take me, and keep me within the house. I opposed them with all my force, and got into my palanquin; there were near 20 people with me. The quarrel continued between my people and

theirs till I arrived at the house of Rajah Rajah Bullub, when their people returned. I went to the governor, and represented all these particulars to him: I hope for justice."

Seal. [COMAUL O DEEN ALLI CAWN.]

Q. When was it you first applied to Nundocomar with the arzees?—*A.* The latter end of Chite.

He delivered the three arzees to Rada Churn, who carried them to Nundocomar, whom he himself did not see that night; but the next day he saw Nundocomar, who told him he had received the arzees; that he would give the one against Mr. Archdekin to the Committee, and keep the others by him.

His offer was, by means of Rada Churn, 4,000 to Nundocomar, and 2,000 for himself.

He says, he made this offer because he expected that Nundocomar, by his great influence in Calcutta, which is well known, would be able to procure the payment of the money.

That Rajah Nundocomar had always influence, but particularly since the Rajah of Burdwan obtained his Kellaut.

That the said Rajah and the Rajah of Radshue paid him attention, and that he has frequently 50 palanquins at his door.

He did not himself, at that time, mention the money to Nundocomar, but only made the offer to Rada Churn: it not being usual to offer money to the principal, but through an intermediate person.

What he mentioned, concerning the draft of the arzee, was said by Nundocomar in a whisper; and heard by no one except Rada Churn, son-in-law to Nundocomar, who conducts Mr. Fowke's business, and is supposed to be his banian.

He says, that Nundocomar dictated the draft of an arzee to his (Comaul's) Moonshy; and, after having altered it, desired that he would order his Moonshy to write it fair. He then complained of illness, and went away, leaving his Moonshy there.

That Nundocomar sent his Moonshy, about ten at night, under the charge of another person, with the arzee, and directed him to affix his seal to it, which he then refused; saying, that he had made no such agreement.

That, on the 8th, when he went to Mr. Fowke's, there were no others in the room except Mr. Fowke, Rada Churn, and two Bengallies and two writers. Young Mr. Fowke and others passed in and out of the room several times. Mr. Fowke shewed him the arzee, and desired him to put his seal to it. He says he was in fear and trembling on account of Mr. Fowke's anger, who took up a large folio, and threatened to beat him with it; that he had laid hold of his feet, and desired forgiveness, and that he would do whatever Mr. Fowke pleased.

What Mr. Fowke desired him to write was, that he gave the sums of money formerly mentioned to the Governor, Mr. Barwell, &c. This was on a separate list, written by himself out of fear.

That he did not put down any reasons for giving these sums, nor was desired by Mr. Fowke to do so. He did not give these sums, nor any other; and should never have thought of accusing these gentlemen, had it not been for Mr. Fowke and Nundocomar's conduct.

He took the farm of the Hedgelee district for five years, and furnished 375,000 maunds of salt, and collects 75,000 rupees revenue. The Company pays him a lack of rupees yearly for the salt which he provides for them.

DEPOSITION of NUNDOCOMAR.

"Comaul O Deen Cawn, in his childhood, was with me two or three years: since, some disputes arising, he separated from me; about two months ago, he mentioned to Rada Churn that a violent enmity had subsisted betwixt him and me, and begged Rada Churn to endeavour to bring us together; he made many intreaties to this purpose to Rada Churn, who informed me of what had passed; and likewise informed me, that Comaul O Deen was much ashamed of his behaviour to me; and that he begged his faults might be forgiven him. I told Rada Churn, in answer, that he was in the wrong to mention this affair to me; who earnestly requested, that I would forgive Comaul O Deen. I answered, That he was very young, and that this man would occasion more disputes; but at last I gave him permission to bring Comaul O Deen Cawn. One day he said to me, that Gunga Govin Sing had got 26,000 rupees after the manner of a bribe, besides 3,000 and 800 which had been taken by his servants. I asked him, if he had ever mentioned this circumstance to any one else. He answered, That Sudder O Deen and Gunga Govin Sing were in friendship; and though I had several times demanded my money from them, they would not pay it. I told him, That, since that was the case, I had no other remedy but complaining to the council. Another day, having written two arzees, he brought them to me: after reading them, I desired him to carry them to the council. He then desired me to send Rada Churn with him to Mr. Fowke, that that gentleman might send the arzees to the council. I did so, and desired them to give my compliments to Mr. Fowke; requesting, that, if the proofs appeared clear, he would send them to the council, that Comaul O Deen might obtain justice. He gave the arzees to Mr. Fowke, after which some days elapsed. On the 5th Bysaac, I went to the house of the general, to pay him a visit. While I was at the general's, I received a message from Rada Churn, informing me, that Comaul O Deen and himself were at the house of Mr. Fowke, and requested I would call in as I went home. I went there accordingly. Mr. Fowke told me, That Comaul O Deen had made both verbal and written representations to him, and requested that I would examine them, and inform him what part of his representations were true,

Comaul O Deen said, That he had a pain in his bowels, and could not remain any longer, but that he would come with a foul draft of his complaint in the evening. I went home. About seven in the evening, Comaul O Deen came to my house, bringing a foul draft of a paper and a Moonshy with him, and desired Rada Churn to carry him to me. He accordingly came to me with the foul draft; and, upon inspecting it, I asked him, What was the meaning of Gherab Purwar Audaulet Gooster? He answered, That the council were entitled to be called Gherab Purwar Audaulet Gooster. He told me, that the copy he had given me was not well worded, and begged of me to make out another. His Moonshy then began to make out another copy. He had written out about half his arzee, when Comaul O Deen observed that he was ill, and would go home. He left his Moonshy behind him, and went away. Just as he was going, he desired me to send Sheik Ear Mahmud with the letter when it was done; and that he would seal it at home, and send it back to me. I then went out of the office, and told Sheik Ear Mahmud to carry the arzee to Comaul O Deen, together with the Moonshy; and in case Comaul O Deen should affix his seal to it, to bring it back to me, and I would send it to Mr. Fowke. When the arzee was wrote, Sheik Ear Mahmud and the Moonshy carried it to Comaul O Deen; who sealed it, and gave it to Sheik Ear Mahmud. Next morning the arzee was shewn to me: I directed Rada Churn to carry Comaul O Deen with the arzee to Mr. Fowke. This was on Sunday. Comaul O Deen gave the arzee to Mr. Fowke. Two days after, being Tuesday, I went to Mr. Fowke's house, who observed, That if two people witnessed the arzee, it would be better. I said, he was right, if Comaul O Deen would agree to the proposal. One gurry after, Comaul O Deen came. I informed him, that Mr. Fowke thought it would be right to make two persons affix their signatures to the arzee as witnesses. He agreed to it; and two writers were called, to whom Comaul O Deen said, This is my arzee; witness it. On Tuesday evening Comaul O Deen came to me, and told me, He was informed, that Mr. Fowke intended to deliver in the arzee to the council next day. He requested to go for one gurry to the house of Mr. Fowke, and to entreat him to deliver in the arzee against Gunga Govin Sing first. He made use of many intreaties, and at last I got into my palanquin, and recommended his intreaty to the consideration of Mr. Fowke. That gentleman answered, That he would do what was proper. When I was going, Comaul O Deen represented to me, that it was very hard upon him that the arzee against Gunga Govin Sing was not delivered; for, if the other was given in first, he feared he should gain no advantage from that. I advised him to be patient, and to give in his arzee to the council, where he would obtain redress. He would not attend to what I said, but ran to the governor's. I went home."

SHEIK EAR MAHMUD being sworn; Rajah Nundocomar desires he will give an account of the circumstances of this affair.

"One evening Maha Rajah sitting in his dewan khasina, or office, Comaul ul Deen Cawn came to him, and sat with him about an hour and a half; when he was going away, he pointed to his Moonshy, who was sitting at some distance writing; and ordered his people to ask, If he had finished the arzee? His people returned, and informed him that one half was done. He then requested, that the Rajah would be so good as to send one of his people with the Moonshy and arzee when it should be finished; and that, when he had sealed it, he would return it. Rajah Nundocomar ordered me to carry the paper to Comaul ul Deen when it was finished, and to take the Moonshy with me. I asked the Moonshy, if his arzee was ready? He answered, It was not; but he had only two or three more lines to write. After one gurry, the Moonshy informed me, that the paper was ready; and I went with it, in company with the Moonshy and another person, to the house of Comaul ul Deen; the Moonshy put the paper into his hand. He gave me beetle, and a hooka to smoke. He then read the arzee from beginning to end, and blotted out a word of it, in that part which concerned Mr. Graham; and Goofhast, he said, to be put in stead of it. He then spoke the following words to me: 'Sheik Ear Mahmud, I wrote the 'contents of this arzee; and if a hundred Co-'rans are put on my head, I will swear to the 'truth of every word in it.' He then took off his ring, and ordered his khidmidgar, or servant, to bring his ink-stand; which was accordingly done. He then sealed the arzee; and asked two Moonshys and myself, who were present, If the paper was well sealed? To which we answered in the affirmative. After that, I carried the paper home. Rajah Nundocomar was asleep. I put the arzee under the care of the Consumma, directing him to give it either to Rada Churn or Rajah Nundocomar in the morning."

Sheik Ear Mahmud examined, the Arzee being shewn to him.

In what part of this arzee is the word Goofhast, which you said in your evidence was put in the place of another?—Comaul ul Deen made an observation, that Goofhast should be inserted in one part of the arzee where Mr. Graham's name was mentioned; but he did not alter it in my presence.

Is this the petition which Comaul O Deen's Moonshy wrote in Rajah Nundocomar's house, and which you carried from thence to the house of Comaul O Deen?—[shewing No. I.] —This is the petition.

Did Comaul O Deen's Moonshy copy the arzee from a foul draft?—One man read the foul copy to the Moonshy, who wrote what was dictated by the other person.

Who was the other person?—I do not know

his name. I should know him if I was to see him again.

Whose servant is he?---He is a servant of Comaul O Deen's.

How do you know?---He told me so, as I accompanied him to the house of Comaul O Deen.

Did Rajah Nundocomar read over either the foul draft or the fair copy of the arzee?---I do not know that he either read the foul draft or the fair copy.

Who were the Moonshys to whom Comaul O Deen said, Is not the paper well sealed?---The two Moonshys who accompanied me from Rajah Nundocomar's, and who were Comaul O Deen's servants.

Moonshy Khadar Newaz Cawn examined.

Did Rajah Nundocomar read the petition after it was first wrote from his dictating?---He did read it. He first gave a foul draft of it into the hands of one of his own people; and then corrected it. He first dictated the arzee to me; it was afterwards again written by one of his own people; and the Rajah then corrected that copy with his own hand, and gave it to me to write fair.

Have you a copy of it?---No.

Do you remember the subject of the arzee?---I do not remember any thing of it.

Did you write more arzees than one that day?---Only one that day.

In whose name?---Comaul O Deen Cawn's.

To whom was the arzee meant to complain?---I do not know.

Against whom was the complaint?---Against the governor, in the arzee that was dictated to me.

What was complained of in the arzee?---I before told you, that I could not tell. It is in the petition, which may be produced.

Comaul O Deen Cawn examined.

Was the complaint against the governor, Mr. Barwell, Mr. Vansittart, and Rajah Bullub, in one arzee, or in more?---They were contained in one.

To how many papers did you affix your signature that day?---I put my seal to the arzee, and my signature to one furd on separate paper.

What did that separate paper contain?---An account of sums given to different persons.

What was contained in the arzee?---I do not know: let it be produced.

Were the names of the governor, or any other persons, mentioned in that arzee?---The governor's name was mentioned in the conversation held with the Rajah, when the foul draft was written at night. The complaint was against the governor. Mr. Graham's name, Gunga Govin Sing's, and Sudder O Deen's, were mentioned.

Was the arzee to which you set your seal at Mr. Fowke's house the same written by your Moonshy on the 6th?---The arzee sealed by me on the 8th was the same written by my Moonshy on the 6th.

Did you on the 8th affix your signature or seal to any other paper than the arzee and the furd?---No, I did not.

Was the name of any witness affixed to the arzee?---The servants of Mr. Fowke did affix their names as witnesses to the arzee.

Did they likewise affix it to the furd?---No.

Was there in the arzee any references to the separate paper?---No.

Was there no arzee to explain the nature of the separate paper?---No, there was none.

Was there any Bemootaula on the furd?---When the furd first came on the carpet, I was blind and senseless with crying.

How did you write the furd in such a situation?---I wrote upon the furd the words, Russan nedum, or right. I wrote no other part of it.

What letters or words did you write on the furd?---I wrote words to shew that I approved it.

Whether the furd contained a list of names and sums of money, or if it contained any thing else?---Simply a list of the names and sums collusively taken on account of Hedgelee.

Who wrote the furd?---I do not know.

Who were in the room at the time?---Mr. Fowke and Rada Churn were present; many other people passed backwards and forwards through the room; who they were, I do not know.

Who brought the pen and ink in, to write the furd?---Every thing of the kind was there.

Was the name of the governor or any other person mentioned in the arzee?---The complaint was against the governor. Moonshy Sudder O Deen, Gunga Govin Sing, Mr. Graham, Mr. Vansittart, Rajah Bullub, and the governor's Moonshy's names were mentioned in the arzee. I do not recollect any others.

Was there any thing relating to the Ingalee affair and collusions, in the arzee sealed by you on the 8th?---The petition was very long: I cannot remember.

Cannot you remember the least of it?---I can say nothing respecting the arzee till I have seen it. [Comaul O Deen Cawn represents, there was another small arzee.] I gave in another arzee respecting the Audaulet of Hidgelee.

How did you sign the furd?---I wrote Russan nedum, or 'I acknowledge it,' upon the paper.

How came you to say you wrote the furd with your own hand, when you only signed it?---Azdust Khood Novistadada, which are my own words, may mean signing my name with my own hand, as well as writing it out with my own hand.

Into whose hands was that furd delivered?---Mr. Fowke said to me, You have given me this. I answered, I acknowledge it. I gave it into Mr. Fowke's hands, after having acknowledged it.

Did you suppose that the writers stood over you as guards?---No, I did not imagine they were put over me as guards.

Are you certain you did, on the 8th Bysaac, write any thing upon any other paper in Mr. Fowke's house besides the two arzees?---None but these two papers, besides the furd, which I signed, but did not write.

Into whose hands was that furd delivered?---Mr. Fowke said to me, You have given me this. I answered, That I had written Russan nedum upon it.

[The question repeated.]---I gave it into Mr. Fowke's hands, after writing Russan nedum upon it.

Who was present when the furd was delivered by Mr. Fowke to you to sign?---I did not mark any witnesses; it was in Mr. Fowke's house; a number of people were going backwards and forwards.

In what room was the furd delivered?---In the bed chamber.

At what time of the day was the furd delivered? Was it at the same time the other papers were delivered?---I believe about twelve o'clock the arzee was sealed, and the furd signed at the same time.

Were they signed in the same room?---Yes.

You say that you wrote what was desired of you, and thereby obtained your liberty. What do you mean by obtaining your liberty?---I was got into a place where I considered myself as subjected to misfortunes; from which I was set at liberty.

Was you ever in danger of your life?---I was apprehensive of my reputation; and, when he lifted up the book, even my life might have suffered. [Comaul O Deen gives an account of his signing the arzee, &c.] When Mr. Fowke desired me to seal the paper, I answered, That I had made no such promise to Maha Rajah, and that I had not given the arzee willingly; that, in the petition, Maha Rajah had written Ghereb Puelvar Audaulet Gooster, but that I did not know who could be addressed Audaulet Gooster, and who it was that would issue orders equal to such a title: that if he would carry me before any such man, I would seal the paper in their presence. Mr. Fowke was angry; and, being impressed with fear, I sealed the paper; and immediately after this went out of the house, and raised the clamour of which you have before heard. I know nothing further.

(Shewing N°. 1.) Is this the paper your Moonshy wrote?—My Moonshy wrote it at Maha Rajah's house.

[Same question respecting arzee N° 2.] My Moonshy did write this paper. When I went to Maha Rajah he asked me, in a friendly manner, What reason tempted you to complain to the governor against Mr. Fowke? I answered, that I was a farmer; I did not complain. I gave an account of what had passed from the beginning. When Mr. Fowke asked me improper questions, and was angry at me, I thought it necessary to complain, and gave an arzee into the governor's hands, to lay before the council. Maha Rajah asked me, if I had a copy of the petition in my possession? I answered, that I had; and then went home. I sought for it, but was not able to find it; my Moonshy was gone from Calcutta. As I could not find it, I informed the Rajah of it. He then desired me to write down whatever parts of it I could recollect; and that then Mr. Fowke would no longer shew his anger to me. I then made my Moonshy; who has this day appeared as an evidence, write down the arzee N°. 2, and gave it to Maha Rajah; who desired me to seal it. I accordingly fixed my seal to it. Since that time I have heard nothing more about this arzee.—[Commaul O Deen further observes, two Portuguese writers have witnessed the arzee N°. 2, though he affixed his seal to it in his own house.

Mr. *Fowke.* Whether you recollect, that, when you delivered the arzee to the governor, the governor said, Is all this true? In answer to which you said, It is all a lie?—*A.* It is false.

Mathew Miranda, a Portuguese writer to Mr. Fowke, sworn.

When Commaul O Deen first acknowledged the arzee, N°. 1, was any reluctance shewn on his part?—Not any.

When this paper was acknowledged by Commaul O Deen, did he do it willingly?—Willingly.

Did he appear at all frightened?—No.

Did you see any thing like force or violence in Mr. Fowke's behaviour, when he made that acknowledgment?—No.

Did he acknowledge before you, that he had told many lies about Mr. Fowke in a former paper?—Knows not.

Relate, as well as you can, what passed.—Mr. Fowke asked Commaul O Deen, when the papers shall be produced in council, and they shall demand the particulars, whose name will you make use of? He said, the general's. Mr. Fowke asked him over again, Did I mention the general's name, or even my own name, or demand such a paper from you? To which he answered, No. Mr. Fowke then said, Why will you make use of such names? To which he answered, Whose name shall I mention? Then Akermannu asked Comaul O Deen, Who required this paper from you? Did you give it of your own free will, or did any body insist on your giving it? He said, I gave it of my own free will. Then he said, I went to Rada Churn, and told him that I have done a great fault on Mr. Fowke. Rada Churn asked him, What fault he had committed? He then said, He had given him the particulars, which he had brought in writing, in that arzee; and that he shewed it to Rada Churn, who had bid him shew it to Nundocomar; and the Rajah bid him carry it to Mr. Fowke. Mr. Fowke then asked Comaul O Deen, Whether this paper was all true? When he said, it was all true, but one lie; and said, that he concealed the

fault of Moonshy Sudder O Deen: and the deponent left the room, and him in it.

Did you hear Comaul O Deen ask for the paper back?—I was writing at my desk, and I did hear him ask the papers back, and ask what he should write; and Mr. Fowke told him, he should not have the paper back, nor write any thing in his house.

Did Commaul O Deen bring the arzees, which you witnessed, along with him to Mr. Fowke's?—I do not know.

Did Mr. Fowke, in your hearing, ask any questions about presents?—No.

Was Mr. Fowke present when you signed your name to the arzee?—I signed it in the veranda. Mr. Fowke was in his own room: both the arzees were sealed in presence of Mr. Francis Fowke, and not of Mr. Joseph Fowke. After they were sealed, they were carried into the room to Mr. Joseph Fowke. They were both sealed at the same time. They were sealed before the conversation.

Had Comaul O Deen Cawn seen Mr. Fowke before the seals were put?—I do not know: I was not present at all times when Mr. Fowke and Comaul O Deen were together.

Can you take it upon yourself to say that Comaul O Deen had been with Mr. Fowke that day, before the seals were put to the arzees?—I cannot.

What time of the day were they sealed?—About noon.

What time did you see Comaul O Deen first that day?—About ten or eleven, in the veranda.

Did you see him write on any other paper?—I did not.

Timothy Pareira, a Portuguese writer to Mr. Fowke, sworn.

Is this your signature to the arzee, N°. 1?—Yes.

Did you hear Comaul O Deen say it was his seal?—I saw him seal it.

Is that your signature to N°. 2?—Yes.

Did you hear Comaul ODeen acknowledge the signature as his own?—I saw him seal it, and heard him acknowledge it.

Was the ink put on the seal before he put it on both papers?—The seal was dipt in the ink before it was put to the papers.

Do you know if Mr. Fowke did or did not ask Comaul O Deen any questions relating to presents?—I do not know: not in my presence.

What time did Comaul O Deen come to the house?—About ten or eleven.

In what room was the seal put to those papers?—In Mr. Francis Fowke's room.

Are you sure it was not put to it in the veranda?—No, it was not put in the veranda.

Does Mr. Francis Fowke's room open to the veranda?—No, you go through the hall to Mr. Francis Fowke's room.

Where was Mr. Fowke when the seals were put?—In his own room.

Do you know if Comaul O Deen had been with Mr. Fowke before the seals were put?—I do not recollect.

Did Comaul O Deen make any and what noise?—He was begging and praying; but I do not know for what. He came out to the veranda, and desired Mr. Fowke younger to intercede with his father; but I do not know for what.

Did you at any time see Mr. Fowke lift up a book, offering to strike Comaul O Deen?—I did not; but I heard Mr. Fowke bid him go out of his presence. [Matthew Miranda being asked the same questions, makes the same answers.]

Q. to C. O Deen. Are these the two writers, who you alleged were put over you, when you signed the arzee?—*A.* Pareira was one of the writers; the other passed and repassed; and sometimes another came in his place. While I was in conversation with Mr. Fowke, some Bengalees likewise sometimes came. They were both at first present.

Akermannu, Servant to Mr. Fowke, sworn.

Akermannu. Mr. Fowke said to me, and to another writer named Miranda, Listen to what passes betwixt me and Comaul O Deen. Mr. Fowke asked Comaul O Deen, When you carry those papers to council, and shall be asked about them, what will you say, and whose name will you make use of? He answered, That he would make use of the general's name. Mr. Fowke then said, Why will you make use of the general's name? Did the general ask you any thing himself, or did I ask you any thing in the general's name? Comaul O Deen answered, No. Mr. Fowke then said, Why do you use the general's name? He said, Whose name shall I use? Mr. Fowke said, Make use of those persons' names who make inquiries from you about this business. I then asked Comaul O Deen, if he had himself, of his own free will, written these papers? or if he had been obliged to write them? Comaul O Deen said to me, I went one day to Baboo Rada Churn, and desired him to make me acquainted with Mr. Fowke, as I had said something of him bad: Rada Churn said, What bad things have you said of him? On which I informed Rada Churn of every thing concerning it; and said, I have brought the foul draft of these particulars: Rada Churn said, Shew it to Maha Rajah. Mr. Fowke asked Comaul O Deen, If what he had written was true or false? Comaul O Deen answered, It is all true; there was one falsehood. Mr. Fowke asked, What is it? Comaul O Deen answered, There are some bad circumstances relating to Sudder O Deen, which I have concealed. Mr. Fowke said, There is not one lye; you have only let one man escape.

Were you in Mr. Fowke's bed-chamber with Comaul O Deen?—Yes.

Did you see Mr. Fowke lift up the book to strike Comaul O Deen?—No.

Were you in the room all the time with Co-

maul O Deen?—Comaul O Deen was in Mr. Francis Fowke's room. When Mr. Fowke called me into his, either Mr. Fowke or Rada Churn desired that Comaul O Deen might be called: I called him, and carried him into Mr. Fowke's room with me.

From that time, did you continue in the room till Comaul O Deen went away?—I was all the time present, and not absent a moment.

Was Miranda all the time in the room with you?—He was. He went out for a moment, to shut the door.

Was Pereira in the room all the time?—He was not in the room: he was waiting in the veranda.

While you were in the room, did Mr. Fowke use any words or actions that might tend to intimidate Comaul O Deen?—No.

Whether you are sure that Comaul O Deen was not in the room, before he went into Mr. Francis Fowke's room?—We were in the veranda before. He had been in Mr. Fowke's room before that.

How long had he been in Mr. Fowke's room?—I do not know. I know that he was in Mr. Fowke's room.

Was it about a gurry?—I do not know.

Do you recollect if there was any pen and ink in Mr. Fowke's room?—I did not see any.

Did you hear Comaul O Deen cry, or make any noise?—No.

Do you recollect Comaul O Deen's going out of the house?—It was past one o'clock.

Did you see him go out?—I did.

Did Comaul O Deen go out of the house immediately after going out of Mr. Fowke's room?—No, he went out of the room, and remained some time in the veranda.

Did he return again into the room?—He went into Mr. Fowke's room; but not in the room of Mr. Fowke senior.

During the time he was in the veranda, did he express any signs of discontent?—He was displeased, and requested the papers might not be sent into council that day, but deferred to the next.

Did he desire to have the papers back again?—He did not demand them; but said that he would write them better for next day.

Did he make any outcry when he went into the street?—No.

Was Shumsherbeg in Mr. Fowke's house when Comaul O Deen went away?—I know no one of the name of Shumsherbeg. If I see the person alluded to, I shall be able to answer.

Name all the persons who were present at the time.—I do not remember.

Were there many people there?—No.

Herrasaut Ulla, Moonshy to Mr. Francis Fowke, sworn.

Whether you remember Comaul O Deen's going away from Mr. Fowke's house on the 8th Bepaac?—I do not remember it.

Do you remember Comaul O Deen's asking to have any thing restored to him, and what he said?—Yes, he did ask for something back; and said, I will give it in writing afterwards.

[The question repeated.] He did not ask to take it back; but said, if it was returned to him, he would alter it.

Did he say any thing about falsity?—He did not say there was any thing false: he said, There is something wrong in it; give it me, and I will alter it.

Did he complain that he was forced to write it?—When Mr. Fowke began to fold up the letter, he began to cry out that force had been used.

[Question repeated.] He did cry out that force was used, although it had been attested by two witnesses.

How do you know that the paper he called for was the same attested by two witnesses?—He did not demand that paper which was attested by the witnesses.

What paper was it he demanded?—That paper which was not sealed in my presence, but which he brought from home: it has the word 'Isshaad' upon it.

Did not you ask the meaning of some words and expressions in the arzee that has the word 'Isshaad' upon it?—I did not.

Did you copy out the contents of the arzee, N° 1; and do you not know the contents of it?—I did; I know the subject and contents of the arzee: I learnt it first from the mouth of Comaul O Deen, and afterwards made myself acquainted with it by reading the arzee, where I found some little difference from the information I had received from him.

Do you remember any thing of a conversation between Comaul O Deen and Mr. Fowke's Moonshy, Mahmud Mushruff?—Yes. Moonshy Mahmud Mushruff, upon seeing Comaul O Deen, expressed some anger against him, for having, as he said, once before made him give oath; and asked Comaul O Deen, if he came to the house with the intention of doing the like again? Comaul O Deen answered, I did not occasion you to swear by my own pleasure: I wrote out an arzee for the preservation of my own character; if I had not written it, my reputation would have suffered.

How many petitions do you know of Comaul O Deen's signing?—He put his seal to one arzee in my presence: other four, which I have seen in the hands of my master, though I know not from what particular persons he got them, were under his seal.

Was either of these two petitions, N° 1 and 2, the arzees he sealed in your presence?—Yes, this was, N° 2.

Where was this N° 2 sealed?—In Mr. Francis Fowke's room, before me.

Further Proceedings.

What Mr. Fowke said in his Defence was not minuted. He affirmed that the arzee came into his hands (whether brought by Comaul O Deen or not he could not remember) ready sealed. That Comaul O Deen acknowledged it in the presence of the two witnesses, who attest-

ed it, with every expression that could mark it be his own voluntary and cheerful act; that, after Comaul O Deen had quitted the chamber, he returned, forcing his way into Mr. Fowke's presence, declared his unwillingness to have that arzee presented to the council; intreated and implored Mr. Fowke to give it back to him, fell at his feet, and embraced his legs with such violence as to give him pain. That, provoked with this, Mr. Fowke did lift up a book, which was a volume of Churchill's Voyages, and with difficulty restrained himself from striking him with it. That every syllable of the fund, or paper of bribes, was false; and that he never saw or heard of such a paper.

Mr. Barwell in reply said something upon the subject of this part of the accusation; on which Mr. Fowke, addressing himself in a very earnest and pointed manner to him, said, Will you, Sir, declare upon your honour, or your oath, that you never received that money? (meaning the 45,000 rupees said to have been mentioned in the fund as received by Mr. Barwell.) Mr. Barwell replied, "that he did deny it upon his honour and oath." Then, said Mr. Fowke, "I must acquit you." The rest of his defence consists in protestations of his own innocence; and declarations, that, while he lived, he would ever use his utmost endeavours to detect and prevent oppression, whatever might be the rank or power of the oppressor; in invectives against the character of Comaul O Deen, and appeals to the integrity of his own, with much and violent declamation.

The Examination being closed, the Judges required of the persons affected by the supposed Conspiracy, to declare whether they would prosecute the authors of it at the next session of Oyer and Terminer; and the morning of the 23d was appointed to receive this determination.

Mr. Barwell, Mr. Vansittart, and Mr. Hastings, attending at the time appointed, declared their intention to prosecute Joseph Fowke, Maha Rajah Nundcomar, and Rada Churn. Mr. Vansittart and Mr. Hastings required bail should be given, and bound themselves by a recognizance to prosecute; Messieurs Lechay and Farrer were sureties for Mr. Fowke; col. Thornton and captain Webber for Nundcomar and Rada Churn.

Sir John Doyly was employed as interpreter in the first examination of Comaul O Deen Cawn, before the Chief Justice and the Judges, on the 19th; fearful of not possessing sufficient resolution in the presence of many people, he desired that some other person might assist him in this office on the next day: and Mr. Elliott was accordingly desired to attend with him, which he did, and was, in effect, the only interpreter on the 20th.

The part which sir John Doyley had chosen in this business drew on him the severe displeasure of the board, that is to say, of general Clavering, colonel Monson, and Mr. Francis, who had been assembled as usual, this being their day, to a board of inspection, and formed themselves into a council for the general department; they censured him for neglect of duty, in terms which directly imply a censure for having obeyed the orders of the governor general, and threatened him with dismission from his employment on the next instance of the like neglect.

N° 2 and 3 are extracts of the consultations of the 20th and 24th instant, containing the examination of sir John Doyley, and other minutes, which respect the affair in question. These are in themselves of no moment; but they mark the temper of the majority, and the interest which they took in the prosecution.

But of this they afforded a more conspicuous proof on the evening of the 21st, which was the day following the meeting of the judges. General Clavering, colonel Monson, and Mr. Francis, accompanied by the elder Mr. Fowke and others, whose names are not sufficiently ascertained, went to the house of Maha Rajah Nundcomar, and, as it is said, gave him public encouragement and assurances of protection.

This visit is mentioned without evidence or vouchers, as a circumstance of such notoriety, that it requires neither; for the substance of the conversation comes only report. Such an honour paid to such a man, and on such an occasion, by the actual rulers of the state, too plainly indicates their participation in the mysterious intrigues which have been long carried on in the offices of Fowke and Nundcomar. The nature of the intrigues, and the legality of them, will be best understood by the future event of the trial, at the approaching assizes.

On the 25th instant, Mr. Fowke addressed a letter to the Board of Revenue, in which he inclosed three arzees of Comaul O Deen Cawn: these appear to be the same which were first presented by Comaul O Deen against Ginga Govin Sing and Mr. Archdekin, and to which frequent allusion is made in the depositions. N° 4 is a copy of Mr. Fowke's Letter, and N° 5 translations which have been made of the three arzees.

"To the Hon. Warren Hastings, esq. Governor General, &c. Council of Revenue.

"Honourable Sir and Sirs; on the 13th of December last, Comaul O Deen Ally Cawn delivered to your board a paper containing many falsities injurious to my reputation; which I refuted upon my oath, and the oaths of two other persons. He has now put another paper into my hands, which I take the liberty of inclosing to you for my further justification. In this paper it is pretended, that the governor general was active beyond the limits of justice to forward a charge tending to my dishonour. If it contains a calumny, I shall rejoice to hear that the author has a brand of infamy set upon him, as a public warning to all calumniators and detractors. But, whatever may be the issue of the inquiry, it is evident that the

governor general once thought Comaul O Deen Ally Cawn a person whose testimony was not to be rejected when against me; and therefore I hope I may be indulged in a request, that the recantation of Comaul Ally O Deen may have a place on the records as well as his former accusation. Conscious of the respect I owe to government, I cannot mention the governor general's name without pain, though essentially necessary to my own particular justification.

"I have further the honour to inclose a paper which Comaul Ally O Deen Cawn declares to have been the first account which he wrote with his own free will.

"I am, with the greatest submission, honourable Sir and Sirs, your very obedient and faithful servant, JOSEPH FOWKE."

Calcutta, April 18, 1775.

Translation of the accompanying Paper, N°. 1.

"I am desired to give an account of what conversation passed between me and Mr. Fowke: I do here declare, upon the faith of my religion, the truth of this transaction; viz.

"Banasser Ghose preferred a complaint against me, on account of salt of his Tecka Collaries; and the cause was referred for examination to Mr. Fowke. After Mr. Fowke, having heard both parties, had dismissed us, I went in the evening to Moonshy Sudder O Deen, Mr. Graham's Moonshy, and related to him the conversation that had passed at Mr. Fowke's. Sudder O Deen, 'I comprehend 'the affair: it is proper you should relate this 'to Gunga Govin Sing, Dewan of the Calcutta 'Committee.' I replied, 'what is the good of 'relating this to the Dewan? do you yourself 'relate to the Dewan whatever you think 'proper, but pay attention to my advantage 'and interest: my affairs wear a very severe 'aspect with respect to administration, and I 'am in great difficulties.' On the 19th Paghoon, I went to Dewan Govin Sing, and related the conversation to him; to which he made no reply, but went to the Durbar. On the 20th Paghoon, at 12 o'clock, Moonshy Sudder O Deen sent for me, and told me, that the interrogations put to me by Mr. Fowke, and my answer upon the subject of the Tecka Collaries of salt, had been related to Mr. Graham by Dewan Govin Sing; that Mr. Graham, without making any reply, had gone to the governor, and related the whole circumstance to him; and, returning to his own house, had directed him (Sudder O Deen) to send for me, and tell me to write a petition upon this subject, and deliver it to the governor. In conformity to what Sudder O Deen had said, I drew out a petition, and shewed it to him: having perused it, he told me to shew it to Gunga Govin Sing, and make whatever deductions and additions he should direct me; and added, 'what I now tell you, is by the direction of 'Mr. John Graham.' I shewed the petition to Govin Sing; who told me to write it in this manner: that Mr. Fowke, in the business of the Tecka Collaries, had asked me how much I had given as douceurs to the English gentlemen, and how much to the natives in power, threatening me with severe punishment if I did not declare: I replied, 'that Mr. Fowke 'did not say so to me; and if there should be 'any suspicion of falshood in the petition, my 'oath would be required:' Gunga Govin answered, 'Go you to Moonshy Sudder O Deen, 'and ask his advice, and I will follow you.' Whilst I was relating this conversation to Sudder O Deen at his house, Gunga Govin came in: after some conversation betwixt them, they told me, that I should not have to swear; and that I need be under no apprehensions on that account: having no resource, I complied with the Moonshy's and Dewan's desire, went home and wrote the petition, which I kept by me: on the 26th Paghoon, Gunga Govin Sing said to me, 'You have not yet delivered the 'petition, and Mr. Graham is very angry about 'it; you ought to go immediately to the go-'vernor, deliver your petition, and wait upon 'Mr. Graham to-morrow, with the account 'of your having done so, and I will be at Mr. 'Graham's house at that time too.' I went immediately to the governor, and presented the petition I had prepared. When the governor had read it, he said to me, 'You have 'written this account in a different manner 'from what Mr. Graham related it to me;' I answered, 'that I had not mentioned any 'thing of it to Mr. Graham:' the governor replied, 'Mr. Graham informed me, that Mr. 'Fowke told you to declare what you pre-'sented to the gentlemen, and what to the 'Mutsuddies; and that, if you did not, you 'should be well punished.' From the fear that Mr. Graham's honour might suffer; I answered, 'that I would correct the petition 'to the manner in which Mr. Graham had 'related to his honour, and bring it the day 'following. The governor replied, 'You 'must not put it off till to-morrow, write your 'petition immediately in this place.' I said, 'that I had not my Moonshy with me;' the governor answered, 'My Moonshy is at hand, 'dictate to him, and let him write what Mr. 'Graham said.' I was thus constrained to indite this petition to the governor's Moonshy, which I delivered, when finished, to the governor; but I obtained no copy of it. I then declared to him, that a false oath would extinguish the light of my religion: if there should be any interrogations made to me respecting the petition, I could not take an oath to it: after hearing this, he dismissed me. I went on the 27th Paghoon to Hoosbear Jung (Mr. Vansittart); gave him the account of the petition I had delivered to the governor, concerning the conversation at Mr. Fowke's, and told him, that, if I were to be simply interrogated upon it, it was very well; if my oath should be required, that I would not give it. I likewise said the same to Maha Rajah Roy Bullub. I have, in this address, related the

truth of this transaction: and God's pleasure be done with respect to the determination of the honourable governor and council upon it. I have no other support but God and his Prophet, and the gentlemen of the council; from the commencement of Mahawbut Jung's time to the present, I have acted uprightly, and have never before any of the successive rulers of this country uttered an untrue or unbecoming word. I have here related the truth, and shall intrude no further."

Translation of the accompanying Paper, N°. II.

"Banasser Ghose Yar Mamudar, by means of Latta Ajail Roy, of certain Tecka Collaries, preferred a complaint against me for five thousand maunds of salt; in consequence of which, the general sent for me, and then referred me and Banasser Ghose to Mr. Fowke, that the gentleman might inquire into the cause. In the course of the discussion, Banassar Ghose said, 'This man has given large presents, and 'by this means obtained the business of the 'Tecka Collaries:' Mr. Fowke said to me, 'if 'those be true, and you have given any thing 'to any Mutsuddie, declare it:' I answered, 'that Banasser Ghose had declared what was 'false; and that I had not made any presents.' Mr. Fowke afterwards took down, in writing, the representations of both parties; and then said, 'I perfectly comprehend this cause, and 'shall relate it to the general, who will decide 'upon it.'"

"To the Honourable Warren Hastings, Esq.; Governor General, &c. Council of Revenue.

"Honourable Sir, and Sirs; I take the liberty of inclosing three petitions, which were put in the hands of my son Francis some time since, to translate, with intention that they should be afterwards laid before your board. Comaul Alli Cawn will determine, whether he chuses to proceed on these petitions or not: he has never countermanded his former order; but, as he may not scruple to say falsely that I act without his privity and consent, I beg leave to inform you, my sole intention in laying these papers before you is, that they may be safely deposited in your hands, in case it should be thought necessary hereafter to refer to them, on a charge of conspiracy exhibited against me by Comaul Alli Cawn, for which I am bound to hold up my hand at the bar at the next sessions of oyer and terminer and gaol delivery; the honourable Warren Hastings, governor general, and George Vansittart esquires, being my prosecutors: besides these gentlemen, I was charged with a conspiracy against Richard Barwell, esq. the Rajah Bullub, and Baboo Kishen Kunt, as will appear in the summons issued by the chief justice, and justices of the Supreme Court of Judicature, dated the 19th day of April 1775. At the close of the evidence, on the oath of Comaul Alli Caun, Richard Barwell, esq. waved his demand for a bail; but said, he should prosecute, or not, as future circumstances might appear. The Rajah Bullub and Baboo Kishen Kunt, as I understand, withdrew their prosecution entirely: being now to rise or fall by the laws of my country, I shall say nothing at this time, to influence any man either to my condemnation or acquittal, leaving truth to find its way.

"I am, with the most perfect submission, honourable Sir, and Sirs, your very obedient and faithful servant, JOSEPH FOWKE."

"*Fort William, 25th April,* 1775."

Translation of three ARZEES, *inclosed in Mr. Fowke's Letter to the Board of Revenue, dated the 25th of April,* 1775.

I.

"In the Bengal year 1181, at the end of the month Maugh, I farmed, from the gentlemen of the Calcutta Committee, all the salt works in the Purgunnahs of Keura' Ma'l, &c. Manjeh Mooteth, and Docodumna, &c. in the district of Hedgelee, for four years, at an agreement of 100,000 maunds of salt, to be delivered at twice, at 100 rupees; and I received in advance upon the account 60,500 rupees out of that sum; the Dewan Gunga Govin Sing, by an underhand settlement, persuaded me to give him 26,000 rupees, upon this agreement, that whatever quantity of salt I could contrive to make more than the specified 100,000 maunds, he would cause it to be given up on the part of government, so that I should have an opportunity of disposing of that salt wherever I should chuse, and the profits should be for myself. Upon this agreement, Gunga Govin Sing received from me, the first time, 15,000 rupees in mohurs, upon this underhand settlement. In the month of Jeyt, I made a demand upon the Dewan to have the salt given up; the Dewan did not give up the salt, but forcibly took from me 15,000 rupees more, on account of the underhand settlement: I was therefore unable to pay up the advance of the salt-works without a balance. Those salt-workers now bring their claims against me, and endeavour to lay their complaints before the Huzzoor. I have been very importunate with the Dewan; and have represented to him, that I am poor, and am not able to fulfil my obligations for the aforesaid sum, and have entreated him to settle it; but he pays no regard to me; and I am utterly at a loss where to raise the money, to complete the investment. I humbly request, that the aforesaid Dewan may be summoned; and, upon the justice of my claim being established, that he may be ordered to return my money, with the interest due to my creditors upon it, that I may be released from the importunities of the salt-workers and my other creditors, and have leisure to complete the government's investment.

Sealed, "COMAUL ALLI CAUN."

II.

ARZEE from COMAUL O DEEN ALLI CAUN.

"In the year 1180, Villacty, when the Bundobust* of the farms took place, a daroga of the Audaulet to the Hidgelee district was appointed from the presence; upon condition that he should not have any thing to do with farming, but should confine himself to the distribution of justice, in disputes concerning property, and in causes of murder and robbery; and that the officers of the farmers should sit with him in the Cutcherry. On these terms, Ram Ram Bhose was appointed, on the part of Mr. William Lushington, and went into the said district, where he examined in that appointment for the space of one year, and did not interfere in the farming business; and even consulted with the officers of the farmer, in the determining matters of property. He did not interfere, in any manner, with the farming business. On account of unseasonable rains that year, there was a deficiency of many thousand maunds of salt. In the year 1181, on the dismission of Ram Ram Bhose, Muddun Gopaul was appointed in his place; and, within two or three months after his arrival, had committed such oppressions as produced complaints to the presence against him from great numbers of the Reiots; and there were great deficiencies in the quantity of salt made; and the Salt Bangas were not opened at the proper season. Afterwards Dewan Gunga Govin Sing dismissed Muddun Gopaul, and sent Roop Ram on his own part there, who arrived at the end of Chite, and exercised great oppressions on the Salt Reiots. He kept the Salt Tavildars and Kialandars two months in chains, and collected 3,800 rupees from them and others in the name of Dewan Gunga Govin Sing. Having given such sums collusively, how could they, without plundering the salt, make good their revenue? The said Kialandars entered false records in the Duftur, and delivered the salt at such a short weight, that the surplus, which was established at 54 M^ds per hundred maunds, did not amount to 10 maunds. He now demands from my renter, on account of the deficiency of the overplus of salt, sixty rupees for every hundred maunds. In the Potah which I obtained from the government, and in the agreement which I gave, there is no such condition mentioned. At the same rate at which I deliver it to the government, I receive it from the Reiots; for I received advances from the government, and paid them to Reiots. The said Reiots having plundered the salt, and made short deliveries; if I do not receive it from the Reiots, from whence am I to give it? I issue an order to the said Dewan, demanding of him on what pretence Roop Ram kept the Kialandars and Tavildars two months in chains. No advantage is derived from Roop Ram's remaining in the district; but, on the contrary, ruin to the farmer and loss to the government. I am hopeful that the Audaulet business may either be intrusted to me, or to the said Ram Ram Bhose. It was necessary that I should make this representation to you."

III.

ARZEE from COMAUL O DEEN ALLI CAUN.

"In the month of Bepaack, 1181, Velarpin, Rampusand Muckerjee under-farmed the Tecka Collaries from me, on account of Baboo Leekenace and Nundee giving Mr. Archdeckin as his security. In the month of Chyte the said person complained against me to the gentlemen of the council, under pretence of a claim upon me for the expence of working six collaries; by which I was put under great uneasiness for three months; but after that time, having been unable to establish his claim by the agreement entered into between us, the committee did not find it valid. In the mean time Muckerjee died; and, during eight months afterwards, none of his heirs either came nigh me, nor adjusted settlement of the farm, nor delivered the salt, according to the agreement executed by the Dewan. The said gentleman, under pretence of being the security, has since, without giving me intimation, distributed the advances in the different purgunnahs and villages of the Tecka Collaries, although I am the person who farmed them from government; and the good or evil, or the profit or loss, which may ensue, is my concern. By what grant has Mr. Archdeckin taken upon himself the management of this business, to the prejudice of my affairs? The said gentleman was security for Muckerjee, and I have demanded upon him. Notwithstanding, from a motive of injustice, he has obtained possession in the country, and has complained against me to the council, on account of the advances.

"The said gentleman having been appointed to superintend the salt business, upon his arrival in the district, instead of living at the usual place, took up his residence at the Tackfiel Cutcherry, and pulled down the old accommodations, and built a new one for himself, after turning out the officers of the Cutcherry. When the officers of the Cutcherry have no place to stay in, what must the character of the farmer be in the country? The Zemindar, Reiots, &c. attend chiefly on the said gentleman; next to him on Rogram, and only wait upon the poor farmer at their leisures. The responsibility lies with the farmer; but Mr. Archdeckin exercises an authority: there cannot be three rulers in one district, without occasioning a loss both to the farmers and the Company. I am hopeful for justice, &c."

(A true Translation.)

(Signed) W. CHAMBERS,
P^a Translator to the Khalsa.

* Literally *a binding* or *tying*. It here seems to mean a settlement of the amount of the taxes.

EXAMINATION

INTO THE

CLAIM OF ROY RADA CHURN

To the Privilege of an AMBASSADOR, as VAKEEL of MUBARICK UL DOWLA, NABOB of BENGAL.

Supreme Court of Judicature. Fort William, June 21st, 1775. Present, the Honourable Robert Chambers, Stephen Cæsar Lemaistre, John Hyde, Esquires.

The KING, on the Prosecution of Warren Hastings, Esq. Governor General,
against
ROY RADA CHURN and others, for a Misdemeanor.

THE Chief Justice, being prevented by indisposition from attending the Court, sent them the following Letter and copy of Memorial, which he acquainted them he had received from the Governor General and Council:

"To Sir Elijah Impey, knight, Chief Justice, and the rest of the Judges of the Supreme Court of Judicature at Fort William.

"Gentlemen; enclosed we have the honour to transmit you the copy of a Memorial, which has been presented to us by Roy Rada Churn, the Vakeel of the Nabob Mubarick ul Dowla, representing, that a bill of indictment has been presented and found against him in the Supreme Court of Judicature.

"As this person is the Vakeel, or public minister, of the Subah of these provinces, we conceive him to be entitled to the rights, privileges, and immunities, allowed by the law of nations and the statute law of England to the representatives of princes.* We therefore claim those rights in his behalf; and desire that the process against him may be void, and that the persons suing out and executing such process may be proceeded against in such a manner as the law directs.

"We have the honour to be, gentlemen, your most obedient humble servants,

"JOHN CLAVERING.
"GEORGE MONSON.
"PHILIP FRANCIS."

"*Revenue Department, Fort William, June* 20, 1775.
"Examined, R. S. Sec."

Copy of a MEMORIAL enclosed in the above:

"To the Honourable the Governor General and Council, at Fort William, in Bengal. The MEMORIAL of Roy Rada Churn.

"Your memorialist begs leave to represent, that he has for two years last past been resident at this presidency, as ambassador or minister of his excellency Mubarick ul Dowla, Nabob of Bengal, and has the charge of all his affairs and concerns there; and has never, during that period, acted in any other character or capacity whatsoever, nor been the servant of, or directly or indirectly employed by, the honourable the East India Company, or any British subject; and therefore conceives himself no ways subject or amenable to the laws of Great Britain, but, on the contrary, entitled to all the privileges granted by such laws to the ministers of all foreign potentates or states resident within any of the settlements or possessions of the king of Great Britain. That a short time ago a summons was issued, by sir Elijah Impey, knight, one of his majesty's justices of the peace, requiring your memorialist personally to appear on the then next day, to answer to a pretended charge of conspiracy against Warren Hastings, esquire, governor general, and others; and that your memorialist, wholly ignorant of the nature of such charge, and of the rights and privileges to which he was entitled by the laws of Great Britain as ambassador or minister as aforesaid, attended in consequence of such summons, and was required to give bail to appear at the then next sessions of Oyer and Terminer to be held for the said presidency; which he accordingly did. That your memorialist is informed, that a bill of indictment has since been preferred and found against him, on the said pretended charge of conspiracy, which your memorialist apprehends and is advised, is an infringement of the laws of nations, and of the established rights and privileges to which he is by law entitled in the character aforesaid.

"Your memorialist therefore claims the interference of the government of this presidency, in support of his said rights and privileges; and that such censure may be passed on the parties concerned in the above outrage on your memorialist, as the nature of the case may seem to require. ROY RADA CHURN."

"A true copy,
"*Revenue Department,*
"R. SUMNER, Sec."

The Court directed Richardson Mac Veagh, esquire, one of the masters of the court, to acquaint the governor general and council with the resolutions of the Court in consequence of their letter, which were as follows:

"That the Court is of opinion, that all claims of individuals ought to be made directly to the Court by the individuals, and not by the authority of the governor general and council.

"That it is contrary to the principles of the English constitution, for any person or persons to address a court of judicature by letter missive, concerning any matter pending before such court; and that the higher the station is, the act is the more unconstitutional.

"That the stile of the letter now before the Court, seeming to be of the nature of an order

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* See the Case of Don Pantaleon Sa, vol. 5, p. 461.

rather than petition, is a stile in which no court of justice ought to be addressed."

June 23, 1775. Present all the Judges.

Mr. Jarrett, attorney for the East India Company, offered two papers to the Court, which, he acquainted them, he was directed to deliver from the governor general and council.

Court. We cannot receive papers in that irregular manner: if you will deliver the papers to the counsel for the Company, and he thinks proper to acquaint the Court with their contents, we have no objection.

The counsel for the Company, having perused the papers, said, he saw nothing improper in them; upon which he read them to the Court, as follows:

Extract of Consultation, June 22, 1775.

We have received two papers from your Court by Mr. Mac Veagh, who, as we understand, came to us as one of the masters in equity. If he was sent from you in that character to us, we must observe a want of form and respect due to the government of this country, as he came without his usual formalities.

We observe with deep concern, that the claim made by this government, of certain privileges and immunities in behalf of a person, who, being a public minister, appears to us entitled to such privileges, should be deemed by the judges of a very extraordinary kind.

We inform you, that Roy Rada Churn is no common Vakeel: he receives a considerable salary from the Soubah of Bengal, as his public minister at this presidency. At his appointment, he was honoured with the surpeach dress and horse, which are marks of high distinction; and on the delivery of his credentials to the governor general, he received paun and ottar from him.

We have made such Replies to your Resolutions, as we think consistent with our honour and dignity; and we have directed our attorney to instruct our counsel to move to quash the indictment, so far as it concerns Roy Rada Churn, the Soubah's Vakeel.

A true extract.

(Signed) H. AURIOL, Assistant Sec.

Extract of the Consultation, June 22, 1775.

1st Resolution. That the Court is of opinion, that all claims of individuals ought to be made directly to the Court by the individuals, and not by the authority of the governor general and council.——*Reply.* The claim in question is not that of an individual, but of the government of this presidency, on behalf of the minister or representative of the chief Indian potentate or power, within the province of Bengal, Bahar, and Orissa; between whom and the East India Company a treaty subsisted previous to the passing the late act of parliament (under the authority of which, and his majesty's charter granted in pursuance thereof, the Supreme Court is established) and with whom the government of the presidency have been instructed, since the passing of such act, to make a further treaty or treaties: for these reasons, it was incumbent on the government to make such claims of exemption, on complaint to them made by the party injured, as would, under similar circumstances, have been made by the authority of government in England. The government of this presidency must, in all their negociations and transactions with the country powers, be considered in every respect as invested with sovereign authority and all its incidents, under the express sanction of the British laws. The Company have now a public minister residing at the court of the Nabob, Soubah of these provinces. The application now under consideration has been made, as near as circumstances would admit, in the manner above alluded to, there not being in this country any officer of the Crown or Company invested with powers similar to those of his majesty's attorney general in England; who would there have been the proper officer to have taken cognizance of such a complaint, on the representation of government, without putting the party injured to the necessity of personally or directly making his claims to a court, the authority of which he conceives himself no way amenable to.

2d Resolution. That it is contrary to the principles of the English constitution, for any person or persons to address a court of justice by letter missive, concerning any matter pending before such court; and that the higher the station is of the person or persons so addressing, the act is the more unconstitutional.——*Reply.* The idea of an address from individuals seems to run through the whole of this Resolution also. It is sufficient for us to observe, that the application made to the Court was not made by the members who have signed it, in their private capacities, but in their political one, as constituting the government of this presidency, conformable to the powers vested in the majority of the governor general and council by the late act of parliament. The opinion of the Supreme Court does not apply at all to the present case, how far soever it may be right on general principles.

3d Resolution. That the stile of the letter now before the Court, seeming to be of the nature of an order rather than petition, is a stile in which no court of justice ought to be addressed.——*Reply.* This Resolution will be more fully and satisfactorily answered, by referring to the terms of the application, than by any remark thereon. The claim of a right is not an order, either in form or substance; neither was it our intention to address the Court by petition.

A true extract. H. AURIOL,
Assistant Secretary.

The Court inquired whether either of the papers had any address, and were informed they had not. The Court then returned the following

Answer to the above Papers.

The Court, with very great concern, perceive, that a message sent by the first officer of their Court, for the purpose of preventing a correspondence, which, if carried on, must end in altercation, has been esteemed by the Council a want of respect in the mode of delivering it, and has produced that very altercation which it was evidently intended to prevent; an altercation which, in the first instance, ought to be stopped; and therefore the Court will not make one single observation on the want of address to the Court, or the subject-matter of their papers. Those who first end a dispute which may be of so much consequence to the public, in our opinion, act with the most dignity, and deserve best of the public. The issue of this business sufficiently evinces the impropriety of the mode of application by the Governor General and Council; if the Company thought it right to apply, there are but two modes in which it could properly be done. Though neither the Crown nor the Company have an Attorney General, they have a standing counsel; a motion ought to have been made by that counsel; if they did not think proper to instruct that counsel, the proper mode was by petition; it is the mode that the charter has prescribed for the East India Company, whose agents the Governor General and Council are. An appeal, under the circumstances described by the Act, is a matter of right: to preserve that decency necessary in applications to his majesty's court of justice, the East India Company, as well as all other appellants, must not claim, but prefer an humble petition. These are the words of the charter. It is a false point of honour to decline it, there is nothing humiliating in it; it is mere matter of form. This being thus explained; to prevent any further altercations of this nature, the Court must inform the board, that they cannot (respect being had to the dignity of his majesty's court, and to the welfare of the Company) receive in future any letters or messages but in that form. With respect to the application itself, the Court does not esteem it any question relative to the East India Company having a power of receiving ambassadors, nor what right ambassadors properly constituted and received by them may be intitled to. We observe, that Roy Rada Churn states in his Memorial to the Council (for what purpose we know not), that he was called upon by a summons issued by sir Elijah Impey, knt. one of his majesty's justices of the peace. We must acquaint the Board, that, the matters laid to the charge of Roy Rada Churn being of a public nature, and affecting the first member of government in this presidency, the Chief Justice, unwilling to act alone, called upon all his brethren for their assistance; and that the summons was signed, and every order in the cause made, by every one of the judges of the Supreme Court of Judicature, after mature deliberation, and an examination that took up a whole day. Roy Rada Churn was not at that time apprized of his being invested with the sacred rights of an ambassador: though his claim is made very late, if he is really and *bonâ fide* invested with such rights, they will most undoubtedly be allowed him in their full extent. The claim seems serious, and deserves the attention of the Court, as it is made by the Governor General and Council; they know the facts upon which they claim it; the Court cannot be apprized of them. As we are confident the claim would not be made without grounds, we shall expect to be informed of the following circumstances, without which we cannot determine the claim. The question appears to us to be, whether the Nabob Mubarick ul Dowlah stands in such a relation to the East India Company, as to be able to send to this presidency a public minister, upon whom the rights of an ambassador can attach; therefore we shall expect that the gentlemen, who made the claim in his behalf, do verify, by affidavit, that the Nabob Mubarick ul Dowlah is a sovereign independent prince. That he is in a situation to make war and peace with this settlement. That he is a prince *sui juris*. That he appoints his ministers, and performs all acts of sovereignty, independently, and without the controul of this government. That he is in all negociations treated as a prince *sui juris*. These are facts within the knowledge of the gentlemen of the Council; they can verify them; and if they do not, the Court will understand that they do not consider him as *princeps sui juris*. It will be necessary likewise to inquire who the person is that is sent as vakeel, or ambassador, and what are his powers. We shall expect to have it verified by affidavit, that a vakeel is a public minister, having the right *jus revocandi domum*; where he was commorant at the time he was appointed vakeel, and for twelve months before, *et cujus ditioni tunc subditus fuit*. We shall likewise expect it to be verified by the gentlemen of the Council, that they have always treated Roy Rada Churn as a person invested with all those rights which they claim on his behalf, and that they do in no respect whatever consider him subject to the order or controul of this government. These matters must be cleared up: otherwise the allowance of this claim may be an inlet to a grievance much complained of, the exertion of the power of a double government. These circumstances are pointed strongly, that they may, if possible, be obviated. As a treaty is mentioned in the papers between the hon. the Company and Mubarick ul Dowlah, the Court expect that treaty to be laid before them.

June 28, 1775.

Present, all the Judges.

Mr. *Farrer*. I have the directions of the Governor General and Council to move the Court, that Roy Rada Churn, a public minister, or vakeel, of the Nabob Mubarick ul

Dowlah, may be exempt from a prosecution commenced against him by Warren Hastings, esq. Governor General; and that the prosecution, so far as it concerns him, may be quashed; *and that the Court may pass such censure and punishment as they shall think proper on the persons who have commenced the prosecution.*

Court. You must specify the censure and punishment you wish the Court to pass.

Mr. *Farrer.* I did not conceive that to be necessary; I beg leave to withdraw that part of the motion.

(The words in italic were accordingly struck out.)

Mr. *Farrer,* in support of the motion, said, That Roy Rada Churn, having being informed that a prosecution had been commenced against him, had presented a Memorial to the Governor General and Council, stating, that he was a vakeel, or public minister, to the Nabob, and claiming the privilege of an ambassador. That, in consequence of that application, the Governor General and Council had sent a letter to the Court, claiming, for him, such privilege; that an answer was sent to that letter by the Court, which had produced a message from the Board; to which an answer had likewise been sent by the Court. That as the Court, in their last answer, had said, that they did not consider this as any question relative to the right the East India Company might possess of receiving ambassadors, he would decline saying any thing as to that point.

Court. We have given no decisive opinion: therefore exercise your own judgment.

(Mr. *Farrer* then proceeded to make some observations on the message sent by the Court to the Council.)

Court. We think it highly improper that any message from us should be commented upon by counsel; what was mentioned in that message was intended as hints to the gentlemen who made the claim on behalf of Roy Rada Churn, of what it would be necessary for them to prove, which no doubt they have done; we therefore wish you would confine yourself to what you can support by affidavits.

Mr. *Farrer.* We have affidavits to prove every thing that is necessary to be proved; what has been mentioned as necessary to be supported by affidavit, I do not conceive requisite; many of the things are what cannot be sworn to, but which I hope will be admitted from their public notoriety. First, I shall prove the Nabob Mubarick ul Dowlah to be a sovereign prince, and that he exercises acts of sovereignty; I conceive, that in all matters, where the laws of England have not altered his situation, he must be a sovereign prince; he exercises criminal jurisdiction throughout his dominions, and signs the death-warrants, without any controul whatsoever from this government. He has exercised the right of sending ambassadors time immemorial. He is possessed of a royal mint, and coins money. He keeps in pay a body of troops. From all these circumstances, it is evident, he is a sovereign prince. I will also beg leave to mention an observation of the Chief Justice the other day, which was, "That the ambassador of a powerful prince would be entitled to no more privilege on account of his potency." Therefore *à fortiori* the present weakness of the Subah should be no argument why his ambassadors should not have their privilege; they ought rather on that account to meet with protection from his Majesty's courts of justice. If the Nabob is not the sovereign, I should be glad to know who is. Other European settlements acknowledge the sovereignty of the Nabob; and I am instructed to say, that a Frenchman is now under actual confinement for some misdemeanour committed within the provinces. The asserting that the Nabob is not the sovereign, would be productive of the most dreadful consequences. It would, in all probability, be productive of a war between us and the several European nations who have settlements within the provinces. For, if the sovereignty is vested in the Company, all the disputes within the provinces must of course be decided by us. As to the Nabob's being *princeps sui juris,* that cannot be verified by affidavit; it is sufficient if he is received as such by his own subjects. Rada Churn Roy was invested with the ensigns of his office from the Nabob, which was attended with an extraordinary degree of honour in the mode of conferring. He received his letters of credence in September 1772. Roy Rada Churn has resided in this settlement, in the character of vakeel, or public minister, ever since that time, except for an interval of a few days, from the 22d of May to the 30th. Though he should have been dismissed in the intermediate space; yet, if the indictment was found afterwards, it ought to be quashed. Roy Rada Churn, by virtue of his appointment, receives from the Soubah a salary of 900 rupees per month.

The Counsel for the Company, in support of the motion, produced the following papers:

1st, Memorial of Roy Rada Churn. Copied page 1101.

2d. The letter from the Council to the Court, which inclosed that Memorial, dated 20th June, 1775, which had been altered by the Clerk of the Crown (with the permission of the Court) into the proper form of a petition. Copied page 1101.

3dly, The following

AFFIDAVIT of ROY RADA CHURN.

"The KING, at the prosecution of Warren Hastings, Esquire,

against

"ROY RADA CHURN and others, for a Misdemeanor.

"Roy Rada Churn, the person abovementioned, maketh oath, that he is a Hindoo native of the province of Bengal, and is now, and for

two years and upwards last past has been, resident in Calcutta, at Fort William, aforesaid, as the public minister, or vakeel, of Mubarick ul Dowlah, Nabob of Bengal, Bahar, and Orissa, (except for about the space of ten days in the month of May last) and charged with the conducting and transacting his affairs and concerns with the honourable the East India Company and others, at the Presidency of Fort William aforesaid; and that he receives a monthly salary of 900 rupees in virtue of such his appointment and office aforesaid; and was, on his being invested therewith, honoured by his said master the Nabob with a Chauxpaurchait Kelaut, a Surpaitch Marissah, a Jaighaw, a Calaughee and Horse, as ensigns of such his appointment and office; and that the Surpaitch Marissah was tied on this deponent's head by the Nabob himself, as a mark of distinguished honour. And this deponent further saith, that on his introduction to Warren Hastings, esquire, the then governor, as minister, or vakeel, as aforesaid, he received from him beetle nutt and ottar, which, this deponent saith, he believes are not usually given to vakeels of Rajahs, or others of inferior rank, but only to the public ministers, or vakeels, of the Subahs, Nabobs, or other superior Indian states and powers.

"And this deponent further saith, that he is not, nor during the period first above written has been, in the service or employment of the said East India Company, or of any British subject whomsoever; but is resident in Calcutta as the public minister, or vakeel, of the said Nabob, and on no other business whatsoever. And this deponent further saith, that there is not now any other minister, or vakeel, of the said Nabob Mubarick ul Dowlah resident in Calcutta, or at the Presidency aforesaid, as this deponent verily believes.

"Signed, - - - - -

"Subscribed, the mark or name of

"Roy Rada Churn."

"Sworn at Calcutta, this 28th day of June, 1775, before me. J. Hyde."

4thly, Copies of Letters of Credence, Dismission, and Re-appointment, from the Nabob, addressed to the Governor General.

From the Nabob Mubarick ul Dowlah, to the Governor: received the 23d of September, 1772.

"Roy Rada Churn, who has been honoured with the appointment of vakeel at your presence, on the dismission of Roy Ramnaut, now proceeds to you. He will attend upon you for the transaction of my affairs; and your favour toward him is greater than I can express." (A true translation.)

"Wm. Redfearn, Persian Translator."

From the Nabob Mubarick ul Dowlah to the Governor; received the 22d of May, 1775.

"As Roy Rada Churn has, for some time past, been an idle person, and considering his being retained as my vakeel intirely useless, I have dismissed him from the 1st of Suffer, in the 16th sun (year of his Majesty's reign); and write this for your information." (A true translation.) "Wm. Redfearn, P. T."

From the Nabob Mubarick ul Dowlah to the Governor; received the 30th of May, 1775.

"I some time ago informed you, that I had dismissed Roy Rada Churn, at the solicitation of Yatebar Ally Caun. As the said Roy has been for a long time employed as my vakeel to you, I have re-instated him; and I request that you will shew him the same degree of favour as formerly, and pay attention to whatever he represents to you on my part." (A true translation.) "Wm. Redfearn, P. T."

The following Affidavit of Mr. Redfearn was affixed to the above Letters:

"The King, at the prosecution of Warren Hastings, Esquire,

against

"Roy Rada Churn and others, for a Misdemeanor.

"William Redfearn, of Calcutta, gentleman, maketh oath, and saith, that the Persian writing, in the paper hereunto annexed contained, is a true copy of the original letters of credence, dismission, and re-appointment, of the above-named Roy Rada Churn, as vakeel to the Nabob Mubarick ul Dowlah, which have been filed among the records and muniments of the honourable the East India Company, at their presidency of Fort William aforesaid, taken and made by this deponent from, and carefully compared with, such originals; and that he has a knowledge of, and is conversant in, the Persian language; and that the English writing, contained in the said annexed paper, is a true translation of the said original letters, to the best of this deponent's judgment and belief." Signed, "Wm. Redfearn."

"Sworn at Calcutta, this 28th day of July, 1775, before the Court, J. Pritchard, Clerk of the Crown."

5. Articles of a Treaty and Agreement between the Governor and Council of Fort William, on the part of the English East India Company, and the Nabob Mubarick ul Dowlah.

On the Part of the Company.

"We, the Governor and Council, do engage to secure to the Nabob Mubarick ul Dowlah, the Soubahdarry of the provinces of Bengal, Bahar, and Orissa, and to support him therein, with all the Company's forces, against all his enemies."

On the Part of the Nabob.

Article I.

"The Treaty which my father formerly concluded with the Company upon his first accession to the Nizamut, engaging to regard the

honour and reputation of the Company, and of the Governor and Council, as his own; and that entered into with my brothers the Nabobs Nazim ul Dowlah and Syef ul Dowlah; the same treaties, so far as is inconsistent with the true spirit, intent, and meaning thereof, I do hereby ratify and confirm.

ARTICLE II.

"The king has been graciously pleased to grant unto the English East India Company the Dewanneeship of Bengal, Bahar, and Orissa, as a free gift for ever; and I, having an entire confidence in them, and in their servants settled in this country, that nothing whatever be proposed or carried into execution by them, derogating from my honour, interest, and the good of my country, do therefore, for the better conducting the affairs of the Soubahdarry, and promoting my honour and interest, and that of the Company, in the best manner, agree, that the protecting the provinces of Bengal, Bahar, and Orissa, and the force sufficient for that purpose, be intirely left to their discretion and good management; in consideration of their paying the king Shah Aalum, by monthly payments, as by treaty agreed on, the sum of rupees two lacks sixteen thousand six hundred and six, ten annas, and nine pice rupees (216,606 10 9); and to me Mubarick ul Dowlah the annual stipend of rupees thirty one lacks eighty one thousand, nine hundred and ninety-one, nine annas (31,81,991 9); viz. the sum of rupees fifteen lacks, eighty-one thousand nine hundred and ninety-one, nine annas (15,81,991 9), for my house, servants, and other expences, indispensably necessary; and the remaining sum of rupees sixteen lacks rupees (16,00,000) for the support of such seapoys, peons, and bercundasses, as may be proper for my asswarry only; but on no account ever to exceed that amount.

ARTICLE III.

"The Nabob Minaub Dowlah, who was at the instance of the governor and gentlemen of the council appointed Nabob of the provinces, and invested with the management of affairs, in conjunction with Mah Rajah Doolubram and Juggat Seat, shall continue in the same post, and with the same authority; and, having a perfect confidence in him, I moreover agree to let him have the disbursing of the above sum of rupees sixteen lacks, for the purposes above mentioned.

"This agreement (by the blessing of God) shall be inviolably observed for ever.—Dated the 21st day of March, in the year of our Lord 1770." Signed, "JOHN CARTIER, &c."

(A true copy)

Signed, W. WYNNE, Sec.

6thly, A Sunnud from the Nabob Meer Jaffier, in consequence of a Fermaun from the king, confirming a former Sunnud to the Company, for coining money in Calcutta, in the name of the king.

Mr. *Newman*. As counsel on the prosecution against Roy Rada Churn (together with others) for a conspiracy against the Governor General, I cannot but rise to oppose this extraordinary application.

I understand the motion chiefly to be, That, Roy Rada Churn claiming the privileges of an ambassador, the council, by their advocate, moves the Court, that the indictment, for a conspiracy against him, may be quashed; the latter part, at first mentioned, of the prosecutors of it being punished, being withdrawn. In support of this motion, the following propositions are urged; viz.

1st, The sovereignty of the East India Company. Their power to declare war and make peace; and consequently to receive ambassadors for the latter purpose.

2d, That Mubarick ul Dowlah is a sovereign prince, possessing the right of sending ambassadors, which right he has always exercised; and that he exercises acts of sovereignty likewise in the following instances:

1st, By keeping a standing army.

2nd, And by possessing the power of administrating criminal justice.

And in behalf of his excellency, we are informed of his appointment as Vakeel, or public minister; his being invested with all the solemnities usual on the occasion; the possession of a salary of 900 rupees a month, and being distinguished and received by the governor as an ambassador, for that he gave him ottar and beetle nutt. In support of which last allegations, on behalf of the person sent as an ambassador, an affidavit of Roy Rada Churn is produced; and we are told, that every thing is sworn to which the case will admit of, which is the only just position that has been mentioned, and which renders it very unnecessary for me to say more upon the present occasion, than taking up the sole point of right in the person sending the public minister; for, if that is not established, the right of the person sent ceases of course; and it is immaterial how far the persons to whom such ambassador is sent are vested with the power of receiving or treating with him.

On the first application of the council on this occasion, your lordships announced five things necessary to be established by affidavit, in support of the claim on behalf of Mubarick ul Dowlah, the person sending a public minister:

1st, That Mubarick ul Dowlah is a sovereign independent prince.

2d, That he is in a situation to be able to make war and peace with this settlement.

3dly, That he is *princeps sui juris*.

4thly, that he appoints his ministers, and performs all acts of sovereignty, independently, and without the controul of this government.

5thly, That he is in all negotiations treated as a prince *sui juris*.

In support of which facts, instead of any affidavit being produced, the minister's supposed letters of credence are read; and a treaty of 21st of March 1770, between the Nabob and

the Company, exhibited; by the latter of which it is very obvious, that the two first requisites for establishing the claim are disproved, and the dependency of the Nabob on the Company fully established. Instead of being able to make war or peace with this settlement, the Company agree to support him in his subahship with their forces, and to allow him an annual stipend of rupees 31,81,991 9, which they think proper to make the disposition of, by settling the expences of his salary, by limiting the number of his peons, seapoys, &c. They stipulate for the continuance of the then officers and ministers in their posts, and expressly appoint one of those ministers to have the disposition (in the manner therein mentioned) of one moiety of the money at that time allowed him by the Company; which stipend, so allowed him, was in the ensuing year, by order of the court of directors, reduced to the sum of 16,00,000 rupees per annum. Will these acts and power in the Company shew a sovereign independency in Mubarick ul Dowlah, and his being able to make war and peace with this settlement? Do they not, on the contrary, incontestibly prove, not only his dependency on the Company: but that, though nominally a Nabob, he is in fact no more than an instrument, and may be deemed an agent of theirs? It does not appear that he ever thought himself a sovereign prince, or till on the present occasion ever conceived he had a right to send an ambassador, which he could only now have been prompted to by some friends of Roy Rada Churn, in order to lend him an assisting hand on so pressing an emergency?

The only presumptive act of sovereignty vested in or exercised by Mubarick ul Dowlah, is his signing the warrants on capital convictions in the presidency Audaulet court, before they are carried into execution; but even this is a delusion: and political motives in the Company, when they created these courts, induced them to vest this power in him, which will be presently fully explained; and we shall shew the constituting the courts, and administering criminal justice, to be sovereign acts of the Company, and not of the Nabob. As to the Nabob's standing army, announced as an instance of the sovereignty of the Nabob, and of which, though we are informed by the counsel, there is not one jot of proof; your lordships will find his army a very inoffensive one; for it is no other than his swarry, of which the number of seapoys and peons is limited by the Company: nor can the Nabob have occasion for an army, who has no possessions to lose, and who is protected in the place he holds by the forces of another power, which the Company, by the treaty which has been produced, have undertaken to protect him in.

That Mubarick ul Dowlah is not a prince *sui juris*, will not bear a moment's contention. His being a Nabob would not make him such, if he had obtained his Subahship by the regular line of appointment from the Mogul, whose officer a Nabob originally was, temporarily created to superintend the affairs of a province; and was removable at pleasure; but there has not been a lawful Nabob since the death of Sujah Caun, which happened in the year 1739. It is well known that Mubarick ul Dowlah is a son of Meer Jaffier, the Jammada, who was created a Nabob by lord Clive; from which circumstance, the idea of a *princeps sui juris* ceases immediately; and I believe, after what has been shewn, will presently appear more fully: I need not suggest that the Company, in their negociations, have not treated or ever considered Mubarick as a prince *sui juris*; so that there does not appear the least proof before the Court, of any one of the five requisites declared as necessary to be established, or a ground for a supposition of sovereignty in the person said to create and send the public minister or ambassador to this settlement which renders it unnecessary for me to consider how far the Company have or have not an unlimited authority for sending or receiving ambassadors. From the deficiency of evidence in support of the present claim, it is unnecessary on our parts to produce the affidavits we have obtained, to disprove what we thought might have been attempted to have been supported: but, in order to convince your lordships how ill-advised and ill-grounded the claim is, we shall evince, by the affidavits of the Governor General and other gentlemen of the old council, that Mubarick ul Dowlah is every way dependent on the East India Company, who appoint his officers and servants, allow him an annual stipend, and themselves possess the entire command of the military power of Bengal; that he has neither a seapoy to command, an inch of land to enjoy, nor a rupee in his treasury, more than what the Company may think proper to allow him; and although the criminal courts were nominally the courts of the Nabob, yet that these courts were created by the Company, in the month of August 1772, by their own authority, without consulting or requiring his concurrence; and the mode of the said province, settled by the late president and council, to be under the inspection and control of the Company's servants.

With respect to Roy Rada Churn, who is taught to swear himself a public minister, I believe it never entered his imagination before, that he was more than a common vakeel; nor is a public minister ever constituted by that name; for at the court of Delhy, where ambassadors are received, and a real power is possessed of creating them, they are distinguished by the name of Elchee; and by the affidavits before mentioned, it will appear from gentlemen long resident in this country, a vakeel was never looked upon as a public minister, or entitled to the rights of an ambassador: but even supposing, for a moment, the creation was legal and regular, and Roy Rada Churn actually had been a public minister appointed in the year 1772, it appears, and is admitted, that he was dismissed by the Nabob as an idle fellow on the 3d of April, 1775, and is

not re-admitted till some time in May following. In the intermediate time between his dismission and re-appointment, the crime for which he is indicted was committed, discovered, and a prosecution for it actually commenced; so that his excellency's ambassadorial claim, if there was a ground for it, would stand him in no stead on the present occasion, and it only exposes the wishes of those who prompted him to make it. I therefore hope your lordships will dismiss the motion, with costs.

Mr. *Brix.* Mr. Newman has so fully observed on the insufficiency of the evidence produced in support of the claim, that I think it unnecessary to add any thing to what he has said on that head. I shall therefore proceed to point out the definition of an ambassador, as I find it laid down in the books, which will incontestibly prove that Roy Rada Churn cannot be considered in that light; and then proceed to shew, from the nature of the Mogul government, how far the Nabob Mubarick ul Dowlah comes under the description of a sovereign independent prince.

Ambassador is a person sent by one sovereign to another, with authority, by letter of credence, to treat upon affairs of state. Coke, 4 Inst. 153.

It is therefore requisite, that the person who calls himself ambassador should be sent by a king, or absolute potentate or state; and that he should have letters of credence from the sovereign by whom he is sent, containing his appointment and instructions. Coke, 4 Inst. 153.

Therefore one who hath not sovereign authority cannot send an ambassador to another. Ib. Grotius de B. & P. l. ii. c. 18, § 2.

No subject, though he be very great; nor a viceroy, in whom it would be high treason. When the Scots *(inconsulto principe)* sent Lowden and others to Lewis 13, to treat in the name of the whole nation for assistance, he would not receive them. Queen Elizabeth, in like manner, refused to receive Christopher Assonville, sent to her in quality of minister of state from the duke of Alva, then governor of Flanders, he having no commission or credentials from the king of Spain. Molloy, de Jure Mar. 120.

It is the actual exercise of sovereignty that gives the right of sending ambassadors; insomuch that kings, that are conquered in a declared open war, lose that right, together with other privileges. Grot. ib.

The principal rights of sovereignty of which the Subah Mubarick ul Dowlah must be possessed, to give him such a relation with respect to the India Company as to enable him to send any person with the privilege of an ambassador to this presidency; are, 1st, That he is a sovereign independent prince: 2dly, That he is in a situation to make peace and war with the settlement: 3dly, That he appoints all his ministers, and exercises all acts of sovereignty, independent of any other power, and without the controul of this government; and lastly, That he is in all negociations considered and treated as *princeps sui juris.* Let us see how far the Subah Mubarick ul Dowlah comes under this description.

Whatever the forms of government in this country may have been in earlier times, it is notorious, that, since the establishment of the Mogul empire, Bengal hath been a province thereof. The Subah of Bengal, during the time that the empire continued to maintain its original vigour and strength, was no more than the king's viceroy or governor of Bengal, Bahar, and Orissa: as such, he had the command of the military forces for the defence of the provinces, and the administration of criminal justice. The branch of the revenue and justice in civil matters was intrusted to a distinct office independent of the Subah, viz. The Dewan of the empire. In progress of time, as the empire weakened, the Subahs grew stronger, and appropriated to themselves the revenue of the provinces; but even in the weakest state of the empire, the Subahs always acknowledged the emperor as their sovereign, styled themselves their servants, and took the investitures of the provinces from them.

It is, therefore, by usurpation only that they at any time exercised the rights of sovereignty; but these, I apprehend, entirely ceased with the expulsion of Meer Cossim Ally Cawn. Meer Jaffier, whom the Company placed in the Nazimut, had only a shadow of power, and not even that shadow remained with either of his children.

The present Subah Mubarick ul Dowlah is so far from being an independent prince, that he is in all things dependent on the English government. They alone receive the revenues of the province; he has only a pension of 16 lack of rupees for his support: so far from being in a situation to make peace and war, he cannot even raise the smallest body of troops, nor hath he the appointment of any officers. It is in evidence before the Court on a late trial, that Rajah Goordass Roy received the investiture of Dewan to his household from Mr. Hastings, when at the head of the late administration, and the same hath been confirmed by the present governor general and council.

The late act of parliament, and the charter by which the supreme court is established, clearly evince, that, in the eyes of the British legislature, the provinces of Bengal, Bahar, and Orissa, are considered as a conquered country, in which the conqueror hath a right to introduce his laws, and make them obeyed. How can he be called a sovereign independent prince, whose subjects are at liberty to evade his civil or criminal jurisdiction, by becoming directly or indirectly the servants of the English Company, or of any British subject?

AFFIDAVIT of WARREN HASTINGS, Esq.; Governor General of Bengal.

This deponent maketh oath, and saith, That the late president and council did, on or about the month of August, 1772, by their own au-

thority, appoint Manee Begum, relict of the late Nabob Meer Jaffier Ally Cawn, to be guardian of the present Nabob Mubarick ul Dowlah; and Raja Goordass, son of Maha Rajah Nundocomar, to be Dewan of the said Nabob's household, allowing to the said Manee Begum a salary of 140,000 rupees per annum; and to the said Raja Goordass, for himself and officers, a salary of 100,000 rupees per annum. That the said late president and council did, on or about the month of August, 1772, plan and constitute regular and distinct courts of justice, civil and criminal, by their own authority, for administration of justice to the inhabitants throughout Bengal, without consulting the said Nabob, or requiring his concurrence; and that the said civil courts were made solely dependent on the presidency of Calcutta; and the said criminal courts were put under the inspection and controul of the Company's servants, although ostensibly under the name of the Nazim, as appears from the following extracts from the plan of the administration of justice, constituted by the president and council.

"Article I. That in each district shall be established two courts of judicature; one by the name of the Mussusul Sudder Audaulet, or Provincial Court of Dewannee, for the cognizance of civil causes, the other by the name of Phousdance Audaulet, or Court of Phousdance, for the trial of all crimes and misdemeanors.

"Article IV. That in the Phousdance Audaulet, the cauzee and muftee of the district, and two moulavys, shall sit to expound the law, and determine how far the delinquent shall be guilty of a breach thereof; but that the collector shall also make it his business to attend to the proceedings of the court, so far as to see that all necessary evidences are summoned and examined; that due weight is allowed to their testimony; and that the decision part is fair and impartial, according to the proofs exhibited in the course of the trial; and that no causes shall be heard or tried, but in the open court regularly assembled.

"Article V. That, in like manner, two supreme courts of justice shall be established at the chief seat of government, the one under the denomination of the Dewanee Sudder Audaulet, and the other the Nizamut Sudder Audaulet.

"Article VII. That a chief officer of justice, appointed on the part of Nazim, shall preside in the Nizamut Audaulet, by the title of Darroga Audaulet, assisted by the chief cauzee, the chief muftee, and three capable moulavys; that their duty shall be to revise all proceedings of the Phousdance Audaulet in capital cases, by signifying their approbation or disapprobation thereof, with their reasons at large, to prepare the sentence for the warrant of the Nazim, which shall be returned into the Mossusul, and there carried in execution. That, with respect to this court, a similar controul shall be lodged in the president and council, as is vested in the collectors of the districts; so that the Company's administration, in character of the king's Dewan, may be satisfied that the decrees of justice, on which both the welfare and safety of the country so materially depends, are not injured or perverted by the effects of partiality or corruption."

And the said deponent further saith, That he believes the above to be true extracts from the said plan of administration of justice, as entered into the consultations.

The said deponent further saith, That the management of the revenues of the said province of Bengal has for some years past been, and now is, entirely in the hands of the East India Company, and their representatives in this country, without the smallest participation of the said Nabob. And this deponent further saith, That, in consequence of orders from the Court of Directors, dated in April 1771, the annual stipend allowed to the said Nabob Mubarick ul Dowla was reduced from the sum of 31,81,991,9 rupees per annum, to the sum of 16,00,000 rupees per annum.

And lastly, the said deponent saith, That he believes all the above facts to be publicly known, as they are particularly set forth in a printed book, entitled, "Reports from the Committee of the House of Commons."

(Signed) WARREN HASTINGS.

Sworn before me, this 28th day of June, 1775, E. IMPEY.

AFFIDAVIT OF GEORGE VANSITTART.

"This deponent maketh oath, and saith, That, to the best of his knowledge and belief, Mubarick ul Dowla, the present Nabob of Bengal, is not a sovereign independent prince, nor in a situation wherein he can or is entitled to make war on the East India Company or its settlements. That the said Mubarick ul Dowla does not appoint his own ministers, nor perform other acts of sovereignty, independently, and without the consent of the representatives here of the East India Company. The said deponent further saith, That the whole military power of this province of Bengal has been for several years past, and now is, solely and entirely under the command of the said East India Company and their representatives, without being in the smallest degree under the controul or influence of the said Nabob. That the sole management of the revenues of the said province has also been for some time past, and now is, in the hands of the representatives of the said Company, without the least participation of the Nabob. That a mode for administration of justice both civil and criminal to the inhabitants of the said province was settled by the late president and council, in or about the month of August 1772, by their own authority, without consulting the said Nabob, or requiring his concurrence; and that that plan was carried into execution, by which the civil courts throughout the province were put entirely under the presidency of Calcutta, and the

criminal courts under the inspection and control of the Company's servants, although the latter were nominally the courts of the Nabob.

"That, in the year 1772, the said late president and council did, by their own authority, appoint Manee Begum, relict of the late Nabob Meer Jaffier, to be guardian of the present Nabob; and Rajah Goordass, son of Maha Rajah Nundocomar, to be Dewan of the Nabob's household; and by their own authority appointed salaries to the said Manee Begum and the said Rajah Goordass. And the said deponent further saith, That, in consequence of orders from the court of directors signified, he is informed, in their letter of the 10th of April 1771, the annual stipend of about 32,00,000 rupees, agreed to be paid to former Nabobs, and to the present Mubarick ul Dowla, was reduced to 16,00,000 rupees per annum.

"The said deponent further saith, That, during his residence in India, he has never understood that a person residing under the denomination of vakeel, was a public minister, entitled to the rights of ambassadors; but conceived such a person to be liable to the local jurisdiction of the courts civil and criminal where he resided.

(Signed) "GEORGE VANSITTART."

"Sworn before me, the 27th day of
June, 1775, S. C. LEMAISTRE."

Two other Affidavits were read, one made by Mr. Hurst and the other by Mr. Lane (both members of the late council) in exactly the same words as that of Mr. Vansittart.

Mr. *Farrer*. There has not been the least attempt to prove that the right of these provinces is not in the Nabob Mubarick ul Dowlah; his being divested of the power is no argument against his possessing the right of sovereignty: I therefore hope, that he will meet with full protection from this Court, and that his vakeel Rada Churn will be allowed the right of an ambassador.

Chief Justice. You are hard pressed, to make use of that argument: the Company will not thank you for stating the right to be in Mubarick; for, if it is, the exercise of the power must be an usurpation in the India Company; but I do not take it to be so, for the treaty which you have produced is a surrender by him of all power into the hands of the Company.

In the decision of this question, it will not be necessary to enter into the common-place learning concerning the rights of ambassadors, nor in what manner they have been sanctified, not only by the most polished, but even the most barbarous nations. All nations, who have had intercourse with others, have held their characters sacred; the rights of ambassadors, as far as they relate to the question before us, *jus revocandi domum*, are clearly established by all the writers on the subject; nor will it be necessary to decide, whether the East India Company have or have not a right to receive public ministers, upon whom all the rights of ambassadors will attach: they are authorized to make treaties, war, and peace, with the country powers in India. It is most certainly necessary, that they should receive agents from those powers, for the transaction of their public business: I do not absolutely say, that it is a consequence, that those agents should be put in the situation of foreign ministers at European courts; nor would I by any means be understood to put a negative upon it: it is not necessary in this case, and perhaps no case may ever arise wherein it may be necessary, to determine it. I give no opinion about it; and I desire that may be clearly understood: therefore, however this case may be determined, the dignity, honor, and powers, of the government of this settlement are safe: they are not affected by it: the Court will always support them, when they are fairly, openly, and legally exercised. There is enough and enough to determine this claim, without entering into that question.

But, though the rights themselves are clearly established, it will be proper to consider the true and substantial reason that has induced that common consent of nations, which is called the *jus gentium*, and gives sanction to them. One reason, and a common one assigned, is, that they represent the person of their prince, and carry his majesty about them; and therefore their persons must be sacred: this is rather a captivating and dazzling than a substantial reason; it is a fiction. No nation was more civilized than the Romans; no nation (with very few exceptions) was more attentive to the privileges of ambassadors; yet mere sacredness of person did not, among them, protect from justice: the vestal virgins, the tribunes of the people, the high priests, the *pontifices maximi* (unless actually officiating) and all others, who had nothing to protect them but the sanctity of their persons, were subject to the courts of justice: I do not recollect any claim made simply on that ground, but the exemption claimed by the popes for the Romish clergy, 'persona 'enim quantumvis sancta sola in jus vocatione 'non violatur.' There is another fiction, that ambassadors are not considered as within the territory of the prince to which they are sent; this and what I before mentioned are not properly reasons, but fictions, formed to satisfy the reasonings on the municipal laws of the countries to which the ambassadors are sent: the true and substantial reason is derived from the necessity of protecting persons sent on material business, in which the public is concerned; it is, 'ne ab officio suscepto legationis avocentur, 'ne impediatur legatio, ne prohibeantur pub-'lico munere fungi;' the main great business, which chiefly operates to give this right, is, that of making treaties, more especially such as concern war and peace, 'quia pacis et fœde-'rum sunt nuntii et proxenetæ, et sine his gen-'tium societas et amica quies salva esse nequit.' Among powers capable of making real treaties, and making war and peace, it is absolutely necessary that there should be intermediate

agents, whose persons should be protected even from the laws, lest the laws should be made the instrument of defeating negociations, which might be of the utmost consequence to the state; otherwise nations must live in eternal war, or in insidious peace; for if there were not persons, harbingers of peace, who could with safety come to the opposite party to propose peace, and the terms on which it should be held inviolable, though the contending powers were each peaceably inclined, the horrors of war must continue; and when they were tired out, an insecure armistice would take place, to last no longer than till one of the parties had recovered strength and spirits sufficient to renew hostilities. It is from the real business between nation and nation, not from any representation of supposed majesty, that their rights are substantially founded. Is Mubarick ul Dowlah, or was he ever, a prince in a situation of transacting any public business of consequence with this settlement? Is he, from the evidence before us, capable of making war and peace with this settlement? If not, though there may remain in him a shadow of majesty, I think no sanctity of person can be derived to his Vakeel, which will be sufficient to give him the rights of an ambassador: for this reason I threw out, when this was before mentioned, what I thought would be necessary for the governor general and council to make out, before they could support this claim: I did it, that if they could not make it out, they might have an opportunity of relinquishing a claim, which I was fully aware must embarrass them; they have chosen to persist in it, and to force the Court to a determination on a question, which their counsel states to be political; and that to protect a man, charged (whether properly or no, will appear when the indictment is tried) with a conspiracy against the first man in this settlement, the governor general. Whatever my opinion may be, the gentlemen of the council must have been clearly convinced of the justness and indispensability of the claim; or in such a case, I am sure, they would not have made it.

We have said, it would be necessary that the governor general and council should verify, by affidavit, that Mubarick ul Dowla was a sovereign prince, in a situation to make war and peace with this settlement: that he was *sui juris;* that he appointed his own ministers; that he performs all acts of sovereignty independently, and without the controul of this government; that he is in all negociations treated as a prince *sui juris:* that a Vakeel is a public minister, having the *jus revocandi domum:* that the governor general and council have always treated Roy Rada Churn as invested with the rights which they claim for him, and that they do not consider him subject to the order and controul of this government: no such affidavit has been made; I should have been much surprised if there had; but the reason given for want of the affidavits is not the true one; namely, That the facts would not bear them out: the reason given by their counsel is, That the governor general and council could not make the affidavits required, because they are a corporation.

I cannot imagine from what confusion of ideas this notion has sprung; in fact, they are no corporation; if they were, could it enter into the mind of any man, that it was sufficient for a corporation merely to make a claim, without supporting it by proof? to fling a claim on paper into court, and leave it to establish itself without evidence? Though a body corporate, *quâ* corporate, cannot make an affidavit, each individual that composes it can: in fact, the governor general has: the individuals, if the facts would have borne them out, might, and I have no doubt would, have made the affidavits, especially as the Court had informed them, if they did not, the negative of the question put would be taken *pro confesso.* They have not even sworn, or given any evidence, that they themselves do now, or ever have treated Roy Rada Churn as a person invested with the rights they claim for him from us, nor that they do not consider him subject to the order and controul of this government: is he then to be treated as a public minister, merely to elude justice, and in no other respect to be so treated? I have little doubt but that this man was originally appointed by the influence of the late administration; and am not surprised that those who form the government of this presidency, which undoubtedly exercises authority over the master, cannot swear that they do not think the servant liable to the controul of the government of this presidency.

What has been produced in support of this claim? A paper which is called, a treaty with Mubarick, a Sunnud of Meer Jaffier Ally Kaun, the affidavit of Roy Rada Churn, and two letters to the governor general, which are called the credentials.

The treaty indeed, by its first article, nominally guarantees to him the possession of Bengal, Bahar, and Orissa; but by the other articles, all power whatsoever is taken from him, nothing is left him but an empty title, and 81,81,991 rupees annually; even that sum is appropriated, all but 16 lack, to his household; and it is expressly stipulated, that the remaining 16 lack should be expended by the officer named in the treaty, in maintaining the peons, &c. of his swarry. He is thereby obliged to keep up the ensigns of power, and maintain the outside pomp of a prince, by the very instrument which is an actual surrender of his sovereignty, if he was, which is not in proof, ever possessed of it.

It was stated by the counsel at the bar, to induce the Court to believe that the military power, that substantial evidence of royalty, was in his hands, that he kept an army on foot: what does it turn out to be? a mere swarry, to keep up ostensible pomp, and make him appear what he is not. It is a miserable attempt to impose on the Court. As to the Sunnud of Meer Jaffier, that is produced, to

shew that Mubarick has a right to a mint, another mark of sovereignty: does it prove it? It proves that the East India Company had exercised the right of coining money; and what they possessed before, is confirmed to them by the grant of Jaffier. By what authority the East India Company claimed it before this grant, does not appear; it does appear they exercised it: but though Meer Jaffier might be a sovereign, how is Mubarick connected with him? no title has been attempted to be derived, nor any succession proved, from Jaffier to Mubarick. Is there any proof that Mubarick ever coined money in his own name? He certainly did not. All this is mere colour, and so faint that I can hardly induce myself to think that the gentlemen who made the application do themselves believe what they are desirous the Court should believe. The credentials, as they are called, instead of supporting the claim, prove expressly that Roy Rada Churn was not Vakeel to Mubarick, either at the time the offence charged in the indictment was committed, or at the time that the matter was enquired into, and Roy Rada Churn bound over by the judges to appear at the present sessions. He was appointed two years ago; on the 22d May, 1775, the last letter was read by the governor from Mubarick ul Dowlah, informing him, that Roy Rada Churn had been a very idle person, and that he conceived his having a Vakeel as an useless expence, and therefore he had dismissed him from the 1st of Suffer, which corresponds with the 2d of April. The fact complained of, and the binding over, was all in April. He is reinstated the 30th of May. The grounds on which he was discharged are worthy observation; I cannot help feeling for Mubarick, who, by that letter, seems to feel his own situation; he thinks the having a Vakeel, or as he is affected to be called, a public minister, was needless, and the expence unprofitable. So it was: had he any affairs of consequence to negociate here? could he make war or peace? Why was Rada Churn dismissed? Because he was an idle person, and because he was chargeable to the Nabob; he is discharged for a good cause. Is any reason given why he was restored? Had he become less idle? Had Mubarick more business to transact? The saving his salary could not be great during his short dismission; was the Nabob grown richer? Why then was he restored? The true reason is too obvious. Roy Rada Churn had got into a disagreeable scrape. Mubarick was desirous of protecting him from it. Though the idea of protecting in this manner is by no means Asiatic; I will not suppose that any influence other than the personal interest of Roy Rada Churn was exerted over the Nabob on this occasion.

We next come to Roy Rada Churn's affidavit. I think the person that drew that affidavit, and suffered him to swear to it, is most highly to be censured. What is he made to swear? That he now is, and for two years and upwards last past has been resident in Calcutta, as the public minister or Vakeel of Mubarick, except for about the space of ten days in May last, and in no other character; and that he has been charged with conducting and transacting his affairs, with the East India Company and others, at this presidency. That there is not any other public minister or Vakeel of the Nabob Mubarick resident in Calcutta, as he verily believes. This last is, I have no doubt, perfectly true, and he might, I dare say, have safely added, nor any other place whatsoever. The letters to the governor general are not credentially for transacting business with the East India Company and others; but what I chiefly blame is, the suffering him to swear, what is not true, that he resided as a public minister or Vakeel, when he was not Vakeel. It is said he did not know till these letters were shewn him that he had been dismissed; why then did he make an exception to ten days in May? He must have known it when he swore the affidavit; if he did not, the affidavit might have been amended; if it was not amended, at least it should have been explained to the Court when the affidavit was read. I called upon the counsel, when the letter was read, to acquaint the Court, whether the facts charged on Roy Rada Churn, and the enquiry into them, was during the time of his dismission; but could receive no answer. He that drew the affidavit must have known it. He swears, he was in the character of Vakeel for two years last past, except ten days in May. If that had been true, he would have continued Vakeel till after the time he was bound over. He thought, or rather those who drew the affidavit thought, the time material. It is plain this could not be accident. He is either made to swear what is not true, or to prevaricate most abominably.

But there is another circumstance in which the drawer of the affidavit is most highly culpable. He is made to swear to what he could not understand, the term 'public minister;' it conveys ideas that are hardly to be explained to the natives of this country: and for what purpose? Could it be expected that the Court would only attend to the sound of words? Could it be thought he was nearer proving himself a public minister on whom the right of ambassadors would attach, by using these words, than if he had simply sworn himself Vakeel? There is no affidavit of the place of residence of Roy Rada Churn before his first appointment. But it turns out from this affidavit, that he was resident here before his last appointment, and therefore subject to the English laws. If so, he is answerable here; for an ambassador, any more than another person, is not to commit crimes with impunity. He will be subject to that tribunal to which he was subject before he was invested with his public character. If he was a subject of the prince who sent him, he will be subject to his courts of law: if he was answerable to the courts of law of another prince, he must be called upon in that prince's courts; if he was before subject to the state in which he was em-

ployed, which is the present case, he will still be amenable to the courts. For if before the embassy he was not subject to the prince in whose employ he is, the sole act of making him ambassador will not make him liable to his courts; except, perhaps, in matters which relate to his embassy. There are differences of opinions on this subject, as I stated the other day; but I take the reason and weight of authorities to be on this side. I then stated why Wicquefort was a strenuous opposer of this doctrine. Bynkershoeck is firm in this opinion.

Thus it stands on the evidence in support of the claim. It is mere colourable evidence; but when the affidavits on the other side are read, that colour immediately vanishes.

The Governor General swears, that the late administration, by their own authority, appointed Monur Begum to be guardian to the Nabob, and Rajah Goudass Dewan of his household, allowing each of them large salaries: that the same administration planned and constructed criminal and civil courts by their own authority, without consulting the Nabob, or requiring his concurrence; the civil were made dependent on the presidency solely; and the criminal, though held in the name of the Nabob, are, in fact, under the controul and inspection of the servants of the East India Company: that the management of the revenue (the sinews of war) are entirely in the hand of the East India Company and their representatives, without the smallest participation of the Nabob: that, in consequence of orders from the Court of Directors, the annual stipend, which was allowed him, was reduced from 31,81,991 rupees, to 16,00,000 rupees.

By what authority did they appoint a guardian? The Company had no natural connection by blood with Mubarick. By what authority did they appoint the Dewan of his household, and allow them large salaries? It could only be done in their political capacity, by that authority which they exercised over him. If the treaty given in evidence was in the nature of a real treaty with a sovereign prince, where there were mutual agreements and considerations, how came this stipend, for so it is called, (a word hardly applicable to an independent sovereign prince) to be reduced to 16,00,000 rupees? By what authority did they erect the courts of law, and exercise the administration of justice, without any communication with him? Had he himself any idea he was a sovereign? Does he complain of the reduction of his stipend, or the infringement of treaties? No: He considers himself, what he really is, absolutely dependent on the Company, and was willing to accept any pittance they would allow him for his maintenance. He claims no right. Does he complain that the administration of justice is taken into the hands of the Company? No: by the treaty, the protection of his subjects is delivered up to the Company; and he well knew, whoever is held up as the ostensible prince, the administration of justice must be in the hands of those who have power to enforce it.

The Governor General, who I suppose had a delicacy to state more than what has been before made public, closes his affidavit with saying, all that he has deposed to he believes to be publicly known, as it is particularly set forth in the Reports of the Committee of the House of Commons. I knew it was there, and therefore was surprised at this application. It is so notorious that every body in the settlement must have known it; when I say every body, I mean with an exception to the gentlemen who apply to the court. The only reason I can give for their applying is, the little time they have been in the country, and the want of knowledge of former transactions of government, and the customs and manners of the people. I wished the Governor General had pointed out the passage to them; for, if he had, it ought, and I have therefore no doubt would, have prevented this application.

The Governor General's affidavit proves the revenues, their collection, the whole administration of justice, both civil and criminal, and even in appointing the officers of his household, to be in the Company. Mr. Lane, Mr. Hurst, and Mr. Vansittart, all members of the late council, depose that the military is so likewise. They swear that the whole military power of the province is, and has been for several years, entirely under the controul of the Company and their representatives. They swear that he performs no acts of sovereignty independent of and without the consent of the representatives of the East India Company. Nothing therefore is left to Mubarick but an empty title. This has been said to be a political question, and that the determination of it against the right of the Vakeel might be productive of quarrels with foreign nations, especially the French. I think it can have no such effect, for whether the territorial acquisitions belong to the crown or the company, if either of them have a right to execute sovereignty here, and chuse so far to postpone their own dignity, as to set up another person, through whom, and in whose name, they will exercise the power, I don't know that any foreign state has any right to complain, nor do I think this determination can affect the legality of the courts established in this province. All that is determined in this case is, that Mubarick ul Dowlah, who has surrendered his power entirely into the hands of the English Company, cannot himself, nor can the East India Company in his name, protect delinquents, subject to the jurisdiction of this court, from being punished by the laws of Great Britain; that the agents of the East India Company cannot, by making him the instrument, do indirectly what they would not do directly. It cannot be a political question of a serious nature in the opinion of the gentlemen making the claim; had it been so, they would not have pressed a decision on it in this very unfavourable case. It is no right claimed by the Nabob; both he and

his Vakeel, as the Vakeel as to himself candidly confessed in his memorial, were wholly ignorant of the rights and privileges to which he was entitled by the laws of Great Britain, as an ambassador, or public minister: if any material consequences follow from it, the gentlemen should have been backward in forcing us to a decision; for we must give such an opinion, whatever may be the consequences, as we think founded in law. They were to judge of the politics. They have thought it right to have it determined. The evidence is before us; we cannot determine contrary to it. We must judge by laws, not by politics. Perhaps this question might have been determined merely on the dates of the letters to the governor general; but as the counsel have made the other a serious question, I should not have thought that I had done my duty if I had not given a full and determinate opinion upon it. I should have been sorry if I had left it doubtful, whether the empty name of a nabob could be thrust between a delinquent and the laws, so as effectually to protect him from the hands of justice. Had this been allowed, I don't know how far it might have been carried; the rights claimed extend not only to the ambassador, but his family and servants. It is proper that the public should be relieved from the anxiety they must necessarily be under from such a doubt. It is proper Mubarick should be informed of our opinion, that he may not make the same attempt in future.

The rights of ambassadors, as we have been treating of them, are founded on *jus gentium* in Europe; it is by no means clear that precisely the same ideas rule in this great peninsula of Hindostan, where the laws, customs, and manners of the nations, that inhabit it, are as dissonant from those of the nations in Europe as the country is far removed from it. We know by history that the character of an ambassador of a certain rank is held sacred here, or perhaps more so than in any part of Europe, but does it follow, though in Europe the rights of ambassadors are given to all public ministers of whatsoever denomination, that it is so in this country? Has there been any proof of it? There is to the contrary. Mr. Hurst, Mr. Lane, and Mr. Vansittart, who has resided long in this country, swear, they never understood that a person residing under the denomination of a Vakeel was a public minister, intitled to the rights of an ambassador; but that they conceive such a person liable to the local jurisdiction of the courts civil and criminal where he resides. What is there to oppose this? In Europe there was a time that these were at some courts denied to agents and residents. As I have been informed that one of the gentlemen of the council has served in the character of a public minister, I will not suppose him not acquainted with the law of nations on the subject.

I do not go so far as to say that Mubarick ul Dowlah might not have a public minister here; but I think the minister, in the highest character which he could send him, cannot have any pretensions to the full rights of an ambassador sent from a sovereign independent prince. The highest light such minister could be received in would be (which is carrying it a great way) that of the provincial or municipal ambassadors sent to Rome in the time of the Roman empire. They were considered rather as Mandatarii or Procuratores, and were amenable to the courts at Rome for offences committed during their ambassy. This country does appear to me in some measure in the nature of a province. I would observe, what has been before observed by several authors, that the distinction of ambassadors from foreign princes and those ministers who were sent from the provinces and towns subject to the empire, clears up that which otherwise in the Roman law seems contrary to the *jus gentium*, as now understood, concerning the rights of ambassadors; whatever is said derogatory to those rights is where they are treating of provincial municipal ministers. Of the rights of those of foreign powers no nation entertained, in general, an higher reverence, or acted with greater delicacy. In the infancy of Rome, when the ambassadors of Tarquin conspired with some of the Roman citizens to restore him, Livy says, l. ii. c. 4. "Proditoribus extemplo in vincula conjectis, de legatis paululum addubitatum est, et quanquam visi sunt commisisse ut hostium loco essent, jus tamen gentium valuit." They acted exactly conformably to the present idea of the law of nations.

I am glad I am reminded of the application for punishment; it would not have escaped me, I was on the point of coming to it: it was demanded in the memorial, in the letter from council, and is again repeated from the counsel at the bar. That is indeed treating this affair with a very high hand. In my opinion, the application is indecent and unjust. Who are the persons to be punished? The prosecutor and those who served the process. Who is the prosecutor? The governor general, the first magistrate in this settlement. The very persons who apply to have him punished very well know no punishment can be inflicted upon him by the court. The calling for it is indecent to the highest degree. A punishment can only be inflicted for a crime; it must be known both to the counsel and his clients, that, except of treason and felony, the governor general and council are exempt from the criminal justice of this court. Those who served the process did it by express command of all the judges: is it decent to apply to have them punished? It is not like taking out a process in a civil suit, which is the voluntary act of the party, under no coercion of any order from a magistrate. Is it just that any one should be punished on this account? The Vakeel says, he was ignorant of the rights now claimed for him when he was bound over. He had no apprehension that he had such rights: could it be supposed that those, who served the summons, and acted under the order of the judges, could be appris-

ed of those rights that Roy Rada Churn himself was ignorant of? On what idea of justice then, can a demand be made to punish innocent men, acting expressly under the order of all the judges, for violating rights which they never heard of, and which in fact do not exist? But, was it a case for punishment, I should be of opinion, that a punishment should be devised similar to that inflicted at Naples on one of the principal officers of an ambassador from an Italian prince; it was the Pope's nuncio. His reverence had been found, by the officers of the police, in a public brothel; they hurried him away to the magistrates; who declared, that the sanctity of his character exempted him from their jurisdiction: the reverend father complained to his reverend excellence, who complained to the viceroy. The viceroy was incensed at the indignity which had been put on so high an officer of the nuncio; and resolved to punish it with all the severity due to so gross an outrage on the law of nations. He condemned the officers of the police to this infamous punishment; that they should be carried through all the markets, streets, and public places in the city, with this scandalous label on their backs: "These men are exposed to shame, because they would not suffer the reverend father, first minister and confident of his reverend excellency, the nuncio of our holy father the Pope, to indulge himself in the innocent recreation of the stews."

The more I consider it, the more I am scandalized at the affidavit made by Roy Rada Churn; I do not so much blame him as the drawer: it is scandalous, it is flagitious, to let him swear to his being a public minister, an idea which is almost impossible to be explained to him; to make him swear to what is not true, as it turns out, that he was a public minister, or Vakeel, for upwards of two years, with the exception only of ten days; those who made that exception for him must have known that he was without that character for a longer time. If I again see an affidavit of this nature, sworn by a native, we will inquire who drew the affidavit, and the court will animadvert most severely upon him: it is not to be endured, that the consciences of the natives, swearing in a foreign language, should be thus ensnared.

I consider this to be an attempt of Mubarick (for I desire it to be understood clearly that I do not suppose any influence exerted over him in this case), to see how far the court would suffer him to interpose himself between criminals and justice; an attempt the more bold, as the party, intended to be screened, was actually under prosecution before the writing the pretended letters of credence.

Mr. Justice *Chambers*. I agree with my lord chief justice in opinion, that Roy Rada Churn is not entitled to exemption from this prosecution, and that the indictment ought not to be quashed; though, in delivering the reasons of my opinion, I may not, perhaps, expressly and entirely assent to all the positions from which his lordship has deduced that conclusion.

In considering this subject, I shall nearly follow the method observed by the advocate who made this motion on the part of the India Company; and shall shortly examine, 1st, The right of the India Company to receive ambassadors; 2dly, The privileges of ambassadors so received; and, 3rdly, Whether, in fact, Roy Rada Churn is now, and was at the time when the offence was committed, actually invested with the character of an ambassador, by having been duly appointed and duly received.

That the East India Company has, in India, a right to make war and peace, will not, I believe, be denied; and I agree with my lord chief justice, that the right of making war and peace is the chief ground of sending and receiving ambassadors. That law, by which the person of an ambassador is secured from violation, is universally allowed, because universal reason has demonstrated, that of war there could be no end, unless some man might safely propound the terms of peace; and that a cessation of hostilities, produced by mere lassitude, could not long continue, unless an ambassador might safely offer conditions for its continuance. The power, therefore, of receiving ambassadors, does not appear to me to be such an incident to the right of making war and peace, as may or may not accompany its subject: it seems rather to be an essential property, without which the subject cannot exist. Without such power, it would not be a right of making war and peace, but a right of making war without possibility of end; a right, which every sound moralist will allow, that man can neither possess nor confer.

Many instances might be given of viceroys and generals, who, by virtue of a delegated power to make war, have sent and received ambassadors. In the present case, as the power of making war, delegated by the crown to the East India Company, is comprized to the East Indies, their reception of ambassadors must, I conceive, have the same limits; and an ambassador to the East India Company may be received in this settlement by the Company's representatives, the governor and council.

2. The privileges and exemptions of ambassadors so received must, I conceive, be the same, which they might lawfully claim if they had been received in England by the king himself. The East India Company can neither wage war, nor receive an ambassador, by any intrinsic authority of its own; it does both by the authority of the king of Great Britain, and under sanction of his sovereignty. The minister, whose public character is acknowledged by virtue of this delegated power, may be considered as acknowledged by the king himself, and may therefore expect from the king's court the immunities due to that character.

I have already said, that the first great immunity of an ambassador, the security of his life, depends on natural law universally observed; and it may not be improper to add, that it is observed by Mahometan princes, even towards Christian enemies, not merely by imitation, but as a religious and moral duty 'quæ 'sine peccato committi, nequeunt,' I say this on the credit of Relandus, in his Treatise, 'de 'jure militari Mohammedanorum contra Chris-'tianos bellum gerentium;' but I mention it rather as matter of curiosity, than of importance to the question before us; because he says nothing of other privileges that pass beyond personal security; and also, because I take it to be clear, that in England the ambassador of the most inconsiderable Mahometan state is entitled to the same exemption from civil and criminal jurisdiction, which is allowed to the minister of the most powerful prince in Christendom.

3. It is of more importance, in the present case, to enquire what the facts are on which Roy Rada Churn founds his claim to be exempt from prosecution. He states himself "to have been for above two years (- - - -) Vakeel, or public minister, of Mubarick ul Dowlah, Nabob of Bengal, &c. and charged with the conducting and transacting his affairs and concerns with the honourable East India Company and others, at the Presidency of Fort William." This is by no means a clear and sufficient description of an ambassador; and it is certain, that our ideas of an ambassador are not necessarily comprized in the term 'Vakeel,' which generally means no more than agent, and is frequently applied to very low people, employed by private men in the management of their affairs. It is true, that if he be really a public messenger sent by a sovereign, with authority to represent his person to a foreign power, he must be intitled to the legal privileges and exemptions of an ambassador, by whatsoever title or denomination he is distinguished. But I know that the term (- - - - -) Elchey is as much appropriated to the office among the Mahometans, as ambassador is in Europe; and it has not been proved, that a public minister, either of the first or second order, is ever called a Vakeel: neither, if proved, would it in any degree avail Roy Rada Churn, who appears, on examination, not to have been in fact employed by Mubarick ul Dowlah, either at the time when the offence with which he is charged is sworn to have been committed, or at the time when the enquiry into it was set on foot. The Nabob says, in one of his letters now given in evidence, that he had dismissed Roy Rada Churn from the 1st of Suffer, that is, from the 2nd of April last; and the subsequent letter replacing him was not received by the governor general or council till the 30th of May; during which interval both these events happened: this, in my opinion, entirely puts an end to his claim of exemption; for surely no one will say, that his second appointment as Vakeel ought to put a stop to a prosecution already commenced, for an offence committed while he resided here as a private man.

In the last century, Wicquefort, a native of Amsterdam, who had an employment with a salary under the States General, was appointed by the duke of Lunenbourg to be his resident at the Hague: while he remained there in that capacity, he was tried by the court of Holland, for revealing, by letter, some secrets of the republic, which it was his duty to have concealed, and was condemned to perpetual imprisonment and forfeiture of goods. Of this treatment, as of a violation of the law of nations, he complains in a work which he published soon after. While those, who defended the decision of the Dutch court of justice, insisted, that if a native, or settled inhabitant of any country, is appointed by a foreign prince to be his ambassador in that country, he continues subject to the same jurisdiction as before; this has been, among the writers of natural law, a disputed question ever since; and, to avoid the necessity of determining it for the future, both the states of Holland and the French court have resolved, that they will not hereafter receive a subject of their own as an ambassador. But had Wicquefort's offence been committed, and the prosecution against him been commenced, before the duke of Lunenbourg made him his minister, I believe no one would have dreamed that this new character could stop the course of justice, and exempt him from punishment.

Being, for this reason, clearly of opinion, that the indictment against Roy Rada Churn ought not to be quashed: I think it unnecessary to determine, whether the Nabob Mubarick ul Dowlah is a sovereign independent prince, who can give to his messenger the privileges and immunities of an ambassador. Were there no objection to his sovereignty and independence but his nominal subordination to the Mogul, I should not perhaps hesitate to say, that if he and his ancestors, Subahdars of Bengal, have exercised the power of making peace and war, they have as good a right to receive ambassadors as the princes and free towns in Germany, which owe a nominal obedience to the emperor and laws of the empire; but the difficulty which I feel is greater in itself, and more perplexing on account of its consequences: on the one hand, it appears by a very solemn treaty, very lately executed, the English India Company have guaranteed to the Nabob the possession of the three provinces of Bengal, Bahar, and Orissa, with the title of Subahdar: on the other hand, it is manifest, partly from the depositions of the governor general and other gentlemen, that he has no military force, no revenue except a pension from the Company, and no share in the distribution of justice throughout the country, except a nominal superintendence over the criminal courts.

In this state of things (the cause before me not calling for such determination) I should not

think myself obliged, whatever might be my private opinion, unnecessarily to decide, that the king my master is not sovereign of these provinces; and to decide that he is, I would wish likewise to avoid, because the parliament seems cautiously to have avoided it, by founding the jurisdiction of this court, over those who do not reside in Calcutta or the inferior factories, on personal not on local subjection; and because such a decision might engage us in quarrels with the French and other European nations who have possessions in Bengal.

Mr. Justice *Lemaistre.* I desire to testify my acquiescence to every part of my lord chief justice's learned and ingenious argument: and desire to be understood as giving no precise opinion as to the question, whether or no the East India Company can or cannot send and receive ambassadors, or public ministers, upon whom the rights of ambassadors or public ministers (as acknowledged in Europe) will attach.

Though I am very far from acceding to my brother Chambers's opinion, that such right actually does exist in the East India Company, as a necessary incident to that limited right of making peace and war, which they have, from his majesty's charter, for the protection of their settlements; I think it a question of great consequence, which will admit of a considerable degree of doubt, and ought not to be determined without argument, and upon mature deliberation.

Every definition of an ambassador, or public minister, that I have met with in the book, is a person sent from one sovereign to another, with authority, by letters of credence, to treat upon affairs of state. I cannot admit any right of sovereignty in the East India Company; in every charter granted to them by the crown, there is an express reservation of sovereignty to the king of Great Britain, his heirs and successors; and I am inclined to think, by some of the late charters granted to the East India Company, that their rights under former charters have been very strictly construed, and that no more *jura regalia* have been allowed them, beyond what expressly appears upon the face of such grant.

When the East India Company had taken plunder, it was doubted if that plunder could be vested in them, without the king's grant. A charter was therefore applied for, and granted for that purpose.

When they were inclinable to conclude a treaty of peace, they had considerable doubts how far they could give up any forts or places, the sovereignty of which was vested in the crown. Application was made for a charter to this purpose; which they likewise obtained.

Surely the having the property in plunder, and the right of surrendering forts and places, taken by their forces, are as necessary incidents to a right of making peace and war, as the receiving ambassadors; and if the king's law officers doubted as to these points, and did not consider them as incidental to the power granted by former charters, I think the present matter full as doubtful and deserving of consideration.

With regard to this phantom, this man of straw, Mubarick ul Dowlah: it is an insult to the understanding of the Court, to have made the question of his sovereignty.

But it came from the Governor General and Council: I have too much respect for that body, to treat it ludicrously; and I confess I consider it seriously.

Mr. Justice *Hyde.* I am very happy to find I agree in opinion with my three brethren, that Roy Rada Churn is not intitled to the privilege claimed for him by the Governor General and Council, not claimed by him.

My brother Chambers seems to differ, but does not really differ, from my lord chief justice; for no opinion was declared by his lordship on the right of the Company to receive ambassadors.

My brother Chambers has declared his opinion, that the Company have such a right. I desire to be understood to give no opinion on the subject, whether they can or cannot receive ambassadors, who will be entitled to all the privileges annexed to that character. It is unnecessary to decide the question in this case, because the situation of the person sending is sufficient for the decision: but whenever it does arise, it will be a question of great consequence, and will deserve much consideration; the safety of this town may depend on it: if it shall be understood that public ministers, with the vast retinue which the custom of this country requires to attend them, are exempt from any legal restraint, it may be attended with great inconvenience; even the possession of the town may be hazarded.

The substantial reason for the privileges of ambassadors is, that persons may with safety come to treat of peace or war; but it does not appear to me necessary for that purpose, that they should be exempt from all legal restraint. When the question comes before us, it may be necessary to be informed, and to consider, what rights are understood in this country in Hindostan, to be conferred on ambassadors; and whether the customs of this country do not make a distinction in the degree of the person sent, giving to one styled elchee, privileges which are not given to a vakeel.

By the treaty which has been read, it appears, Mubarick ul Dowlah deprives himself of the great ensigns of sovereignty, the right to protect his own subjects: he declares that shall be done by the Company.

The act of parliament does not consider him as a sovereign prince; the jurisdiction of this court extends over all his dominions, to such persons who are servants of the Company or of any British subject, and to every one of his subjects who chooses to submit himself to our jurisdiction and exempt himself from that of his courts, by making a control above

500 rupees in value, and declaring any dispute on it shall be determined in this court only; so that, if we allowed this claim, his vakeel would be the only person in his dominions, to whom he could extend the arm of protection.

Roy Rada Churn has not produced his instructions, which ought to have been done, to shew he came on public business, such as is the proper subject of treaty between sovereign powers; for what appears, if this were a proper place for it, his business as a vakeel might be to buy horses.

On the whole, therefore, I am of opinion, the defendant is not intitled to the privilege claimed for him, because I think the situation of the person sending him is not such as will enable him to confer the character of ambassador.

July 6th, 1775.

Present all the Judges.

The Chief Justice communicated to the Court, the following Letter, which he had received from the Governor General and Council, inclosing a copy of a Letter from the Nabob Mubarick ul Dowlah.

"To the Hon. Sir Elijah Impey, knight, Robert Chambers, Stephen Cæsar Lemaistre, John Hyde, Esqrs. Judges of the Supreme Court of Judicature.

"Honourable Sirs; We beg leave to transmit, for your information, the translation of a Letter, which we have just received from the Nabob Mubarick ul Dowlah; from which it will appear that he looks upon himself as Soubah of these provinces, and Roy Rada Churn to be his vakeel; we request that you will be pleased to inform us in what light we are to consider those declarations, which we understand have been made from the bench, publicly denying the sovereignty of the Nabob, that we may know how to act when any case occurs with respect to the signing of warrants for the execution of criminals; or what answer we must give to foreign companies, and particularly the French nation, who, the better to assert their claims of independency, maintain with us the same argument which we understood has been used by sir Elijah Impey, that there is no double government in this country, and consequently that the proceedings of the Courts of Dewanny against their subjects, who reside without those places which have been assigned to them by the treaty of Paris, are direct attacks of the English nation against that of France.

"If it be true, that the sovereignty of Mubarick ul Dowla be not admitted by the supreme court, we are persuaded that the chief justice and the other his majesty's judges will see how important it is, not only to the tranquillity of this country, but likewise to the preservation of the peace which subsists between the king and the European powers who are settled in this country, that we should not be left in doubt as to the right to whom the sovereignty belongs. The late act of parliament, as we understand, only subjects such of the natives to the jurisdiction of the British laws, as are, or were, employed in the service of the Company, or of British subjects, at the time when the suit, action, or complaint, against them arose; from whence we are led to conclude, that though the king's sovereignty were admitted to be extended over those who are so particularly described, yet it does not follow, according to our idea, that it includes the rest of the natives of Bengal, Bahar, and Orissa.

"We are, honourable Sirs, your most obedient, humble servants, (Signed)

"J. Clavering.
"Geo. Monson.
"Ph. Francis."

Fort William, July 3, 1775.

The above Letter, being altered by the Clerk of the Crown into the form of a Petition, was filed.

Copy of a Letter from Mubarick ul Dowlah, to the Governor General and Council.

"Roy Rada Churn has for these three years been my servant, and is now in Calcutta, in the capacity of my Vakeel: I am now acquainted by him, that somebody has complained against him to the Court. As the said Roy is now actually employed in the affairs with which he is entrusted by me, and for these three years hath been in no other service but mine; I beg leave to represent to you, that, if complaints against my Vakeel are to be admitted in the Court, it will reflect the greatest disgrace and indignity upon me. You gentlemen, I hope, will not approve of such a proceeding; but speak in such terms to the gentlemen of the Court, as will prevent my affairs being impeded or disgraced; in doing this you will confer the greatest favour upon me."

(A true copy from the translation.)

Wm. Bruene, Sub-Sec.

The *Chief Justice* delivered the sentiments of the Court, in the following words:

It is with the deepest concern we find the Council still persist, notwithstanding the frequent declarations and unanimous opinion of the Court (for it is a mistake if it is thought my brother Chambers was of a different opinion) to address the Court by letter.

We declared our apprehensions that it would, if the opinion of the Court and that of the Council should not agree, lead to altercations; the least ill consequence of which would be, the lowering both the Court and the Council in the eyes of the public, and would be prejudicial to the affairs of the Company. We have done all in our power to avoid it; and, assailed as we have been both in and out of court, we will not be provoked to depart from that sobriety of sentiment, which is peculiarly necessary for our stations.

I shall ever be for furnishing the East India Company with every right and every assistance, judicially or extra-judicially, which I think I legally may, be the application ever so improper, or the conduct of their servants so exceptionable.

We have asserted the impropriety of this mode of application; they give no attention to our representations, and pay no respect to our unanimous opinions. There is no power here to decide between us; they still persist: nothing but absolute outrage will provoke us to appeal to his majesty, or their honourable employers: we will not increase the embarrassment his majesty's ministers must labour under on account of India affairs, nor add to the distress of the East India Company: the proceedings will be sent to both: our conduct shall speak for itself, without a comment: in the mean time, we must steer between creating confusion and losing our dignity.

The letter from the council encloses one of a most extraordinary nature from the Nabob Muberick: his situation is such, that there is no man, either in England or in India, will believe he would be induced to write such a letter, was it not either dictated to him by the agents of those who rule this settlement, or unless he was perfectly convinced it would be agreeable to, and coincide with, their sentiments. We always have and always shall consider a letter of business from that Nabob, the same as a letter from the governor general and council.

He says in that letter, that, if complaints against his Vakeel are to be admitted in the Court, it will reflect the greatest disgrace and indignity on him.

There never was such an idea entered into the head of an Indian Nabob with respect to his Vakeel. The Vakeel, in his memorial, has no such idea; he claims only as a new right given to him by the laws of England, of which right he was wholly ignorant.

That is not all: I have an affidavit in my hand, made by Roy Rada Churn for a different purpose. He says, "I never heard of the word 'public minister:' I understand vakeel; but what is the meaning of public minister I know not; vakeel is one thing, elchee is another. I never before imagined I should have been exempted from punishment because I was a vakeel. People every where respect the vakeel of the Nabob. I never before heard, that if the vakeel of the Nabob, or even of the King himself, should commit a crime, he would be exempted from the punishment established for such a crime. Perhaps, if the Nabob or King was to write a letter, the vakeel might be forgiven."

I will order a copy of this affidavit to be delivered, with the minutes of the Court, as it will give great light into this matter.

Can any one after this believe, that the Nabob himself really entertained the sentiments which he adopts in the letter?

If this was the opinion of Roy Rada Churn, it would have been candid in the counsel for the Company to have laid it before the Court.

But the close of the letter is really alarming; it is addressed to the governor general and council: speaking of complaints being received in the court; he says, "You, gentlemen, I hope, will not approve of such a proceeding, but speak in such terms to the gentlemen of the Court, as will prevent my affairs from being impeded or disgraced." Did the Nabob ever write in this style to the governor and council before? The letter is transmitted to us after our opinions have been given. If it is the real opinion of the Nabob, that we can be spoke to in such terms as to influence our judgments, from whence did he learn it? We have a right to demand of the council, that, in answer to that letter, they do acquaint him, it is highly derogatory both to the honour of the council and the Court, to entertain any idea that the council would speak in the terms he desires; and if they did, that the opinion of this court could be in the least influenced by them. We think it necessary, on this occasion to assert, if a contrary idea should any where prevail, that there doth not reside in the governor general and council any authority whatsoever, to correct or control any acts of the judges, either in or out of the court, be those acts ever so erroneous: and that no supposed necessity whatsoever can authorize any check or control over those acts. The law of necessity is the law of tyrants: if the governor general and council should assert such a right, as they make themselves judges of the necessity, they, and not the king's justices, would administer the law in this country.

We could have hoped that the governor general and council, instead of transmitting this insulting letter to the Court, desiring such illegal interposition, would have acquainted the Nabob how highly criminal it would be in them to comply with his solicitations.

I cannot help observing a small circumstance. I have, since the claim made by the council for Roy Rada Churn, received two letters from the Nabob directed to myself, and one original letter from him, directed to the governor general and council, inclosed in a letter from them to the court. Though improper, we took no notice of that letter. I had before received letters from him; they had the usual alcob, the same that is given to the first in council. The letters to me since the dispute, to give him a higher air of consequence, make the alcob much inferior. The same artifice is made use of in that sent to the governor general and council. The alcob sent to the governor general and council is infinitely inferior to that formerly sent to the first in council and myself. They best know whether at any other period they would have admitted a letter from him with that alcob. They best know whether the Company in future is to be treated with the same inferiority.

This observation will not be so striking to those who are not conversant with the customs

and ideas of the natives, and do not know how tenacious they are of that address.

If our opinions are carefully examined, we think no doubt can arise as to the question of signing warrants for the execution of criminals. But, lest they may have taken their idea of our judgment from loose notes and partial representations, the Judges have written their opinions, which were delivered on the late question, and will transmit them to the governor general and council, with the present opinion of the Court. Mr. Justice Chambers, having taken no notes of what he said, has delivered his opinion from his recollection and such notes as the Chief Justice was able to furnish him with. The opinion of the rest of the Court is, as near as may, in the very words they were delivered. But, lest any doubt after that should remain, and to prevent any possible occasion of impeding or obstructing the justice of the country, we explicitly declare, that there is nothing, in the opinion of the Judges, which ought to prevent the warrants being signed as usual by Naib Nazem, who is paid out of the Khalsa treasury. Nothing is decided by that judgment, but that neither the East India Company nor their servants, both being subject to the laws of Great Britain, can, by interposing the name of the Nabob, screen any criminal from the justice of this court.

We have expressly said, that our opinions did not affect the country courts established in this province.

How far Mubarick is a sovereign, with respect to the Company, in the opinion of these gentlemen, is apparent, by putting the question, how they are to act with respect to the signing of warrants for the execution of criminals. It is plain, we do not differ in opinion upon that question. Nobody, either in England or in India, will dispute to the chief justice the making use of arguments because they have been used by the French; nor can it be thought that arguments are weaker because they have occurred to others. What the chief justice said, was not simply his opinion; if it was not in every circumstance the opinion of the whole Court, it was that of the majority of the bench had not he been there. But, in fact, neither the chief justice nor any of the justices made use of the arguments attributed to them. They never asserted there was any double government in this country. All that a negative is put upon is, the illegal exertion of the powers of a double government to defeat the king's laws. They were very far from drawing the consequence imputed to them, namely, that the proceedings of the courts of Dewanny, against the French who reside without those places that are assigned to them by the Treaty of Paris, are direct attacks of the English nation against that of France. We never thought of the Treaty of Paris. We think the position itself, as stated by the French, not true; and are astonished to see it asserted as our opinion. We have affirmed the very contrary. We have frequently desired, to prevent partial and malicious representations, that the Company would employ a person able to take down the opinions of the Court correctly.

I can foresee no political consequences from our decision; but be it remembered with what reluctance we entered into the question. We flung out what it was necessary for the council to maintain, and told them the consequences of not maintaining it. We did it to save the honour of government. We did it that they might not persist in a claim which we feared it would be impossible for them to support. They were judges of their own politics. They urged us to a decision we wished to avoid. We were obliged to judge, from the evidence before us, of the legality of the claim, not of the political consequences. If, which we do not believe, any ill consequences follow to the state, they who unnecessarily urged us to a decision, not we who are bound to decide according to law, are answerable for them. Did they expect that we, who must administer justice according to our oaths, should, contrary to evidence, determine that, which, though within their own knowledge, they would not take upon themselves to swear to? We do not know a worse character than a political judge; we do not know a more dangerous one. Can any one believe this strong struggle with the Court is simply to protect Roy Rada Churn? Is he *dignus vindice?* It is clearly to serve other purposes, which for fear of prejudicing the ensuing trial, I will not mention. But the attempt is on mistaken principles. The rulers of a state should be very reserved in bringing on political questions of real importance, except they are sure the law on the subject is with them. They must not expect complaisance from judges. We must execute stern justice. Were judges to look to political consequences, they must ever be dictated to by those that hold the powers of the state. It was necessary to determine that question in this case. Mr. Justice Chambers avoided it, and hinted something like what is advanced now by the council; but the other judges could not rest their opinion simply on the dates of the credentials. As Mr. Justice Chambers was of opinion that an ambassador, a subject of the state in which he is employed, is not amenable to the courts of justice where he resides; Rada Churn, being a vakeel, and so accepted by the East India Company (if that should give him the right of an ambassador), on those principles ought not be amenable to this court, though the offence was committed when he was not an ambassador. The chief justice, though of a different opinion, advanced what he said on that head with a degree of diffidence; and only gave his opinion on which side the weight of authorities lay. The other justices likewise thought the same.

As to the question put concerning the right of the sovereignty of this country; it seems to us as if it was meant to draw us into a dilemma; but we were never less embarrassed as to

the state of Mubarick ul Dowlah; we have before declared, it is not altered by this decision. As to the question between the Crown and the Company, it is of a very delicate nature: both the Crown and the Company have been anxious to avoid bringing it to a decision: we therefore are much surprized that the servants of the Company should press an extrajudicial opinion upon it; nor, if given, do we conceive it would operate upon their conduct. We should be much concerned if they brought a case before us which would make it necessary for us to determine it. We would avoid it if we could. If it became absolutely necessary, we would not retract from giving our opinion; but we would not give it until we had heard every thing that could be said on either side, nor until we had obtained all the lights and information that could be obtained on the subject. But we must decline precipitately and wantonly giving an extra-judicial opinion of so much consequence, especially as such high offence was taken, that the Court had tried an indictment, in which a robbery which was committed here was charged to be committed on the king's highway; it being erroneously understood that the Court thereby had taken upon itself to determine the very question now proposed to the Court, though it had been, and must have been, the form of the indictment when the president and council were justices of Oyer and Terminer and Gaol Delivery. We will not enter into an argument on a matter of law with the gentlemen; much less break into their province, to decide upon matters of politics. We should have declined taking any notice of this letter, had we not feared that occasion might have been taken from our silence to put a stop to the criminal justice in the provinces.

We take this opportunity to declare, that the establishment of this Court hath made no alteration in respect to the administration of criminal justice, except only in this town and the factories subordinate to this settlement. We declare it, that, if there is a stoppage of justice, it may be clear that it is not occasioned by this Court.

My brother Chambers has pointed out to me a passage in Roy Rada Churn's affidavit, which I had neglected to make any observation upon.

He says, 'He thinks he is obliged to obey 'the orders of the council, and that they may 'summon him. That, in fact, he was called 'to appear before the council when those gen-'tlemen, who make the claim for him, were 'present.' He said, in his instructions for the affidavit, 'It was not left to my pleasure whe-'ther I would come or not; it was said, Come.'

What then was the sense of these gentlemen, as to his having the rights of an ambassador? Is he not to be considered merely to elude the justice of the Court?

The above, having been signed by all the Judges, was sent, together with their former Opinions and the following Affidavit, to the Council.

Translation of the AFFIDAVIT made by ROY RADA CHURN, before Sir Elijah Impey, knight, the 4th day of July 1775.

"I knew nothing with respect to the rights of a Vakeel, or Elchee, till Mr. Farrer asked me what was my employment; to which I answered, that I was a Vakeel of the Nabob. When Mr. Farrer and Mr. Jarret were together, I mentioned to them that I had been the Nabob's Vakeel for near three years; and they caused an arzee to be written, which I signed. I imagine that it was necessary for me to obey any order issued to me by the council, and that I must attend upon them in conformity to any summons they may send to me. I was one day called to appear before the council, or committee; and attended accordingly. The governor, the general, colonel Monson, and Mr. Francis, were present; Comaul O Deen had before that presented some papers to Mr. Fowke: the gentlemen of the council asked me, if he had given the papers to Mr. Fowke to keep, or with the intention that they might be presented to the council.

"Mr. Farrer and Mr. Jarret caused a paper to be written out in the English language, to the truth of the contents of which I swore before Mr. Hyde; but they never explained the words 'public minister' to me, they only mentioned the word 'Vakeel.' I know nothing with respect to my having been dismissed from the service of the Nabob for ten days. The Nabob never wrote any thing of it to me: perhaps Mr. Farrer and Mr. Jarret may have heard it from report. Mr. Farrer said to me, 'You was not in the Nabob's service for ten days;' and said nothing more. He probably heard this from others. I never heard any thing of it from any one. Mr. Farrer never told me that I had been dismissed from the beginning of the month of Suffer. One day I went to the house of colonel Monson, who said, Perhaps you was dismissed for some days from the service of the Nabob: do you know any thing of it? I answered, I know nothing of it. This conversation passed after I had made the affidavit before Mr. Hyde. I never heard the words 'public minister,' I understand vakeel; but what is the meaning of public minister, I do not know. Vakeel is one thing, and Elchee is another. I never before imagined I should have been exempted from punishment because I was a vakeel. People every where respect the Vakeel of the Nabob. I never before heard that if the Vakeel of the Nabob, or even of the King himself, should commit a crime, he would be exempted from the punishment established for such crime. Perhaps, if the Nabob or King was to write a letter, the vakeel might be forgiven.

"Mr. Farrer said to me, I heard that you were dismissed from the Nabob's service for ten days: this was after I had made the affidavit: I never before had heard a word of it.

(Signed) "RADA CHURN."

THE TRIAL.

Indictment.

"Town of Calcutta and Factory of Fort William in Bengal, } To wit. The Jurors for our lord the king, upon their oath, present, that Joseph Fowke of Calcutta, gentleman, Francis Fowke of the same place, gentleman, son of the said Joseph Fowke, Maha Rajah Nundocomar, Bahader, late of the same place inhabitant, and Roy Rada Churn also of the same place inhabitant, all of whom are subject to the jurisdiction of the Supreme Court of Judicature at Fort William in Bengal, being persons of evil name and fame, and dishonest reputation, and wickedly devising and intending Warren Hastings, esquire, governor general of the presidency of Fort William, in Bengal aforesaid, not only of his good name, credit, and reputation to deprive, and to bring him into the ill-opinion, hatred, and contempt, of all his majesty's subjects in the said province of Bengal, and of the native inhabitants thereof; and by that means, as much as in them lay, to disturb the good government of the said country, and the management of the commercial concerns of the honourable East India Company therein, which are so eminently intrusted to the said Warren Hastings, but also to bring upon the said Warren Hastings the ill opinion and hatred of the king himself, and of the two houses of the parliament of Great Britain, and of the proprietors and directors of the said East India Company, did, on the 19th day of April, in the 15th year of the reign of our sovereign lord George the 3rd, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, in Calcutta aforesaid, in Bengal aforesaid, conspire, combine, and agree among themselves, falsely to charge and accuse the said Warren Hastings of divers enormous and scandalous offences; particularly, that he the said Warren Hastings had then lately, by divers sinister and unlawful means, procured a certain false accusation against the said Joseph Fowke, in the name of one Cummaul ul Deen Allee Cawn, to be made and wrote, which said false accusation he the said Warren Hastings had himself presented to the governor general and council at Fort William aforesaid, knowing it to be false; and also that he the said Warren Hastings had heretofore, corruptly and collusively, received several sums of money from the said Cummaul ul Deen Allee Cawn, in the nature of bribes, for services rendered or to be rendered to him the said Cummaul ul Deen Allee Cawn; by that means representing him the said Warren Hastings as guilty of wilful bribery and corruption in his office and duty. And the jurors aforesaid, on their oath aforesaid, do further present, that the said Joseph Fowke, Francis Fowke, Maha Rajah Nundocomar, and Roy Rada Churn, on the said 19th day of April, in the year aforesaid, at Calcutta aforesaid, in Bengal aforesaid, according to the said conspiracy, combination, and agreement among themselves as aforesaid, did, falsely and wickedly, for the evil purposes aforesaid, frame and make, and caused to be framed and made, a certain paper writing in the Persian language; purporting, that he the said Warren Hastings had then lately, by divers sinister and unlawful means, procured such false accusation as aforesaid, in the name of the said Cummaul ul Deen Allee Cawn, to be made and wrote against the said Joseph Fowke, and had presented the same to the said governor general and council at Fort William aforesaid, knowing it to be false; thereby falsely and scandalously representing the said Warren Hastings as guilty of the said offence of procuring the said Joseph Fowke to be falsely accused. And the jurors aforesaid, on their oath aforesaid, do further present, that the said Joseph Fowke, Francis Fowke, Maha Rajah Nundocomar, and Roy Rada Churn, afterwards, to wit, on the said 19th day of April, in the year aforesaid, at Calcutta aforesaid, in Bengal aforesaid, according to the conspiracy, combination, and agreement aforesaid, between them had as aforesaid, did, for the purposes aforesaid, by certain sinister and unlawful means, to wit, by intreaties, promises, and threats, procure the said Cummaul ul Deen Ally Cawn to affix his seal, containing the impression of his name, to the said paper writing, so framed and made as aforesaid; and that the said Joseph Fowke, in pursuance of and according to the conspiracy, combination, and agreement, between him and the said Francis Fowke, Maha Rajah Nundocomar, and Roy Radachurn, so as aforesaid had, afterwards, to wit, on the said 19th day of April, in the year aforesaid, at Calcutta aforesaid, in Bengal aforesaid, did, against the will and consent of the said Cummaul ul Deen Allee Cawn, and notwithstanding the express declaration of him the said Cummaul ul Deen Allee Cawn, that the said paper writing had been forcibly and illegally obtained, and that the contents thereof were false, take and carry away the said paper writing, and present the same to the governor general and council at Fort William aforesaid, or to some or one of the members thereof, as an arzee or petition of him the said Cummaul ul Deen Allee Cawn to the said governor general and council. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Joseph Fowke, Francis Fowke, Maha Rajah Nundocomar, and Roy Rada Churn, afterwards, to wit, on the said 19th day of April, in the year aforesaid, at Calcutta aforesaid, in Bengal aforesaid, according to the conspiracy, combination, and agreement aforesaid, between them as aforesaid had, did, for evil purposes aforesaid, unlawfully, wickedly, and unjustly, frame and make, and caused to be framed and made, a certain paper writing in the Persian language; purporting, that the said Warren Hastings and others had, indirectly and collusively, received from the said Cummaul ul Deen Allee Cawn, by way of bribes for services

Conspiracy, and on the Arzee.

rendered or to be rendered to him, sundry sums of money; to wit, the said Warren Hastings, esquire, the sum of 15,000 rupees, Richard Barwell, esquire, 45,000 rupees, and to Heshyar Jung, thereby meaning George Vansittart, esquire, 12,000 rupees; and that the said Joseph Fowke, in pursuance of and according to the conspiracy, combination and agreement, between him and the said Francis Fowke, Maha Rajah Nundocomar, and Roy Rada Churn, so as aforesaid had, afterwards, to wit, on the said 19th day of April, in the year aforesaid, at Calcutta aforesaid, in Bengal aforesaid, did, by divers sinister and unlawful means, to wit, by force, threats and menaces, procure the said Cummaul ul Deen Allee Cawn to write on the said paper-writing certain words, purporting that he acknowledged such sums to have been paid by him, notwithstanding the express declaration at the same time of the said Cummaul ul Deen Allee Cawn, that the facts thereby pretended to be acknowledged were false; and notwithstanding in truth and in fact the said Warren Hastings has not received such several sums of money, or any part thereof, nor is guilty of all or any of the charges or accusations so made against him as aforesaid, to the great damage of him the said Warren Hastings, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity. And the jurors of our said lord the king further, upon their oath, present, that the said Joseph Fowke, Francis Fowke, Maha Rajah Nundocomar, Bahader, and Roy Rada Churn, all of whom are subject to the jurisdiction of the said Supreme Court of Judicature at Fort William in Bengal aforesaid, being persons of evil name and fame, and dishonest reputation, and wickedly devising and intending Warren Hastings, esquire, governor general of the presidency of Fort William in Bengal, not only of his good name, credit, and reputation to deprive, and to bring him into the ill-opinion, hatred and contempt of all his majesty's subjects in the said province of Bengal, and of the inhabitants thereof; and by that means, as much as in them lay, to disturb the good government of the said country, and the management of the affairs of the honourable East India Company there, which are so eminently entrusted to the said Warren Hastings, but also to bring upon the said Warren Hastings the ill-opinion and hatred of the King himself, and of the two Houses of the Parliament of Great-Britain, and the proprietors and directors of the said East India Company, did, on the 19th day of April, in the 15th year of the reign of our sovereign lord George the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at Calcutta aforesaid, in Bengal aforesaid, conspire, combine, and agree among themselves, falsely to charge and accuse the said Warren Hastings of divers enormous and scandalous offences; particularly, that he the said Warren Hastings had then lately, by divers sinister and unlawful means, procured a certain false accusation against the said Joseph Fowke, in the name of one Cummaul ul Deen Allee Cawn, to be made and wrote; which said false accusation he the said Warren Hastings had himself presented to the said governor general and council at Fort William aforesaid, knowing it to be false. And the jurors aforesaid, on their oath aforesaid, do further present, that the said J. Fowke, F. Fowke, Maha Rajah Nundocomar, and Roy Rada Churn, on the said 19th day of April, in the year aforesaid, at Calcutta aforesaid, in Bengal aforesaid, according to the said conspiracy, combination and agreement among themselves as aforesaid had, did falsely and wickedly, for the evil purposes aforesaid, frame and make, and caused to be framed and made, a certain paper writing in the Persian language; purporting, that he the said Warren Hastings had then lately, by divers sinister and unlawful means, procured such false accusation as aforesaid, in the name of the said Cummaul ul Deen Allee Cawn, to be made and wrote against the said Joseph Fowke, and had presented the same to the said governor general and council at Fort William aforesaid, knowing it to be false. And the jurors aforesaid, on their oath aforesaid, do further present, that the said Joseph Fowke, Francis Fowke, Maha Rajah Nundocomar, and Roy Rada Churn, afterwards, to wit, on the said 19th day of April, in the year aforesaid, at Calcutta aforesaid, in Bengal aforesaid, according to the conspiracy, combination and agreement aforesaid, did, for the purposes aforesaid, by certain sinister and unlawful means, to wit, by entreaties, promises and threats, procure the said Cummaul ul Deen Allee Cawn to affix his seal, containing the impression of his name, to the said paper writing, so framed and made as aforesaid; and the said Joseph Fowke, in pursuance of and according to the conspiracy, combination and agreement, between him and the said Francis Fowke, Maha Rajah Nundocomar, Bahader, and Roy Rada Churn, so as aforesaid had, afterwards, to wit, on the said 19th day of April, in the year aforesaid, at Calcutta aforesaid, in Bengal aforesaid, did, against the will and consent of the said Cummaul ul Deen Allee Cawn, and notwithstanding the express declaration of him the said Cummaul ul Deen Allee Cawn, that the said paper writing had been forcibly and illegally obtained, and that the contents thereof were false, take and carry away the said paper writing, and present the same to the said governor general and council at Fort William aforesaid, or some or one of the members thereof, as an arzee or petition of him the said Cummaul ul Deen Allee Cawn, to the said governor general and council; they the said Joseph Fowke, Francis Fowke, Maha Rajah Nundocomar, and Roy Rada Churn, thus endeavouring to represent the said Warren Hastings as having procured the said Joseph Fowke to be falsely accused; whereas, in truth and in fact, the said Warren Hastings is not guilty of all or any of the

charges or accusations so made against him as aforesaid; to the great damage of him the said Warren Hastings, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.

Signed, JAS. PRITCHARD,
Cl. of the Crown.
June 19, 1775. W. M. BECKWITH,
Clerk of Indictments.

Comaul O Deen Cawn examined.

Are you acquainted with Maha Rajah Nundocomar?—Yes.

Were you so in February last?—Why should I not know him? I have known him for thirty years.

Did you ever apply to him to borrow money?—Yes.

When the last time?—In the month of Chile, I applied to him, to borrow 3,000 rupees.

Did any conversation then pass?—At that time this conversation. I went to Maha Rajah Nundocomar; he desired me to sit down, and said to me, Do you know any thing of the barramut in the business between the governor and me? I answered, I have heard something of it; I have not heard all. He said, There has been enmity between Mr. John Graham and me: he was my enemy, I was his. I was thinking of the enmity between me and Mr. John Graham, and of that with the governor; and the governor has, without cause, been angry with me, and forbid me his house; and has told me, I will do bad things to you; be upon your guard. Being remediless, I took the advice of Mr. Fowke. Mr. Fowke gave this answer: Until you get the paper of barramut, till you produce barramut against the governor, Mr. Barwell, Hushia Jung, meaning Mr. Vansittart, and other gentlemen, I cannot say any thing to the gentlemen in your behalf; but if you do this, I will get you the kellaut of Aumeen. Being remediless, I gave the barramut papers, the barramut in the business of Munny Begum; and I have proved the governor culpable. Do you likewise consider of this. I (C. O Deen) said, What you yourself have done, you have done well. But in the hearing of the world, it will appear shameful, that you being such a man should do such business. When Maha Rajah heard this, he laughed, and said, To it, and write a bond for the rupees, which you have applied through Rada Churn for on loan, and get the rupees from him; and two days hence the Burdwan people will receive the kellaut; and then I will converse with you. He then gave me two pauns, and my dismission. Nothing more passed then.

Had you ever any demand against the dewan of the khalsa for any sum of money?—He was not my debtor. I had a demand on him for the Tuka Collary.

Did you ever send any arzees to Maha Rajah Nundocomar or Roy Rada Churn, with respect to this demand?—I deposited two arzees with Maha Rajah Nundocomar, but did not mean to complain.

Did you present these arzees to Maha Rajah, or Roy Rada Churn?—To Rada Churn, and desired him to explain to Maha Rajah.

What passed when you presented the arzees to Rada Churn?—I said to Rada Churn, Do you take these two arzees in deposit; I don't deliver them in as complaints; was I to complain, I would complain of what is true. In order to frighten him, I have wrote what I pleased myself. Do you take these as a deposit: when Moonshy Sudder O Deen comes from his out-house, then we shall settle it among ourselves; and at that time I will take these two arzees of you again. I will give 6,000 rupees; 4,000 rupees to Maha Rajah, and 2,000 rupees to you. I gave him then 19 golden mohurs.

Did any particular conversation pass?—I came to my own place, after having given him the arzees, and desired him to explain them to Maha Rajah. I went again the next morning to Maha Rajah's. Maha Rajah said, I have heard from Rada Churn that you have deposited with him two arzees against Gunga Govin Sing; why don't you present them to the council? I will procure for you from the general ready money to the amount of the demand, and I will settle it with Gunga Govin Sing. Mr. Fowke is at enmity with you; do you go with Rada Churn, and be reconciled to him again; and being reconciled to Mr. Fowke, he will introduce you to the general, the colonel, and Mr. Francis; and he will get you the appointment to Purnea; and I shall, in three or four days, obtain the kellaut of the aumeeny of the khalsa. I replied, When you have got the kellaut, I will get introduced by your means to the gentlemen; but it does not signify being introduced to Mr. Fowke. I cannot go to-day, I will go with Roy Rada Churn to-morrow. He said, It is well. I then went home to my own house, and went the next day to Mr. Fowke, with Rada Churn. Mr. Fowke was laying upon a couch in the hall; I presented him with a nuzzeer of five rupees: he put his hand upon the nuzzeer, but did not take the rupees. He told me to sit down. I sat down. He got up, and went into a room. Then Rada Churn took me with him into the room Mr. Fowke went to. Mr. Fowke shewed me tokens of kindness; he gave me beetle, rose-water, and ottar; and told me, Do you do what Maha Rajah shall tell you. I have heard your praises from Maha Rajah; do you be perfectly contented. Do you do what Maha Rajah tells you, and I will give you the business of Purneah, and confer many favors on you. Having given me beetle, rose-water, and ottar, I took my dismission, and went home; and staid at home two days: I neither went to Maha Rajah's, or Mr. Fowke's. I thought the business bad, and therefore did not go out of my house for two days. The third day, in the evening, I went to Maha Rajah; and told him, I will go to Houghly to-

day, I have private business of my own; I am come to get my dismission. He said to me, That arzee which you gave in to the governor in Mr. Fowke's name, did you give it the last of Aughun, or the first of Poos, and when the Governor gave you the arzee back? Where is that arzee? Bring it me, I will see it, and Mr. Fowke wants to see it; do you bring it to me to-morrow evening, and then go. I then came to my own house: the man who was my old Moonshy was gone home at 12 o'clock; the next day I made my new Moonshy Kewdernawaz write out whatever I remembered. Having made him write, I kept it myself; and in the evening, having put my seal to it, carried it to Maha Rajah's, and said to him, Sir, this is the arzee. He took it, and then gave me my dismission.

What else passed?—I don't remember.

What was the business you thought bad? State it, if you can.—I looked upon this as bad business. Maha Rajah told me to give this barramut against the Governor, Mr. Barwell, Mr. Vansittart, &c.

Who asked you to give the barramut?—Maha Rajah Nundocomar and Rada Churn told me. I saw his house was a cutcherry of barramuts; the Radshaky man went with a barramut, and others went with barramuts. I was a poor man, and was frightened.

Did you see the Radshaky men go with barramuts?—I saw the Radshaky people there; all the world know they went with barramuts.

[Question repeated.]—*A.* I sat in the dewan connah, and saw the Radshaky people there; and from hearing from one and another, my own sense pointed out to me that they went with barramuts.

Was the barramut which Maha Rajah spoke to you about already made, or one that was to be prepared?—They told me to prepare one: how should it be ready! had I a barramut cutcherry, that it should be ready? (Comaul O Deen desired to go on with his story.) Having received my dismission from Maha Rajah, I went to my house at Houghly; four or five days after I heard that Moonshy Sudder O Deen was come to Calcutta. I came to Calcutta, and one or two days after Moonshy Sudder O Deen arrived: after he arrived, the business between Gunga Govin Sing and me was settled. I went to Maha Rajah's, and told him, that the business between Gunga Govin Sing and me is settled, by means of Moonshy Sudder O Deen: give me back the two arzees. Maha Rajah then said to me, What is to happen in relation to those rupees you conversed with Roy Rada Churn about? I said, Sir, I have not received those rupees yet; when I receive back the arzees, I will make the settlement with you, and pay you; and, if you please, I will give it you in writing, I will give you a receipt for it. Maha Rajah then said, Roy Rada Churn has, without my knowledge, given the arzees to Mr. Fowke, and he has translated them. I said, I had not given them to Mr. Fowke; I had not complained; I deposited them with you: what is the reason of your having given them? He then said, Never mind the arzee which you presented against Mr. Fowke by directions of the Governor: do write thus, that the Governor and Mr. Graham made you do it by force against your will; give a writing to this purpose; and Mr. Fowke, from seeing it, will be pleased with you, and he will remember you in his own mind; he will give you that arzee and the two arzees back, when you have got the business of Purneah. Do then give me an arzee of this kind. I was then remediless, and considered in my own mind how I should get back the two arzees; and came home, and wrote down whatever occurred to me, *i. e.* I caused it to be written. At noon I went again to Maha Rajah's; Maha Rajah was not at home. I sat down till he came. I gave him the arzee, as he was getting out of his palanquin. Maha Rajah read it; and said, This arzee is worth nothing; you have not wrote well; do you bring your moonshy with you in the evening, it shall be wrote here. I was angry, and tore that arzee, threw it away, and came home. I went again in the evening, took my moonshy, and brought him into the presence of Maha Rajah. Then he called his own Moonshy Doman Sing; having called him, he caused my moonshy to write out a foul draught; and then directed his own moonshy to write it out fair. I am not sure whether he made Doman Sing or my moonshy write out the foul draught. After that Maha Rajah took it, and struck out some things with his pen, and made my moonshy write it out fair. When Maha Rajah took the pen to alter the draught, I told him I had a pain in my belly, and wanted to go home, and that my moonshy would write it out fair. Then Maha Rajah said, Are you in a great deal of pain? I said, I am. He then said, Go, and come to-morrow morning; Rada Churn will go with you to Mr. Fowke's, and will there cause the arzee to be given to you: I will speak to Rada Churn to that purpose. I went home, and then it was about a par or a par and a half of the night; my moonshy and Shuk Yar Mahomed came from Maha Rajah's. Shuk Yar Mahomed said, Maha Rajah sent this arzee, do you put your seal upon it. I said, There was no agreement between Maha Rajah and me about sealing it. I then gave Sheik Yar Mahomed my hooka to smoke, and then he went away. At that time my seal was not in my hand; it was in my chest. In the morning I went to Mr. Fowke's; Rada Churn was sitting in young Mr. Fowke's room; I went and sat down there: when I had sat down Rada Churn went in to old Mr. Fowke. Rada Churn staid a gurry or two with Mr. Fowke. Then Rada Churn came from there, and sat down where he sat before, in young Mr. Fowke's room. In a few minutes Accour Mutnah came and called me, and told me that Mr. Fowke wanted me. I went to him; Mr. Fowke was sitting on the bed, and gave me a chair to sit down opposite to him; he first said

a few civil words to me; he then took the arzee from the bed, and desired me to seal it. There were two Tringy waiters and two Bengallies standing behind me, one of the Bengallies was Auboo Moon; the other I do not know. Mr. Fowke said, Seal this, and give it. I said, there is no agreement between Maha Rajah and me to seal; it is not an arzee; it is a jabob sawaul, Who is the person to whom the words Gurreeb, Puriver, and Adawlet Gooaten apply? and who issues the order? Mr. Fowke said, Leave that to me. Then Mr. Fowke was angry with me; when he was angry, I grew afraid. When I saw he was angry, I put my jamma in this manner about my neck, and fell at his feet, and said, Mr. Fowke, this is all a lie; I am a poor man; don't ruin me. Mr. Fowke, hearing this, took up a book, and cried out, God damn you, you son of a bitch! When he took up the book, and called me names, I said, Bring it, and I will seal it. He then put down the book; my body shook for fear, and I sat down on the ground in this manner; I cried, and sat on the ground. He then gave me the arzee, and I sealed it. He then cried out, Tell these people to be witnesses; I said, It is very well. He then took out a furd, and shewed me. Within three years have you given 45,000 rupees to Mr. Barwell; *i. e.* 15,000 rupees per annum? I said, I have given it. He then said, Did you give the governor a nuzzeer of 15,000 rupees? I said, I gave it. Did you give Husheia Jung 12,000 rupees? I said, Yes, I did. Did you give Rajah Ragibulluh 7,000 rupees? I said I did. Did you give Cantoo Baboo 5,000 rupees? I said, I did. He said, Sign this. Upon some of the names I wrote, I had given; upon others I wrote, I delivered. Having taken this from me, he said, Go. I ran away from them, wiping my face. Running away from thence, I came to the stair case, and stood there. Samsheer Beg was standing there; I said to him, See, this force is put upon me. Samsheer Beg said to me, I see that you are shaking; but what is the matter? I have not heard. I said to him, Will you hear what is the matter? Young Mr. Fowke and Rada Churn came out laughing; and stood at the door of the hall. I then said to young Mr. Fowke, Give me back those papers which your father has taken from me by force, or I will go and complain to the general and to the colonel. When I had said this, he told me to stay; they both went in to Mr. Fowke; they came out from thence, after having staid a long time. Young Mr. Fowke brought out a cover of a letter of this size, and said, Your arzees are all within this; I will put them to-day in my own chest; do you come here in the morning; Maha Rajah will come also: whatever Maha Rajah says, and will be your pleasure, shall be done. I was remediless, and came to my own house. When I got to my own house, I eat nothing; fear arose in my mind. When four gurries of the day were remaining, I went to moonshy Sudder O Deen's, and said, Roy Rada Churn has dealt treacherously (dagger) by me; they have caused me to write a very scandalous paper of baramuds: if in the morning Maha Rajah gives me back this paper, it is very well; if he does not, I shall ruin myself: do you enquire after me in the morning, and acquaint Mr. Barwell and Mr. Vansittart, that this oppression has been used upon me. I am going now to Maha Rajah's, and at night I will come to you. Having said this, I went to Maha Rajah's; Maha Rajah was in private; Roy Rada Churn was with him: Samsheer Beg, Shirk Yar Mahomed and I sat down in the gateway. I said to them, Four pars of the day this oppression has been upon me; that I have yet four pars of the day to remain in this manner. I asked Yar Mahomed for a glass of water; and he gave it me. Samsheer Beg and I in the evening said our prayers together. After saying our prayers, I went to Roy Rada Churn, and said to him, On your account I have been abused and disgraced by Mr. Fowke; and he has, by force, caused me to write a paper I cannot prove: I cannot sit, give me a pillow to lay down. He then gave me a pillow, and I laid down. Roy Rada Churn said, I have explained this matter to Maha Rajah, and he is very angry with Mr. Fowke. Maha Rajah will just now come; do you go to him, he will tell you all. I lay there about a gurry or more, when Maha Rajah came out into the Dewan Connah: I then went to him, and sat down. Maha Rajah said, I have heard every thing from Roy Rada Churn: never mind, I will go in the morning to Mr. Fowke's; whatever will content you shall be done. He then gave me beetle and my dismission. I then went to Moonshy Sudder O'Deen, and told him what had passed between Maha Rajah and me, and then went home. The next morning I went again to Mr. Fowke's; and there was Mr. Fowke, Maha Rajah, and Roy Rada Churn; I do not know where young Mr. Fowke was. For fear, I stood on the stair-case, and did not go into the room. About a gurry after Mr. Fowke came out of the room; I salammed to him; he took no notice of it, and went out: then Maha Rajah and Roy Rada Churn came out; then I asked of Maha Rajah, What have you done for me? He answered, I have spoke to Mr. Fowke about it, but he does not hear me: do not you mind. In saying this, Maha Rajah got into his palanquin, and went away. I called out, Duoy on the king, and the court, the governor, and on the council. Having called out Duoy, I tore my jamma, and cried out, Mr. Fowke, Maha Rajah, and Roy Rada Churn, have caused me to write out a false baramud paper against gentlemen, and I am going to the court to complain. Then Yar Mahomed and Nelloo Sing laid hold of my hands, or one of them; having disengaged my hands, I went into my own palanquin. Many people, I do not know whether Mr. Fowke's, Maha Rajah's, or Roy Rada Churn's, went scuffling along with my people and my bearers as far as a house of Rajah Rajibulluh's, [illegible]

Coosah. Then they went back. I came and gave notice of it to the chief justice lord Saubt. I am fifty years old; I have seen the Durbars of Soubah and Kings, and such a court I have never seen. I have read of such a court that now shah wan; and at the time I lodged the complaint, I had no idea it was such a court. I understood that Mr. Fowke was oppressive and powerful, and Maha Rajah and Rada Churn were so likewise; and did not expect to have found such justice to a poor man. I thought to myself, I shall be ruined, my post will go from me. When I go away from the Adawlet, Mr. Fowke or Maha Rajah, who are the masters of the country, will imprison me, and very great ruin will ensue; and no ruin will accrue to you, from hearing Mr. Fowke's, Maha Rajah's, and Roy Rada Churn's words. From doing this business to the pleasure of Mr. Fowke, Maha Rajah, and Roy Rada Churn; I thought, if I would agree to take a false oath before the committee, no ruin would ensue; but my religion would go.

Did Maha Rajah or Roy Rada Churn ask you for the barramut? and did they tell you for what purpose they wanted it?—What Maha Rajah told me about it I have caused to be wrote down, about the governor's being put to shame in Europe: Mr. Barwell, Mr. Vansittart, and Mr. John Graham, and their consequence in this affair, will be less.

From whom did you hear that the governor and the other gentlemen would be brought to shame?—I heard it from the Maha Rajah, Mr. Fowke, and Rada Churn.

When you had sealed the arzee, was it returned to you or Mr. Fowke?—Mr. Fowke kept it.

Do you know what use was made of the arzee?—I know nothing of it.

When you say you know nothing of it, do you mean, you have never seen it since?—I can't say I have never seen it since; I saw it at lord Saule's, and in that room, (pointing to the Grand Jury room.)

Did you give those sums to the governor and the other gentlemen?—I never gave any body five rupees.

Then why did you say to Mr. Fowke that you had?—Mr. Fowke had taken up a book, and was in a great passion. I did it through fear; if you was to frighten me, you might make me sign an assignment of the kingdom of Indostan.

How came you, when you was frightened, to say Yes to the questions put by Mr. Fowke?—I was frightened; if he did not intend that I should say Yes, why did he write the paper?

Why did you think it would be agreeable to Mr. Fowke?—Whatever Mr. Fowke would have bid me write, I would have written.

Why should you think Mr. Fowke would be angry if you said No?—I was in his power; he was in a passion, and angry with me.

Don't you know that Mr. Fowke wanted you to say, I did not give?—[Could get no other answer to this question than what was given to the last.]

What did Mr. Fowke say to you about the furd?—He asked me if I had given Mr. Barwell 45,000 rupees? I answered, Yes; I was so frightened, I should have said Yes to any thing he said.

Could you collect, from the manner of Mr. Fowke's putting the question, that he expected you should answer Yes?—I knew very well, if I did not say Yes, I should be disgraced.

How did you know that?—When I was sworn at, and called names, and the book lifted up, what remained but to answer as Mr. Fowke pleased? He did not tell me to say Yes; but he asked me if I did; and I answered Yes.

What reason had you at that time to suppose, that Mr. Fowke wanted you to say those gentlemen had received money?—At first when I went to Maha Rajah, he asked for a barramut, and for the barramut of Hidgelee. Why am I asked this question, when he has a cutcherry of barramuts?

Who do you mean by he? Mr. Fowke or Maha Rajah?—It was first held at Maha Rajah's, afterwards at Mr. Fowke's. Who is he, that all the world should go to him? he is no counsellor: there is no other person in Calcutta that has such an assemblage of black people at his house.

Who ordered the persons to follow your palanquin, when you went from Mr. Fowke's?—I do not know.

Whose servants are Sheik Yar Mahomed and Netto Sing?—Maha Rajah Nundocomar's.

Did any body else touch you?—Yes, all the hircarrahs.

What do you expect would be done to you, if your people were less powerful than theirs?—How do I know whether they would carry me to the general's or elsewhere? I thought they would either confine me in their own house, or carry me to the general's.

Why did you particularly think they would carry you to the general's, more than to any other of the council?—Mr. Fowke used to go to three gentlemen, the general, colonel Monson, and Mr. Francis. I have seen it with my eyes.

If Mr. Fowke had wanted you to swear to this furd, would you have done so?—If he had killed me, I would not have sworn falsely; but if he had demanded of me to promise to swear it another time, I would have permitted it; but I would not have done it.

You say, you have seen the Radshaky people, and that it was bad; what did you mean by bad?—I saw them there; and I thought the keeping a cutcherry of barramuts was bad.

Do you know Barnassy Ghose?—I do; he is a ryot of mine.

Did he make any complaint against you?—Yes, he did, to the general; he sent for me; he laid his hand upon the nuzzer of five rupees which I offered, but did not take it, and gave me beetle, and told me to come to-morrow. His Dewan told him I was come; the general

wrote a chit, and sent it and another paper, together with me and Barnassy Ghose, to Mr. Fowke; and Mr. Fowke would enquire into it, and report it to him; then the general's man went with me and Barnassy Ghose to Mr. Fowke's house; he went up stairs, and left us two below; the servant then came down; and said, he had delivered the chit to Mr. Fowke; that Rada Churn was then with him; and when he was gone, we should be called up. He went away in about four gurrys. We went up; Mr. Fowke was sitting upon a chair; he then began to enquire of me about Hedgelee, the revenues of it, what it was worth, and every circumstance about the salt, and all other matters about that country. Barnassy Ghose then told Mr. Fowke, that I had rented the Tecka Collaries,* of English gentlemen, at a very great expence.

What do you mean by a very great expence?—Barnassy Ghose told Mr. Fowke, that I had expended large sums of money on bribes to English gentlemen for the Tecka Collaries. Mr. Fowke then asked me, Does this man speak truth? I said, He lies. Mr. Fowke replied, You have given rupees to the English gentlemen. Then young Mr. Fowke came, and there was a great deal of conversation between them; and then young Mr. Fowke gave me my dismission; and told me to come next day. I went accordingly the next morning; and Mr. Fowke again interrogated me, as to all the business of the country; and again asked me if I had not given money to Mr. Vansittart. I answered, It is all a lie; and then Mr. Fowke was angry, and he and young Mr. Fowke talked English together, and dismissed me. I went again on the third day.

What date was all this?—I do not remember accurately the day I received the chit from the general; this conversation was either the last day of Aughun or first of Poos.

What passed on the third day?—He asked me what I had given to the English gentlemen, and what to the Mutsuddies.† He told me to tell the truth: if I did not, I should be greatly punished. I said, I had given nothing to any body. He said, you speak this without reason. I then said, I am a farmer, and no thief.

Did any thing more pass on the third day?—I only went to my own house.

Did you go to the general's?—I went; but I did not meet with him at home.

What did you next?—I came home and considered in my own mind, whatever has past between Mr. Fowke and me, if I write, and give so much, I do not know whether the governor will be angry with me. What did I know that the governor would be angry with me! therefore I did not write much; but, having caused a little to be wrote, I went and gave it to the governor, and I told him all by word of mouth. The governor said, You have wrote in your arzee little, and by word of mouth you say a great deal; whatever you tell me by word of mouth write down in an arzee, and I will inquire about it in the committee. I answered, I have not my moonshy with me; I will write it out, and bring it to morrow morning. The governor answered, If you have not your moonshy with you, take mine; and whatever you have to write, he will write it. The words the governor then used, in the Hindostan language, I did not understand. He desired Mr. Vansittart to explain them to me in Persian; then Mr. Vansittart explained them to me, that the governor had said, My moonshy is here; do you cause it to be wrote by him. I agreed to it; and the governor called his own moonshy Shereit Oollah Cawn, and told him, whatever this man has to write, do you write for him. I then caused him to write whatever had passed between Mr. Fowke and me: having wrote it, I gave it to the governor; and the governor having caused it to be read to him by the moonshy, he kept it, and gave me my dismission, and returned me the small arzee I had given him. I then came to my own house.

Was what you dictated to the moonshy a true account?—Whatever passed between Mr. Fowke, Barnassy Ghose, and myself, I caused to be wrote truly.

Did the arzee contain any thing more than what passed between Mr. Fowke, Barnassy Ghose, and you?—There might be a word or two wrote more, about my own affairs, which I do not remember, whether relative to Mr. Fowke, Barnassy Ghose, and myself.

After you went to Rajah Rajebullub, who did you first apply to?—I first applied to the governor; he said, I cannot administer justice to you; they are three gentlemen; I am but two.

Who did he mean, by three and two gentlemen?—I do not take upon me to explain the governor's meaning. He said, If you have any complaint, the king's court is here; lodge your complaint there.

Did you lodge any complaint?—I then said, How shall I get to the Adawlut, to lodge my complaint? Mr. Fowke's people will take me on the road. Then the governor spoke to a chubdar,* and said, Do you go along with this man to the chief justice's house. I then went to the chief justice's, and came into his presence.

(Mr. Sumner produces two arzees, and a letter in which they were enclosed.)

From whom did you receive these?—I received them from one of the secretaries of the public department; I received them from Mr. Auriol.

Cross-Examination of Comaul O Deen.

Have you conversed with any body on the subject of your examination?—With nobody.

* Salt Contracts.

† Clerks or Writers in the Public Offices.

* A staffbearer; one who waits with a long staff plated with silver, and runs before his master, proclaiming aloud his titles.

†

Have you given an account, in conversation or writing, directly or indirectly?—I have not said any thing to any body, or seen the appearance of pen and ink.

Has any moonshy?—I do not know that any moonshy has; I was above; he was below; I did not speak to him about it.

Tell the day of Chile you went to borrow money of Maha Rajah Nundocomar?—I first demanded it on the first of Chyle; I got the rupees on the 13th or 14th.

Did you receive the money?—Yes; I was paid in gold mohurs.

Did you give any security?—I gave a tomassuk.

When did you apply to borrow the money?—I often before borrowed money of him; this was not the first time.

When was the last time before this, you borrowed money of Maha Rajah? was it within two or four months?—Not within two or four months.

[Question repeated.] It was between 12 or 14 months.

Are you sure it was not more?—I paid the balance due to Maha Rajah.

[Question repeated.] It was two or four years since I borrowed, when Rupea O Din Cawn was Phousdar* of Houghly; I have borrowed none since; I borrowed through the means of Roy Rada Churn: it was in the year of the famine, five or six months before the famine; I cannot exactly fix the date.

Did you never apply between that time and Chyle to borrow money?—I never made any application.

Had you ever visited between?—I had frequently.

When did you last visit him before the month of Chyle?—My son was married in the month of Phaugun, and I then paid the customary compliment to Maha Rajah of sending sweetmeats.

When did you visit the Maha Rajah?—I carried the sweetmeats myself, and presented him with a nuzzeer. We were on terms of friendship a long time before.

How long before the month of Chyle, in which you borrowed the money?—It was the last of Phaugun.

Why did you apply to borrow money?—I had occasion for it; therefore I borrowed it. The bond carries an interest of one rupee per month.

Had you any conversation on any other subject with Maha Rajah?—Whenever I went, he conversed with me on no other subject but the baramut.

What conversation had you the day you received the money?—I did not see Maha Rajah when I received the money.

Had you any conversation with Maha Rajah at the time he desired you to go to Roy Rada Churn about the money?—There was that conversation about the Munny Begum I related yesterday: if you please, I will tell it again.

Did Maha Rajah ask any questions of you yourself?—He asked me if I had heard what had passed between the governor and him; he said, I was not his enemy; I was John Graham's.

Did he ask any other question?—[He relates word for word what he saw yesterday.]

Did Maha Rajah ask any particular questions?—Hear me what I am going to relate: he asked barramuts.

What did he ask about barramuts?—He said to me, That when the governor told me, I will be revenged on you, I, being remediless, consulted with Mr. Fowke. If you will bring to me the papers of barramuts against the governor, Mr. Barwell, and Mr. Vansittart, those gentlemen will meet with shame at home, and I will give you the business of Aumeen of the Khalsa.*

Did he ask you any other words except those about the barramuts?—He said, Do you this business of Hedgelee Comgeer, Tumlook, and the salt Mhauls,† and from wherever you can. By business, I mean barramuts.

Did this conversation pass on the day Maha Rajah bid you apply to Roy Rada Churn?—Yes, that day; and he laughed and told me, When the Burdwan Rajah gets his dress, then I will confer with you.

How came this particular conversation to be introduced?—How should I know what was Maha Rajah's reasons for introducing it?

In what manner was it introduced?—I went there to visit him; he told me all these words, and gave these answers.

Tell the conversation.—First, in the month of Phaugun I went to Roy Rada Churn, and told him, Do you tell Maha Rajah, that there is to be a wedding of my son, and beg him to receive the sweetmeats. Roy Rada Churn said, Maha Rajah will take the sweetmeats at your son's wedding, and will shew you many kindnesses; this is your old home; you must be on terms of friendship with Maha Rajah. He has taken proper measures about the Governor, Mr. Barwell, and Mr. Vansittart, and other gentlemen. What they have ate, they will be obliged to disgorge; and will be put to shame in their own country, and will be called thieves.

Did Roy Rada Churn say, proper measures taken? or did he say that Maha Rajah Nundocomar said so?—It was what Maha Rajah said:

Go on.—And in proportion to the bad name that the gentlemen have given to Maha Rajah here, he will have a good one in England. I (Comaul) said, There used to be great friendship between the Governor, Mr. Barwell, and Maha Rajah. Was it this? What is the reason of their separation? He answered, Maha Rajah was Mr. John Graham's enemy; he was not

* Qu. *Foujdar*, a police magistrate.

* Commissioner of the Treasury.

† Properly *mals*, revenues.

an enemy of the Governor or Mr. Barwell. The Governor and Mr. Barwell had themselves made the Maha Rajah their enemy, and had forbid him to go to their houses; and now the Governor presses Maha Rajah to come to his house; and Maha Rajah says, I will never see his face; I will never go; and I shall consider well of him. I then asked, Why does Maha Rajah go to Mr. Barwell's and Mr. Vansittart's? Roy Rada Churn answered, They are always calling him, in order to reconcile him to the Governor; but Maha Rajah will not. I said, Great men know the business of great men; I am a poor man: go and tell so much for me to the Maha Rajah, that I am going to the wedding of my son, and request of him that he will agree to accept of the sweetmeats. He then said, Do you sit down; I am going to Maha Rajah. He returned in two gurries after, and said, I have satisfied Maha Rajah; he will accept the sweetments. If you are to go to Houghly to-day, go, and send the sweetmeats; and if you do not go to-day, come to-morrow, and get your dismission from Maha Rajah. I said, I have taken dismission from the governor, and all the gentlemen, except Mr. Cottrell; I will go to-morrow and get my dismission from him; and at a par and a half of the day I will come to Maha Rajah, and get my dismission from him. I went next morning, got my dismission from Mr. Cottrell, and at a par and a half or two pars of the day I went to Maha Rajah's. He was not there, nor Roy Rada Churn. I sat down in the Dewan Connah: just as I sat down, Maha Rajah's sewarry came, and he also came. I then went down, and Maha Rajah was got out of his palanquin; as he was going in, I paid my salams to him; Maha Rajah stopt, and said, I have heard from Roy Rada Churn about your marriage: may God prosper it! Undoubtedly, when there is a marriage at your house, and you send sweetmeats, I will receive them; and if there is a marriage at my house, I will send sweetmeats to you. He called for the pandor, gave me beetle, and my dismission. I then went to Houghly; and at the marriage of my son, I sent the sweetmeats to Maha Rajah and Rada Churn; they both accepted of them. I returned the first of Chyle—I do not know whether the 30th Phaugun or 1st of Chyle. The first day after my arrival I went to pay my respects to the Governor, Mr. Vansittart, and all the gentlemen. The 2d day I went to Maha Rajah's, Maha Rajah was not there; I went and sat down in the Dewan Connah; in a little time Maha Rajah came. I presented him with a nuzzeer of one gold mohur. He took it, and desired me to sit down; which I did. He first asked me about my health, and the marriage. He then said, Did you hear at Houghly what passed between the governor, and how I have proved him to be in the wrong? I said, I have not heard particularly; but I have heard you gave in barramuts against the governor, and that you have been before the council with respect to the barramuts. I have not heard the particulars; but people in general say, that there was great friendship between the governor and you, and now there is a great nuzzeer; people laugh at this. If the zemindars* had done it, it would not have signified; but that you have done it, is very bad. Then Maha Rajah said, What can I do? I was to escape from the governor's hands. If I had not done it, I should not have escaped from the governor's hands: being remediless, I did it. He then began to relate what I related yesterday and to day. The conversation went on as I yesterday related it.

When did you speak to Roy Rada Churn about the rupees on loan?—When I went up to Houghly. Maha Rajah then told me to go and get the rupees from him.

What passed about barramuts on this last day you mentioned?—What I have related, interpreting many during the course of the examination.

What was said about barramuts?—He said, I was an enemy to John Graham, and he was to me. The Governor said, Be on your guard, I will consider of you. I have consulted with Mr. Fowke. Mr. Fowke says, Do you give me barramuts against the Governor, Mr. Barwell, Mr. Vansittart, and other gentlemen; they will meet with shame in their own country; and I will procure for you the kulput of the auneen of the khalsa. I, being remediless, gave in a barramut against the Governor, on account of Munny Begum. There was a conversation in the council about the governor and me till one par of the night. I have proved the governor to be in the wrong. Do you

* Landholders. The term *zemindar* is derived from the Persian words *zamin*, land: and *dar*, holder or keeper. Under the Mahommedan government of India, the *zemindar* was an officer charged with the superintendance of the lands of a district, financially considered, the protection of the cultivators, and the realisation of the government share of the produce; out of which he was allowed a commission, amounting to about 10 per cent., and occasionally a special grant of the government share of a part of the produce, for his subsistence, termed a *Nauncar*. As the appointment to this office was generally continued in the same person, and frequently to his heirs, so, in process of time, and through the decay of the ruling powers, and the confusion which ensued, the hereditary right (at best only præcuptive) was claimed and tacitly acknowledged to be in the *zemindars*; and (particularly in the province of Bengal) from being the mere superintendants of the land, they have been declared the hereditary proprietors of the soil; and the before fluctuating dues of government have, under a permanent settlement, been unalterably fixed in perpetuity.—For further information on this subject, see the Fifth Report (to the hon. House of Commons) on the Affairs of the East India Company, and the Glossary thereunto annexed.

bring barramuts of Hidgelee, &c. against the same gentlemen.

Did Maha Rajah desire you to get false barramuts?—He said nothing to me of false barramuts; he desired me to bring such as I could get.

Did he desire you to get false barramuts, or of such people who had actually given money?—He never said false or true.

Did you understand that he meant false or true?—How should I know what was in his breast?

If you had been willing to oblige him, do you think false barramuts would have answered that purpose?—What I know, and he said, I tell. I cannot tell what he thought.

Was the matter of the arzees, complaining of Gunga Govin Sing, true or false?—I did not give them in as complaints; I did it to frighten him. I wrote therein whatever I thought.

[Question repeated.] I did not do it as a complaint; I wrote much to frighten him. There was some money due to me: I put in a great deal more to.

What is the amount of the money demanded by the arzees?—You have the arzees, look at them.

Was the whole of the money due demanded in the arzees?—It is the custom of farmers, where one rupee is due, to put in four. If I complained, I should specify; if on oath, I should specify. There may be money due from me to the Company: I should, if asked, say there was none due.

Is that matter settled between Gunga Govin Sing and you?—It is, by Moonshy Sudder O Deen.

What did you receive?—No one talks of their own riches.

[Question repeated.] If Mr. Cottrell was to know what I received, he would, upon my going away from hence, immediately imprison me. I am indebted to other merchants: if they were to know I had received money, they would come upon me. Whatever was wrote in the arzee, I got.

Did you get 26 000 rupees, which is mentioned in the arzee?—I did get 26,000 rupees. Farmers engaged in business have various accompts. I owed him money; that was deducted. I received some money.

Did you receive the whole in money, or was the debt of yours to him set off?—It was settled by Moonshy Sudder O Deen. What was due to me I got; what was due to him he got.

Did you get 6,000 rupees in money or securities?—I got more.

Did you get it in cash?—I received in ready money more than 6,000 rupees.

Did you receive more than is due?—I got 10,000 rupees in ready money: 16,000 was due from me to him; that was allowed him.

Was the matter of complaint in the arzees true or false?—What was wrote in the arzees was partly true, and partly exaggerated from the enmity between us. I had separate accompts, by which part of the business was settled.

Was that 16,000 rupees due on accompt mentioned in the arzee?—It was not; that I wrote to frighten him; I had not lodged a complaint, I had not taken an oath. Now I have, I will answer whatever you ask.

Were the 10,000 rupees due on the reasons in the arzee?—Gunga Govin Sing, as Dewan to the Committee of Revenue, should have made advances to me on account of the salt-works: instead of making them, he detained as a deposit, and made over that sum as a transfer, for my account of land revenues.

Was you greatly indebted on account of your land revenue?—I was indebted a large sum of money.

Did Nundocomar ever tell you, that Roy Rada Churn had informed him what passed when he delivered the arzees?—Yes. That when the account came before the council, the general would see that justice was done. How do I know what was in his breast? What he told me, I have answered.

When did you first after go to Mr. Fowke's?—I don't remember the day.

As near as you can recollect?—I think the day following.

Who did you see at Mr. Fowke's?—How can I tell? There was a cutcherry there.

Do you remember the names of any persons you saw there?—I can't tell the name of any one. There were a great many people; zemindars, moguls, bootans, and hircarrahs.

Do you know the name of any one person you saw in the house?—I did not go to write down their names. I might have seen many whose names I knew, but don't recollect. There was one of Mr. Fowke's Moonshys, either that or the next day, I don't know which, quarrelled with me; and Roy Rada Churn threatened the Moonshy.

Did you see any one the first day whose name you recollect?—I do not recollect the name of any one.

Did you see Mr. Fowke?—I presented a nuzzeer to him.

Did you see young Mr. Fowke?—He was in the room; I saw him sit writing in his room.

Did you speak to him?—No.

Was there much conversation between Mr. Fowke and Roy Rada Churn?—Much laughing and joking.

Did you tell Mr. Fowke what had previously passed between Maha Rajah and you?—Not at that time. [Do what Maha Rajah bids you.] I neither understood it to be with respect to Gunga Govin Sing, or any body else. I understood in my own breast, I understood Maha Rajah and Mr. Fowke talk in this way. I said to myself, I am poor, don't go into such company; and I went to neither of them for two days. I went on those two days to pay visits; why should I go on this business?

Where was Moonshy Sudder O Deen at that

time?—He was at his out-house; not in Calcutta.

Did you make any objections to what Maha Rajah struck out of the arzee?—No.

What were the words?—I remember, Gereb Puriver (and repeats some other words;) I heard it read; but do not remember.

When did you go again to Mr. Fowke's?—The next day, at nine in the morning, or rather after.

Who was in Mr. Fowke's room when you went in?—Accoor Munnah called me, and carried me with him. Mr. Fowke was sitting on his bed, with his feet up; there were two Bengallies and two writers standing behind me.

How long did the two Bengallies and two writers stay there?—As long as there was good conversation between Mr. Fowke and me, I know that four men stood there; when he took up the book, and I threw myself down on the ground; I then looked up, and said, Bear witness; and after that, I don't know who went or came; I was down on the ground crying.

When you called to bear witness, were the two Bengallies and two writers in the room?—I do not know whether any one was there; I hardly saw myself. When Mr. Fowke took up the book, and I sat on the ground, and called out, Bear witness, I do not know whether there were a hundred or none: I was distressed at my own situation.

Did any body say any thing to you?—No.

Did any person in the room do any thing?—What should they do?

When you went into the room, was the door fastened?—When I went in, it had been fastened; when I came out, it was not fastened; when I went away, it was opened.

Were there many people about in the veranda?—At that time there were but two or three people; it was past noon; they were all gone.

Did you offer to go away when Mr. Fowke threatened you?—How could I go, without Mr. Fowke's leave?

Did you ever ask leave?—Why should I ask leave? I put my clothes round my neck, and laid down.

Did any person besides Mr. Fowke threaten you?—Young Mr. Fowke shewed me kindness.

Was he in the room then?—No; when I came to the stair-case, I saw young Mr. Fowke and Rada Churn.

Are you sure you had not sealed the arzee before these threats?—I did not.

When you sealed it, did you sign it?—I do not remember whether I signed the arzee or no: I think not.

Do you mean by signing, putting your name to it, or putting 'volaab' to it?—I was at that time out of my senses; I can say with certainty, that in my remembrance I did not sign it.

Was you ever threatened by Mr. Fowke more than once?—Not after the other dispute in the month of Poos.

Did he threaten then?—It was harsh conversation; but not so bad as the last. I have not seen him since, except at the chief justice's and here.

Are you sure you did not see him again that day?—Why should I? Young Mr. Fowke comforted me: I went away to my own house.

At the time the book was taken up, who were there?—The four men were there; but not when I was crying on the ground.

Did you write on the ground?—Yes.

Did you carry a pen and ink with you?—There was a sicca dewat, pen and paper, ready upon Mr. Fowke's bed.

Do you recollect what was wrote?—First, the name of Barwell was wrote, 15,000 rupees per year for three years, 45,000 rupees. The governor, in a Nuzzurana, 15,000 rupees, the word governor was not used, but Mr. Hastings. Hushier Jung 12,000 rupees. Raja Rajebullub 7,000 rupees. Cantoo Baboo 5,000 rupees.*

Had you ever seen that furd before?—No.

Have you since?—No: it is not a furd; but such a piece of paper as this, [shewing a sheet of white paper.]

Was there any other writing?—Nothing more was wrote; what he told me, I wrote; nothing else was wrote: the words I wrote were 'Russan nedum' and 'Dadum.'

How many times did you write these words?—On the first name I wrote 'Russan nedum,' I wrote one or the other on the five names.

Did Mr. Fowke read the furd to you?—He took it in his hand, and asked me, Have you, for three years, given 15,000 rupees a year to Mr. Barwell? He did not tell me so from reading the furd. I answered, Yes, Sir, I have given it.

In what language was the furd wrote?—In Persian.

In whose hand did it appear to be written?—I don't know; the letters appeared to be Rada Churn's: I speak from guess.

How came you to say Yes, rather than No, to Mr. Fowke's question?—He held up a book to me, when I refused to seal the arzee; I intended to say No.

Did you think Mr. Fowke would strike you, if you did not say Yes?—When he held up the book, upon my saying No to his desire of sealing the arzee, I conceived he would have struck me if I had answered No to the question put as to the furd.

What distance of time was there between

* The Rupee is, as a silver coin, of comparatively modern currency; for there do not exist any specimens in that metal of a date anterior to the establishment of the Mohammedan power in India; of gold a great many have been preserved of far higher antiquity. The imaginary rupee of Bengal, called the *current rupee*, in which the Company's accounts were formerly kept, was nominally valued at 2*s.* and the real coin, or *sicca rupee*, 16 per cent. better than the current rupee.

your fixing your seal to the arzee No. 1, and your signing the furd?—I cannot tell the moments or minutes; but, as soon as the arzee was done with, Mr. Fowke produced the furd.

Did any thing pass, between your sealing the arzee and Mr. Fowke's producing the furd?—No; nothing passed.

Did you see the long arzee witnessed?—I did not see it; it was not before me: Mr. Fowke said, Be witnesses to it.

Were the two Tringy writers in the room black or white?—Black: I know one; the other I do not.

Where was the little arzee sealed?—In my own house.

Did you seal any other arzee?—Two against Gunga Govin Sing, in my own house. I sealed no other in Mr. Fowke's house.

Was there any body in the room besides Mr. Fowke and yourself?—Yes, there were some men.

Do you believe they were the same men who were first in the room?—I cannot tell. As soon as Mr. Fowke told me to go, I went.

Did you observe any different people in the room, at the time of your recollection?—How do I know? I went away wiping my face.

Did any body offer to stop your going out of the room?—No; when Mr. Fowke bid me go, I went.

At the time Mr. Fowke lifted up the book, what position was he in?—He sat upon the bed, with his feet hanging down.

At the time you sealed the large arzee, where was it?—Mr. Fowke took it from the bed, near the pillow; and asked me whether I had given that arzee? I said, Sir, this is not an arzee; it is a jabob sawaul: Maha Rajah, having taken a draught, has given it for your satisfaction. When I was upon the ground, he gave it into my hands, and I sealed it.

Did you either sign or seal the furd?—I signed it.

[Question repeated.]—I neither put my seal, nor wrote my name. I wrote Russan nedum and Dadum. Whatever Mr. Fowke had told me, I should have done.

Did Mr. Fowke bid any body be witnesses to the furd?—I put my duskeet to the furd, and Mr. Fowke bid me go.

When Mr. Fowke gave you the furd, did he bid you do any thing with it?—He told me to write upon it.

After you had wrote upon it, as Mr. Fowke did not understand Persian, did he desire any body to explain it?—No.

At the time you went to the governor, why did you carry an arzee different to that which you afterwards wrote by the governor's Moonshy?—The general had referred me to Mr. Fowke for enquiry. Mr. Fowke is an Englishman, and I am a poor farmer: the governor is the master of the country. God knows whether he will be angry with me if I write a long arzee, therefore I wrote a little, and said a great deal by word of mouth. In the little arzee was wrote, The general has referred me to Mr. Fowke; Mr. Fowke has said so and so to me; and then, having given in the small arzee to the governor, I told him every thing by word of mouth.

Was it the small arzee that was sealed and sent to Mr. Fowke, and then carried to the governor?—When Maha Rajah required the arzee from me, the man who had been my Moonshy was gone home. I caused to be wrote whatever was in my remembrance by my new Moonshy.

Was that the same that was given to the governor?—It was.

At the time the barramuts were first mentioned, by whom were they mentioned?—When I spoke about the sweetmeats, Rada Churn first told me.

Did Rada Churn tell you to get barramuts, or did he tell you that Maha Rajah wanted them?—At that time he told me what I have repeated about their coming to shame in England.

Did Roy Rada Churn ever desire you to get barramuts?—Whenever I saw him, he asked them from me.

Mention the particular time when.—Whenever people have any business with Maha Rajah, they first apply to Rada Churn; Maha Rajah is the master, Rada Churn the son.

Examined by Mr. *Fowke*.

Did Gunga Govin Sing know that you had put the arzees against him into mine or Rada Churn's hands?—Gunga Govin will tell you; how should I know?

Did any body else know?—How should I know?

How could Gunga Govin Sing be frightened, if he did not know it?—There was a conversation upon it between Gunga Govin Sing and me.

Repeat that conversation.—I said to Gunga Govin Sing, Pay me my rupees; if you do not, Maha Rajah's doors are open for barramuts; I will go, and having written a great deal, will present an arzee against you to the Maha Rajah. Gunga Govin Sing said, What will be the effect of your giving an arzee? at last you will be put on your oath on it in the English Durbar. Do I forbid you giving in an arzee? whatever balance is due from you on account of the revenues, I will imprison you, and get from you; or else let Moonshy Sudder O Deen come, we will settle it among ourselves; if not, and you wish to be a great man, go and take a false oath before Maha Rajah. I said, Give me my dismission, and I will go to the Moonshy, and I and the Moonshy will come together. He said, You are at liberty to go or stay; why do you want dismission from me? get dismission from Mr. Cottrell. The next morning I caused the arzee to be written.

Did you ever acquaint Gunga Govin Sing that you had actually lodged it?—Every day he threatened me, and I threatened him. He

laughed, and I laughed. We staid in expectation of the Moonshy's coming.

Did you, at any time, acknowledge your seal to be put to the great arzee before witnesses?—From that time I have complained, that Mr. Fowke caused me to put my seal to the arzee by force.

How often did you go to visit Mr. Fowke senior before the long arzee was sealed and witnessed?—Altogether I went about three times to his house; when I came from Houghly, I do not remember.

When was the first time?—Every thing was from the end of Chyle to the 7th of Bysaak.

Knowing Mr. Fowke's house to be a cutcherry of barramuts, how came you to go to it?—Maha Rajah told me to go, and be reconciled to him.

Did you ever tell any body that you had given the sums mentioned in the furd?—If I had given, I should have told; should I say I had, if I had not?

Examined by the *Court*.

Was any thing said about carrying the arzee to council?—Mr. Fowke desired me to go; then [I] said to Roy Rada Churn and young Mr. Fowke, As you have caused me to write this arzee by force, and you will send it to council, having my torn jammah, I will go to the council before it.

Did you ever desire of Mr. Fowke, or Maha Rajah, that the arzee should not be carried to the council?—At the time I came out of Mr. Fowke senior's room, I said to Roy Rada Churn and young Mr. Fowke, Give me back that arzee and furd which Mr. Fowke has caused me to sign, or I will immediately go to the council and complain.

Did you ever ask Mr. Fowke to return the arzee?—I demanded it of him the next day, in the room; Maha Rajah was there, Roy Rada Churn, and Mr. Fowke.

Did you ever consent to have that arzee delivered into council?—I never did.

Was the pen English or Persian?—It was an Hindostannee pen and a silver ink-stand; the sicca dewat and ink-stand were both silver.

Had you any reason to think that Mr. Fowke knew of your coming?—The night before the draught of the arzee had been wrote at Maha Rajah's, he sent to call me.

When did he send to call you?—In the evening, when I was going to get my dismission, Maha Rajah said, Write an arzee, and carry it to Mr. Fowke; Roy Rada Churn will go with you; an hircarrab of Rada Churn's the next day called me to go to Mr. Fowke's, when I was at Mr. Cottrell's.

Were the sums in the furd in words at length, or in figures?—The names were in words; the sums in figures.

What sort of figures were they wrote in?—In Persian.

Mr. *Sumner*. I received two arzees enclosed in this letter, signed, Joseph Fowke; together with two English translates of the arzees. I am secretary to the revenue council. It is customary to remove papers from one office to another, when they are sent by mistake. It should have been sent originally to my office. Presenting an arzee is the mode of instituting an enquiry. I have known censures and punishments inflicted by the board in consequence of arzees. I have known examined both on oath and without; the parties accused examined: I believe, I have known the party accused examined on oath. The subject of the arzee was proper matter to be enquired into in my department: I allude to the large arzee.

Mr. *Auriol*. Young Mr. Fowke called on me one morning at breakfast, and gave me a letter addressed to the governor general and council; which, as they were to sit that morning, I desired might be delivered to them. That letter contained these papers. I delivered them to the council; the governor general was not present. I received no order respecting them, till Mr. Fowke had sent a second letter to the board, applying for original papers he had before delivered in. I was then directed to send these papers, excepting the Persian, which was ordered to be translated, as the original papers which Mr. Fowke applied for had been recorded in the revenue department; and to desire Mr. Sumner to attend the board with all the papers applied for by Mr. Fowke; Mr. Sumner accordingly attended the board; and received further instructions to carry them to Mr. Fowke, at the chief justice's house.

Were the contents of the arzees mentioned in Mr. Fowke's letter?—No.

[Mr. Auriol says, the letter was dated the 18th; and he received it on the 20th, the day the parties were before the chief justice.]

Q. to Mr. Sumner. Do you know this paper?—*A.* I received this paper the 2d of June, of sir John Doyly; I received it as secretary to the revenue department.

Sir *John Doyly*. I believe this to be the paper I sent to Mr. Sumner, by order of the council. I received the paper from the governor, or one of the secretaries, and delivered it to Mr. Sumner.

Comaul O Deen. This is the true arzee. It is the arzee I delivered to the governor, to deliver to the council. It was not my custom to affix my seal to arzees: I did to those of Mr. Fowke's and Maha Rajah Nundocomar's. It was not my custom to write my name to arzees: the Moonshy wrote it. I sealed this, because the gentlemen desired it. Send for other arzees I have given in to the committee, and see how many of them have my seals to them. Ask Mr. Cottrell for my arzees, and see how many of them have my seals.

Do not you seal all arzees?—I never put it on C. arzees: but I do on darkhausts (proposals to government.)

Why did you put your seal to your arzee; viz. the small one?—If I had not put my seal

to it, Maha Rajah would not have given credit to it. I have put my seal on the arzees of Maha Rajah and Mr. Fowke, and on all the arzees in their possession.

Why did you put your seal to the arzees against Govin Sing?—To prevent their being changed, as a mark. If the governor tells me to put my seal, I put it. I should of my own accord, to know my own paper. Roy Rada Churn would not have taken it if it was not sealed. That I sent to Yar Mahomed was not sealed; I did not intend that should be delivered; therefore I did not seal it; (the large arzee) Mr. Fowke desired me to seal it.

Defendant's Counsel shews him a paper.

Do you know this arzee?—I delivered two or three arzees; one from myself, the other two from the zemindars. I will send for the copy, and tell you whether I delivered it or not.

Don't you know your Moonshy's handwriting?—No.

Can't you write Persian?—I can read, but not write well.

Did your Moonshy ever write in your presence?—Yes, always.

Are the seals to the great and little arzee yours?—Yes, they are.

Mr. Fowke admits the Letter enclosing them to be his.

Mr. William Chalmers proves the translate of the arzees marked A. and B. also of that marked D.

The *Governor General* examined.

Are these arzees of course sent upon the consultation?—I cannot say of course; but these are.

Are they sent?—Not yet; but they are to be sent.

Q. *to Mr. Sumner.* Are these arzees transmitted to England?—They are upon record, and will be sent.

Mr. Fowke's Letter read.—Arzees read.

Mr. *Elliot* explains his sense of the word 'barramut:' "An account of the receipts of money improperly received, which may be either true or false, forming an accusation, or reflecting a disgrace, on such person by whom the money is said to be received."

Captain *Camac.* A barramut is a paper delivered in, either before or after an aumeen is displaced; when it is delivered before, it is meant to get him displaced; if after, to accuse him of money received in his office; is often exaggerated; it may be either true or false.

Mr. *Redfearn.* An accusation that may be either true or false.

Mr. *Ducarel.* The same.

Kewdernawaz sworn.

Whose servant are you?—I am Comaul O Deen's Moonshy.

Do you know Maha Rajah Nundocomar?—Yes.

Were you ever at his house?—Yes. I was never but once, which was upon the occasion of this arzee; I went with Comaul O Deen. He went into the Dewan Connah: I staid without. He sent for me. I went and paid salam to Maha Rajah; who said to me, Come, and sit near me. When I had sat down, he gave me pen, ink, and paper; and bid me write out the foul draught of an arzee. I wrote out a foul draught according to what he told me. When I had wrote out the foul draught, he took it into his hands, and then looked at it, and gave it to Doman Sing; whose name I was not then acquainted with, but have since learnt it, and told him to copy it over on another paper. When Doman Sing had wrote it over, Maha Rajah, having altered it wherever he saw a small difference, told me to write it out fair. Then Comaul O Deen said, I have the disorder of the piles, and a pain in my belly, let me go away; my Moonshy will stay, and write out the arzee according to your instructions. C. O Deen then said to me, I am going home, do you stay and write out the arzee according to Maha Rajah's instructions. He went away; I staid till about a par and a half of the night; Maha Rajah was sitting, and I was sitting writing the arzee. When I had wrote it fair, I gave it into Maha Rajah's hands. Maha Rajah, having read ten or twelve lines of it, said, This is the fair copy of the arzee I bid you write; it is very well. He said to Yar Mahomed, Go with the Moonshy, and get Comaul O Deen to seal the arzee. We then went both together to Comaul O Deen's house. He was sitting smoking his hooka. Yar Mahomed salamed: I likewise went and sat down. Yar Mahomed sat near C. O Deen; I at a distance. Yar Mahomed said, Maha Rajah has sent this arzee to you; having considered of it, put your seal to it. Comaul O Deen, having read it, said, There is no agreement between Maha Rajah and me for putting my seal to it. If I should put my seal to the arzee now, and should be called on to prove the circumstances in it, I shall not be able to prove it. I will by no means put my seal to it: whatever I have wrote, I wrote to please Maha Rajah. Yar Mahomed then answered, Maha Rajah is the master, he has sent to you; you may either put your seal on it or not, as you please. During the conversation, Comaul O Deen gave him his hooka to smoke, and he soon went away.

How long have you known Mr. Fowke?—I have known him only since the disputes. I never went to Mr. Fowke's except the day of the dispute, when I went with Comaul O Deen.

Relate what passed.—Comaul O Deen went up stairs. I staid below. In about three or four gurries Mr. Fowke came down, and behind him Maha Rajah, and then Comaul O Deen. I don't exactly fix the number of gurries.

When did this happen?—It was next day after the arzee was brought to Comaul O Deen.

Mr. Fowke and Maha Rajah got into their palanquins. Comaul O Deen stood opposite Maha Rajah, and said to him, For God's sake, give me back that false paper of barramuts, which you have forcibly caused me to write. I cannot prove what is wrote in those papers against the gentlemen. He then called out Duoy on the gentlemen of the Audaulet. He said, his life and honour will be affected by this. Maha Rajah gave no answer. Comaul O Deen then took the collar of his jammah, and went to go into his palanquin. Then Yar Mahomed, Nettoo Sing, and others, took hold of Comaul's hands, and said, Where are you going? He then got his hand away from theirs, and got into his palanquin. When he got out of the lane which leads to Mr. Fowke's, a hircarrah went and stopt his sawarry, and said, Where are you going? come back. And they kept disputing in this manner, till they got to the Bitah Connah of Rajah Rajebullub. He then got rid of them, and went along the high road.

Were you ever examined concerning this before?—I was; at the Chief Justice's, and once before the Audaulet.

Do you know Goolaum Hussin?—Yes.

Do you know whose servants they were that stopt Comaul O Deen?—They belonged either to Maha Rajah or Mr. Fowke.

Do you know whose servants Yar Mahomed and Nettoo Sing are?—They are servants to Maha Rajah.

Did Comaul O Deen make any objections to the alterations in the arzee made by Maha Rajah?—No, he said nothing. He went away while the fair copy was writing.

Did Comaul understand the contents of it, after the alteration?—I do not know whether he did or not.

What time of the day was it, when you went with Comaul O Deen to Mr. Fowke's?—It was about a par and a half of the day.

How long did you stay there?—I cannot exactly tell; it might be about three or four gurries.

Did you hear any noise up stairs, at Mr. Fowke's?—How should I hear any noise in the upper apartments? I was down below.

[Mr. Farrer produces a paper, and asks whose writing it is?]—Mine. I wrote it in Comaul's presence. It is a paper about the Audaulet.

Who did you give it to?—I gave it to Comaul O Deen; he is my master. I gave it into his hands.

Q. to Comaul O Deen. Do you know this paper?—*A.* Yes. I gave it to Roy Rada Churn; it is a durk. Rada Churn said, it would have no effect; and therefore it was not sealed.

Kewdernawaz's examination continued.

Is that Comaul O Deen's seal on the arzee?—It is.

Did you see Comaul O Deen afterwards?—When he had gone from the cutcherry to his own house, I did not see him.

When you were before the justices, were you asked, whether you had been at Mr. Fowke's?—I was not asked as to my being at Mr. Fowke's, before the chief justice.

Where did you go after you left Mr. Fowke's?—I went with Comaul's palanquin on foot, to Rajah Rajebullub.

Hussein Alli examined.

Whose servant are you?—I am Consuma to Comaul O Deen.

Do you know Yar Mahomed and Kewdernawaz?—Yes.

Did you ever see them at Comaul O Deen's house?—Yes.

Relate what passed.—It was about one par of the night when Yar Mahomed and Kewdernawaz came to Comaul O Deen's house. I don't remember the day; it may be a month or a month and a half ago. Two or three days before the disputes, I met Kewdernawaz on the stair-case. He said, Comaul O Deen is going to seal a paper; do you bring the sicca dewat, and the box where the seal is. I brought them. I did not carry them into the room where they were: I gave them both to Huttoo. He took them, and stood with them on the stair-case. I told him, When they call for them, do you give them. I went in where Comaul was sitting, and saw Yar Mahomed sitting near him, and Kewdernawaz at a distance. About a quarter of a gurry, or not so much, Yar Mahomed went away. Then I went out, and said to Huttoo, Perhaps the business for which these things were wanted will not be done; let us take them away again. I took them; and put them in the Tosha Kannah.

Did Comaul O Deen call for the seal while Yar Mahomed staid?—No.

Did he seal the arzee?—No.

If he had done it, should you have seen it?—I must have seen it; the seal was in my possession.

Were you ever at Mr. Fowke's with Comaul O Deen?—Yes, I was there the day of the disputes; it was three or four days, I cannot exactly tell which, after that I was at Mr. Fowke's.

Relate what passed.—I do not know what passed above stairs. At the door way, first Mr. Fowke came out, and got into his palanquin; then Maha Rajah came out, and got into his palanquin. Then Comaul O Deen, addressing himself to Maha Rajah, said, I cannot prove the false Barramuts you have made me write out: this is very bad business, and I shall be ruined; get me the papers back from Mr. Fowke. Maha Rajah gave him no answer. Then he began to tear his jamma, and call out Duoy on the king, the company, and audaulet; and said, See, they have caused me to write this paper forcibly. When he attempted to get into his palanquin, Yar Mahomed and Nettoo Sing held his hands. They are servants to Maha Rajah Nundocomar. Comaul O Deen disengaged himself from them, and got into his

palanquin. As he went out of the lane to come on the great road, two hircarrahs stopt the palanquin, and said, You must come back. He went on in his palanquin. I left him: I had business in the Bazar. I could not go so fast. I saw as far as Rajah Rajebullub's Hish Connah.

Do you know whose hircarrahs they were?—They came out of Mr. Fowke's house. I do not know who they belonged to.

Cross-Examination.

Have you charge of Comaul O Deen's seal?—The seal is always in my possession. When Comaul goes out, or to the Durbar, he puts his small seal upon his finger, and a bundle of papers into his cummerband. When he comes home, he pulls off his cloaths, and puts the ring into the small box again; and that box is under my care. Whatever he has is under my care.

In what language did Comaul O Deen address Maha Rajah, when getting into his palanquin at Mr. Fowke's?—In Moors. What I heard, I remember. I was about two yards distant when he spoke to Maha Rajah.

Did you tell any body what passed?—I told it to the grand jury; to no one else.

Did you not mention it to Mr. Durham?—I don't remember that I did. Comaul O Deen asked me, You was there, did you hear what past? I said, Yes, I was there, and heard it. He wrote out a paper of what past, and I witnessed it. Comaul said, I have wrote down what passed; do you witness it. I witnessed it.

Did you read it before you witnessed it?—I did.

In what language was it wrote?—In Persian.

Do you understand Persian?—Yes.

What were the contents of this paper?—He first wrote and prepared the paper, in which was written, "Let those who are Mussulmen upon their oath of God and Prophets, and those that are Gentoos on their oath and Water of the Ganges, and their conscience, if they know any thing of this paper, let them witness it." He first wrote it, and then shewed it to me and others.

Q. to Mr. Elliot. Is it customary to draw out such papers?—*A.* It is. I scarce ever knew a cause in a country court, in which a suruthal* was not produced on one side or the other.

Keemageet examined.

Do you know C. O Deen?—Yes.

Do you know Mr. Fowke?—Yes.

Were you ever at Mr. Fowke's house with C. O Deen?—No, never. I never saw C. O Deen near Mr. Fowke's.

Relate what you know respecting a fray which you saw, between Comaul O Deen and others, in the street.—I was going on the road near the Hish Connah of Rajah Rajebullub; I saw Comaul O Deen in his palanquin, with his collar torn. There was one hircarrah running by C. O Deen, and crying, C. O Deen, stop your palanquin. C. O Deen did not stop his palanquin. The hircarrah ran up, and took hold of it; and having taken hold of it, said, Where are you going? Maha Rajah calls, and the gentlemen call you. Comaul O Deen called out Duoy on the king, council, audaulet, and governor; they have taken a writing from me by force, and now they send a hircarrah to make a disturbance. Having said this, and disengaged himself from the hircarrah, he went on.

Do you know whose hircarrah he was?—What do I know of the hircarrah?

Mahomed Ghose Newas examined.

Whose servant are you?—Nobody's.

Do you know Comaul O Deen?—Yes.

Do you know Mr. Fowke?—Yes.

Did you ever see C. O Deen at Mr. Fowke's house?—Yes, I saw him there the day of the quarrel; it is about three months ago.

What past there?—First Mr. Fowke came out, after him Maha Rajah. I was standing below. Behind Maha Rajah was C. O Deen. When C. O Deen came out, he addressed himself to Maha Rajah, and said, Those false papers of barratnuts you have caused me to write give me back again; I am a poor man, I cannot do this business, it will ruin me. Maha Rajah gave no answer. C. O Deen got in to his palanquin, and tore the collar of his jammah, and cried out Duoy of the Audaulet: when two men laid hold of his hands, and stopt him. He did not mind them. They went on disputing as far as Rajah Rajebullub's Hish Connah. As they were going there, a hircarrah from some distance behind, cryed out, Bring back the palanquin. He came up, and seized the bearers, and stopt the palanquin; and said, Come back. Comaul O Deen then called out Duoy of the Council and Audaulet, and got away. Where he went, I do not know.

Cross-Examination.

Whose servant did you say you were?—I am a student; employ my time in reading; am nobody's servant. I never was a servant.

How long have you lived in Calcutta?—It is about eight or nine months since I came to Calcutta.

Where do you live?—I live in the Mutchee Bazar, in a place I have hired of my own. I give rupees, six annas, per month for it.

Do you know Moonshy Sudder O Deen?—I have heard of his name. I do not go backwards and forwards to him. He sometimes goes to the Durbar; I go to the Durbar: I have seen him going there in his palanquin. I never spoke to him. He never sent any of his people to me. As I know the name of Moonshy Sudder O Deen, I do that of Comaul O Deen.

Did you stop when you heard Comaul O Deen cry out Duoy?—Yes. He called to the people to be witness.

Did any conversation pass between you and

* From *súrat-i-hál*, *Pers.* the statement of a case in writing.

Comaul O Deen?—I did not speak to him on the day of the dispute, or since.

Have not you signed a paper?—No.

Have you not signed a suruthal?—No. C. O Deen, when he called out Duoy, said, You will all be called on at the Audaulet. I received a summons to appear here; a peon gave it me, and to five others. I never told any body my name, or where I lived.

Where were you, when the summons was given you?—At my own house.

When did you first see Comaul O Deen?—When he began to cry out Duoy.

Being shewn the paper called the suruthal, and asked, If his name is to it in his own hand, he says, Yes, and calls it a Dewan Putny. At last he said it was a suruthal. Then he called it a Recidaad, and said, If you had asked me if I had signed a Recidaad, or any paper concerning this business, I should have answered I had. Being asked, If the paper which he calls a Recidaad is not a paper, he says it is.

Kewder Newaz re-examined.

Do you know the last witness?—I certainly do. He is my own brother. He is a witness to what passed in the dispute with Comaul O Deen at Mr. Fowke's house.

Are you own brothers?—We had the same father and mother; look at his face and mine, we are like; but he is a fool, and has denied it through fear. He knows nothing of business, and never did any in his life. I am forced to give him victuals and clothes. I was a servant of Comaul O Deen's at Calcutta; he came to me; he was present with me when the dispute happened; Shake Mahomed, Hussein Ally, Mahomed Gose Newaz, Mushurer Rahmaun, and Keemageet were there likewise. At the time of my father and mother I maintained him; and if out of six brothers one happens to be sensible, would he not maintain the others? My brother knows Comaul O Deen through my means. He lives with me in my apartments at Comaul O Deen's house. He is a man: if he has made himself witness upon any business, he understands it; why should he not know truth from falsehood?

Q. from Mr. Farrer. Whether you bid your brother go to Mr. Fowke's house that day? or whether any body else to your knowledge bid him go?—*A.* Nobody bid him go. He went of his own accord. Hussein Alli and I are Comaul O Deen's servants. We went by his directions.

Is it customary for you to go with C. O Deen?—Wherever he carries me with him, I go.

Hussein Alli re-examined.

Do you know Mahomed Gose Newaz?—Yes. His brother and he live with me in Comaul O Deen's house. He was with us at the time of the dispute at Mr. Fowke's house.

Is he a sensible man, or a fool?—He is not a sensible man, and yet not quite an ideot.

Is he such an ideot, as not to know his brother?—No, I think not. If he was, he would run about naked.

Does he smoke bang?—Not that I know.

Is he more sensible at one time than another?—Yes. But I never saw him in such a state as not to know his own brother: or not to know who is his brother, if the question is asked him.

Mushurer Rhamaun examined.

Do you know Comaul O Deen and Mr. Fowke?—I know them both.

Were you ever at Mr. Fowke's when C. O Deen was there?—I was. It may be about two months or two months and a half ago.

Relate what you saw.—I was standing at the door, and saw Mr. Fowke, Maha Rajah Nundocomar, and Comaul O Deen come out. Comaul O Deen said to Maha Rajah, Give me back that paper which you have forcibly caused me to write. I have never given money, or caused any to be given to any body. I know nothing of the contents of the paper; give it me back again. Then Comaul O Deen called Duoy upon the governor and gentlemen of the council, and said, Give me back the paper. When they did not give him back the paper, he tore his clothes, the collar of his jamah, and made a great piece of work: and called out to Gentoos and Mussulmen to bear witness. He got into his own palanquin and went away. A hircarrah ran after the palanquin, took hold of it, and said, Maha Rajah and Mr. Fowke call you; you must come back, C. O Deen. C. O Deen went towards the governor's house, and I went by the court-house to my own house.

Cross-Examination.

Who bid you go to Mr. Fowke's that morning?—Somebody's vakeel. I am vakeel of Fyzullah Issalam of Bangha. It is my business to go to every body's durbar. I did not go particularly to his.

Did you sign the suruthal?—I witnessed the suruthal, and signed it in the afternoon of that day. I did not see the suruthal in his hand at the time he cried Duoy.

What time of the day was it?—I cannot exactly tell what hour of the day it was; but believe there was three or four gurries of the day remaining. When the dispute happened, there were about six gurries of the day advanced. I signed the suruthal at my own house. Comaul O Deen brought it to me himself, carried me to read and sign it, and went away.

Moonshy Sudder O Deen examined.

Do you know Comaul O Deen?—Yes. I have known him more or less than 20 years; there is a friendship between us.

Did he ever tell you any thing about arzees?—One day in the month of Bysaak, Comaul O Deen told me so much on the business of the Teeka Collaries, that the dispute which was before: Maha Rajah wants me to write an er-

zee, and that there may be such a meaning put in that arzee by which the Governor and Mr. John Graham may get a bad name: he has desired me to write it; but I will not do it; and I will not bring so bad a name upon myself: you are my friend, and therefore I have communicated it to you. This was in the night, upon the business of arzees, he told me so much.

What time was that in Bysaak?—It was either the third or fourth, I do not remember. That was all that passed upon the arzees. When one friend goes to visit another, they talk of various subjects; if you mention any particular subject, I will tell. Again, there was a conversation on the eighth Bysaak; there were four gurries of the day remaining. Comaul O Deen came to me, and said, I have been at Mr. Fowke's house, to get back the arzees which I gave against Gunga Govin Sing. He has not given me back the arzees. He has caused me to put my seal by force to an arzee on the business of the tecka collaries, and he has made me sign a furd; but afterwards I told him, Do not do so. When I became my own master, I said, Sir, do not do so. Then Mr. Fowke said, Do not be in a hurry, Maha Rajah will be here to-morrow, and then we will settle it, don't make a disturbance. (Comaul) I am now going to Maha Rajah's, if he will procure me back my arzees and papers very well; and if not, to-morrow I will make a disturbance; or, I will destroy myself. You are my friend, acquaint Mr. Barwell and Mr. Vansittart with it. Having said this, he said, I am immediately going to Maha Rajah. I will come back again at night, and tell you all the particulars. He went away. He came back at night. I speak from guess, it might be about five or six gurries after the night. There was this conversation between us: seeming pleased, he said, "Maha Rajah will give me back the arzee and all the papers; he has told me to come to-morrow. Do you now hear all the particulars: the arzees which I gave against Gunga Govin Sing, and deposited with Roy Rada Churn, with the knowledge of Maha Rajah, upon this condition Moonshy Sudder O Deen is gone; if my dispute with him can be settled, I will take back, and I am to give him 6,000 rupees: 4,000 rupees to Maha Rajah, and 2,000 rupees to Rada Churn. Two days ago I desired Maha Rajah to give them back again, but Mr. Fowke says, Write out an arzee on the business of the tecka collaries, and then you'll get back your arzees against Gunga Govin Sing. I (C. O Deen) said, Maha Rajah, how can I write this? Maha Rajah said, It does not signify; do you one thing; do you write on one subject; having shewn it to Mr. Fowke, that story of yours shall be torn; and you will receive back the arzees against Gunga Govin Sing that are with Mr. Fowke. I said, I have the disorder of the piles, and a pain in my belly; I will go; my moonshy will remain, and will write it. I went; my moonshy staid. Maha Rajah caused the moonshy to write the dictates of his own heart; and in the night Maha Rajah sent it by Yar Mahomed for the purpose of getting my seal upon it. I told him, There was no agreement between Maha Rajah and me that I should put a seal to it. I did not put a seal to it. Yar Mahomed went back again upon that business. Mr. Fowke has to-day forced me to put my seal, and fished up a book to strike me, and was very angry with me; for which reason I sealed it, and gave it to him. He took out a furd, in which was wrote the names of Mr. Barwell, the Governor, Mr. Vansittart, Cantoo Baboo, Rajah Rajebullub; these names, and certain sums, were wrote in the furd, and desired me to put my duskut to it." I asked him what duskut heir he had put upon it: Comaul O Deen said, In some places I wrote Russan nedum, and others Dadum. And he told me a great deal about his being in a great measure senseless.

Gunnissan Doss, being asked as to the difference between Duskut and Duskut Kier; says, "Duskut generally among great men to inferiors means a mark of authentication, without a name."

Moonshy Sudder O Deen. It may be either a signing or a single letter; or any mark they chuse to make; the same from an inferior to a superior, as from a superior to an inferior.

Are the two Persian words mentioned by Comaul O Deen a duskut?—Yes. For which reason I asked him what duskut he had put to it; and undoubtedly I thought when he told me what it was he had put, I thought it a duskut. "After having wrote them, I (C. O Deen) made a disturbance. All this I told to Nundocomar; who said, To-morrow you shall get back again all your papers and arzees."

Sudder O Deen cross-examined.

Were you at Comaul O Deen's last night?—I neither saw him nor heard from him.

Have you heard what evidence he gave?—It is the custom here for persons to talk about what passes in the court; some are good men, some bad; and have told me, at different times, Comaul O Deen gave such and such an evidence. Nobody came to my house to inform me of his evidence.

When did Comaul O Deen first inform you of any disputes between him and Gunga Govin Sing?—He told me of it when I came from my own house.

Did Comaul O Deen desire you to obtain from Gunga Govin Sing any sum of money which he had upon him?—C. O Deen said to me, I have on your account deposited arzees against Gunga Govin Sing; do you get the business settled for me.

Did you settle it?—I did.

On what terms? What sum of money was paid to Comaul?—When I came home, Comaul complained much against G. G. Sing; and he afterwards told me, He is now in my power; you are his friend and mine; if you'll

settle it, very well; if not, there will be a dispute; I will injure him very much. He began to talk angrily; and I said, Disputes are not good: why should there be disputes between friends? Such conversation passed every day. They were both my friends; for which reason I told them it was better to settle it; and about the 5th day I settled it, for 10,000 rupees.

Was 10,000 rupees the whole paid to Comaul O Deen, either in money, or any other consideration?---Comaul O Deen claimed 26,000 rupees; G. G. Sing said, I have written off this to your revenue account: you have no claim upon me. I told this to Comaul O Deen; who then said, I am much in arrears, on account of the tecka collaries; and my character will go; if I can get 10,000 rupees, I shall escape. I then told Gunga G. Sing, You are my friend, and he too; it is not well to quarrel among ourselves; and now the times are such, that it behoves every good man to avoid having any complaint against him; it is necessary for you to give C. O Deen 10,000 rupees. Then Gunga G. Sing said, You say this to prevent quarrels; it does not signify; what you say is very well: you tell me to give 10,000 rupees; the remaining 16,000 rupees shall be written off on his land revenues.

Did Comaul O Deen mention any other arzees than those against G. G. Sing?---He said something about having given a duskut for the Audaulet of Hidgelee to Maha Rajah.

When C. O Deen spoke to you about the book being held up to him, was it about G. G. Sing?---It was to seal the arzee about the tecka collaries. He told me nothing of the contents of the arzee, that was wrote at Nundocomar's when he went away and said he was ill, which was carried to his house to be sealed, and about which Mr. Fowke held up the book.

Was it that arzee, or any other, that Mr. Fowke made him seal?---From his telling me, I know it was that arzee.

Which Mr. Fowke was it, that bid him not make a disturbance?---I did not ask which; he said Fowke Saub.

Did you ever advise Comaul how to act, when he went to Mr. Fowke's?---No, never.

Did you, in your own name, or in any other, ever promise Comaul O Deen any thing, for giving the evidence he has given? or told him, that advantage would result to him from it?---No, never.

Did you ever desire him to write an arzee against Mr. Fowke?---No, never.

Mr. *Hastings* examined.

Do you know Comaul O Deen Cawn?---Yes, I do.

Did he make a complaint to you, in the month of December last?---Yes; I will endeavour to relate what passed: Comaul O Deen, in the month of December, complained that Mr. Fowke had attempted, by promise and threats, to extort from him a declaration, that he had given bribes to English gentlemen, and mutsuddies, for the grant of the tecka collaries, or the adjustment of accounts relative to them; I am not certain which. These were salt works, not originally included in the lease of the farm of Hidgelee, but worked by other farmers, by people brought from other parts, and afterwards given to the farmer of Hidgelee, to prevent competition. I told him, I would not receive a verbal complaint; if he desired me to take cognizance of it, he must commit his complaint to writing, and deliver it in writing. He did so; but in terms so brief and general, that I returned it to him, telling him, that, as he had stated it, it did not amount to a complaint; that I would have nothing to say to it; but if he wished I really would take notice of it, he must mention the facts by which he thought himself injured, in writing, and relate their circumstances. I think, while I was talking to him, Mr. Vansittart arrived in the apartment where we were conversing. I told him what had passed, and what I had been saying to Comaul O Deen; he repeated the same injunction to him. Comaul O Deen said, He would write down the complaint, and make it fuller and more circumstantial; but that he had no Moonshy with him. I told him, Mine should write it, if he would dictate it. He agreed to it, and wrote the first arzee, which has been read; it was then brought to me, I believe by Comaul O Deen, and I laid it before the council. In conversation between Comaul O Deen and me, other particulars may have happened, which, if there were, I cannot recollect, and have totally forgot.

Did Comaul O Deen ever tell you that there were falsities in the arzee, to which he could not swear?---No, never. I understood what was written; and believed it to be true, as far as I could believe a single witness; I put several questions to establish my belief, so far as to lay it before the council.

What directions did you give, as to the drawing up of the arzee? or what did you say on the occasion?---I only said, All circumstances must be related. I believe I might say, If it is true, as you have said, that Mr. Fowke told you it would be better for you to make declaration; and, if not, you would be punished: this is material to the complaint, and should be mentioned. I believe I might have said so, because I think, in like circumstances, I should do so now.

Did the arzee contain nothing more than the accusation, as related by Comaul O Deen?---The circumstances put in the arzee did not in the least, I believe, vary from the accusation in essential points; only in a different manner of relating the same facts: they appeared to me the same.

Had you not connections with Maha Rajah Nundocomar?---I certainly had; that is to say, I employed him on many occasions; I patronized and countenanced him, it is well known. I never had an opinion of his virtue or integrity, I believe he knew I had not. I beg leave to add, that when I employed him as

an instrument of government, I might have other motives than my reliance on the man's integrity; motives which did not depend upon me. I might have other motives—I had—I considered it as a point of duty, which I could not dispense with; I have, till lately, concealed the motives, because I thought it my duty; but I think it necessary, for my own character, to declare, that I had the orders of my superiors to employ this man. He never was, in any period of my life, in my friendship or confidence; never.

Did not you say, that you would be revenged on him, and would ruin him?—I never mentioned revenge, or that I would ruin him. I am clear I did not mention these words, because it is not in my disposition.

Did you never tell Rajah Nundocomar, that you would withdraw your countenance and protection, and would not be his friend?—My friendship he never had. I certainly did use expressions which implied, that he was neither to expect my protection or countenance; and dismissed him my house.

Did you ever say, that you would conduct yourself to him as he deserved?—I never made use of the expression.

Did you, directly or indirectly, countenance or forward the prosecution against Maha Rajah Nundocomar?—I never did; I have been on my guard; I have carefully avoided every circumstance which might appear to be an interference in that prosecution.

When did you first hear of Comaul O Deen's complaining against Mr. Fowke? — That morning I examined into it. He came with his complaint, and broke in upon me very abruptly. He told me his story, and I put many questions during the relation; and afterwards I doubted it. When he first related it, I asked him questions, to clear up those doubts. I bid him be cautious in what he related. I observed, he seemed much agitated with passion, or had much the appearance of it. And I advised him seriously and repeatedly to weigh what he was about, before he persisted in an accusation, which might be dictated by prejudice, interest, or present passion. He persisted in his story, affirmed the same facts, with much vehemence, in such manner as to induce me to give a degree of credit to it; but, as I was a party, I told him, I could not redress it: that was the reason I assigned, and directed him to make his application either to the chief justice or to one of the judges of the supreme court. He said he would go to the chief justice, and desired I would procure him an introduction. I sent a chubdar with him, to prevent any detention or prevention he might have met with from the chief justice's servants. I also wrote a note to him, which I sent by one of my own servants.

When was it that you interrogated C. O Deen respecting his complaint?—Between the examination at the chief justice's house and the Monday, when we determined to prosecute. I questioned him two days successively, and urged him, by the arguments which I thought most likely to have weight with him, to declare the truth that passed between him and Mr. Fowke. He was strictly consistent when he told the story, repeated always the same facts, varied only in the manner of telling them, and introducing immaterial circumstances; he did not vary in the sense: he did not repeat the same words, or make the same arrangements; the material facts were the same.

In what language did you examine him?—In the Hindostanny.

Did you ever examine any other of the witnesses?—No, never.

Did you ever see Comaul O Deen's moonshy?—I never saw him but at the chief justice's. Comaul O Deen always persisted in the same story of the furd; it was on that point chiefly that I examined him, because it was less capable of evidence, and I wished to be convinced, as far as I could be, from the man's manner of relating it. I was thoroughly satisfied in my own mind, when I commenced the prosecution, that the story was true: and I have had no reason since to alter my opinion.

Was Nundocomar never in your private friendship or confidence?—There was never a period in which he was in my private friendship or confidence: I may except the small time, till I had acquired an opinion of his conduct. There are some in this settlement that know on what terms we were before I went to England.

Would you have employed him, had you not had the orders of your superiors for so doing?—I believe I should; but I never should have shewn him that degree of countenance, or continued it. I might have employed him for a particular purpose. I was directed to employ him in a particular service, and to make it his interest to exert himself. I never had orders to give him particular countenance and protection.

At what time did you employ him particularly?—It was about the removal of Mahomed Reza Cawn, and the making new arrangements. His interest and inclination were contrary to Mahomed Reza Cawn's, and he was thought fittest to destroy the influence of Mahomed Reza Cawn, till the new arrangements should be confirmed.

Mr. *George Vansittart* examined.

Were you at the governor general's when Comaul O Deen made his complaint?—I was.

Relate what you recollect of it.—Mr. Hastings was in the south-east room of his house; Comaul O Deen was there, and others, when I went in: Mr. Hastings told me that Comaul O Deen had been complaining of him, that Mr. Fowke had threatened him with punishment, if he did not deliver an account of barramuts; that he had been relating every thing very circumstantially by word of mouth; but had given in a petition, very short, and of no kind of consequence. He desired me to explain to Comaul O Deen, that if what he had related

verbally was true, and he meant to complain, he should be as circumstantial in his petition as he had been in his verbal relation; and particularly, that he should mention the circumstance of Mr. Fowke having threatened him with punishment, if he did not give in the barramut paper, or account of bribes: it was on the subject of tecka collaries. The governor then turned to Comaul O Deen, and himself told him to the purport he had been desiring me to tell. Comaul O Deen said, He would go home, and write such a petition: the governor said, It was unnecessary he should go home, that he might dictate it to his Moonshy; he would order his Moonshy to write what Comaul O Deen dictated. He then left the room. I repeated over again to Comaul O Deen, in Persian, to the same purport as the governor had been telling him in the Hindostan language. I particularly asked him if the circumstance of Mr. Fowke's threatening him with punishment was true, and particularly charged him, that he must write nothing but what was strictly true. He said that circumstance was true; promised he would not write any thing but what was so; he then went with the Moonshy, I believe into the south veranda, and I returned home: I believe I did stay till it was wrote.

Did C. O Deen ever give you any reason to think his complaint not true?—Never; his assertions have always been that it was true.

Where were you on the 20th of April?—At the chief justice's.

Did you ever hear Mr. Fowke say, that he used threats to make C. O Deen sign the paper?—No; he said he lifted up a volume of Churchill's Voyages: I think the reason he gave for it was, that C. O Deen went into his room when he was lying on the bed, and was troublesome to him. I believe it was to get back his arzee. I cannot say that certainly.

Do you remember any thing else that passed at the chief justice's?—I remember Mr. Fowke speaking to Mr. Barwell, with great vehemence, "Can you say upon your honour and your oath, that you did not receive the 45,000 rupees?" Mr. Barwell replied, upon his honour and his oath, he did not.—I am generally called Hoshia Jung by the black people, it is a title I have.

Did Moonshy Sudder O Deen ever call at your house?—Yes.

When was it?—On the Tuesday or Wednesday before the Thursday of the examination.

What time of the day?—I believe about seven or eight o'clock in the evening. He acquainted me that C. O Deen had called on him, and told him that Mr. Fowke had used him ill that morning; that he had obliged him against his will, to write an account against Mr. Barwell and me, of bribes pretended to have been received by us; that he was determined, however, to get back what he had written, or would complain to the governor.

Did he mention nothing of the governor's name?—I do not recollect that he did—I am not sure.

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Cross-Examination.

How long have you known C. O Deen?—I had an acquaintance with him about 12 years ago, and not after till 1773.

How came you acquainted with him?—I know him as being member, and he a farmer.

Do you know of any complaints being preferred against him?—I do not.

Had you ever any particular conversation with him at your house?—I think he has called on me; but whether I had any particular conversation I do not recollect.

Did you never turn him out of the room, as a man not worthy to be credited?—No, never.

What is your opinion of him?—I never had reason to put confidence in his credibility, or to doubt it. I thought him a creditable man, and never heard any thing amiss of him.

Do you remember any instance of a complaint of his which was found to be groundless?—No; though I have frequently heard of accusations against him in the farming business; the only one I can recollect made by him, was against an English gentleman; and that I believe to be true.

Did you believe Comaul's accusation to be true?—I did; else I should not have joined my name in the prosecution.

Was it not your doubt of his credit that made you tell him to write only what was true?—No; from the nature of his story; and not from thinking his credit doubtful.

How long have you known Mr. Fowke?—I have known him 16 years.

What is your opinion of his character?—I have ever looked on Mr. Fowke as strictly honest, and of strict honour, according to his own principles; but I believe the violence of his temper may in some points lead him out of the road of honour without he himself being sensible of it. Procuring accusations I think one of those instances that may lead him out of the road of honour. I should be embarrassed to put any other case, but accusations against the governor general and those immediately connected with him.

Is Mr. Fowke in the Company's service?—No, he is not; I believe he is employed by general Clavering; he is in office.

Did you, or did you not, receive the 12,000 rupees, on account of the tecka collaries, as mentioned in the furd?—I never received that sum, or any other on that account.

Moonshy Seerat Alli Cawn examined.

Whose servant are you?—I am in the service of the Company; but remain about the governor.

Did you ever write an arzee for Comaul O Deen by the governor's order?—Yes, I did.

Relate the circumstances.—As I go every day to pay salam to the governor, that day, as I was standing in the outward room, I was called, and went in. The governor was sitting at his writing-table, and Comaul O Deen was at a small distance from him. Another person, Cantoo Baboo's deputy, was there, and the

governor's surizbeggy. The governor called me to him; then he took the arzee, and gave it me to copy it fair; and went out with Comaul O Deen, at some distance from him. When I began to write, Comaul O Deen said to me, Write what I dictate. He then, looking on the other arzee, began to dictate, and I to write: when I had wrote it, Comaul O Deen read it over; towards the latter end there appeared something confused; he put it right, in order to present to the governor. When I had wrote it fair, I gave it to the governor. Comaul O Deen followed me. The governor began to read; and I explained it in places he did not understand. When the arzee was read, the governor looked at Comaul O Deen, and said, You say one thing, and write another. Comaul O Deen answered, I have written what I before said. The arzee remained with the governor; I and Comaul went away.

Gunga Govin Sing examined.

Did you give directions to Comaul O Deen, to complain against Mr. Fowke?—I did not.

Did Comaul O Deen ever shew you an arzee, complaining of Mr. Fowke?—I saw an arzee in his hands, at the governor's house; I do not know whether he put it into my hands; I did not read it.

Had you ever any dispute with Comaul O Deen?—There was something of a dispute between me and him, about 26,000 rupees.

Mr. *Alexander Elliot* examined.

Do you remember what passed at the Chief Justice's, respecting a book which Mr. Fowke lifted up to Comaul O Deen?—Mr. Fowke acknowledged, that he had lifted a volume of Churchill's Voyages against Comaul O Deen, I do not remember why, on the morning of the day he came for the arzee. He said, Comaul O Deen was teazing him; and I think said, seized on his legs; I am not sure; in consequence of which he lifted up a volume of Churchill's Voyages; it was something about the arzee.

Do you remember any thing that passed between Mr. Barwell and Mr. Fowke at the Chief Justice's?—Mr. Barwell spoke to Mr. Fowke with some warmth about his conduct in this affair; and Mr. Fowke, appearing to be angry, asked him if he could give his honour and oath that he had not received the 45,000 rupees. Mr. Barwell said, he would give his honour and oath he had not. Mr. Fowke then said, He must acquit him; that is the way I generally wipe off accusations against myself.

Verdict on this Prosecution, Not Guilty.

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558. The Trial* of Joseph Fowke, Maha Rajah Nundocomar, and Roy Rada Churn, for a Conspiracy against Richard Barwell, esq. one of the Members of the Supreme Council for the Province of Bengal. At Calcutta or Fort William, in Bengal aforesaid: 15 George III. A. D. 1775. [Subjoined to the preceding Report.]

"*Town of Calcutta and Factory of Fort William in Bengal, to wit,*" THE jurors for our lord the king, upon their oath, present, That Joseph Fowke of Calcutta gentleman, Maha Rajah Nundocomar Behader late of Calcutta inhabitant, and Roy Rada Churn of the same place inhabitant, all of whom are subject to the jurisdiction of the Supreme Court of Judicature at Fort William in Bengal, being persons of evil name and fame, and dishonest reputation, wickedly devising, and unjustly intending, to deprive Richard Barwell esquire, one of the members of the council for the province of Bengal, of his good name, credit, and reputation, and to represent him as an unjust and dishonest person, and unfit to be trusted with the high office and authority which he holds in the said province of Bengal, and thereby to bring him into the ill opinion, hatred, and contempt, of all his Majesty's subjects, both in India and Great Britain, did, on the 19th day of April, in the 15th year of the reign of our sovereign lord George the 3d, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, at the town of Calcutta, and factory of Fort William, fraudulently and unlawfully conspire, combine, and agree among themselves, falsely to charge and accuse the said Richard Barwell, for that he had corruptly and collusively received several sums of money from one Comaul al Deen Allee Cawn, in the nature of bribes, or for services rendered by him to the said Comaul al Deen Allee Cawn, by virtue of his office, and the authority of his station in this province, and by that means to represent the said Richard Barwell as guilty of wilful bribery and corruption in his office and duty: and the jurors aforesaid, upon their oath aforesaid, present, That, according to the said conspiracy, combination, and agreement, the said Joseph Fowke, Maha Rajah Nundocomar Bahader, and Roy Rada Churn, did at several times, make use of persuasions, promises, and threats, to prevail on the said Comaul al Deen Allee Cawn to accuse

Conspiracy.

* See the two Cases immediately preceding.

the said Richard Barwell of having received the said sums, and of being guilty of the said offence of wilful bribery and corruption; and the jurors aforesaid, upon their oath aforesaid, do further present, that also the said Joseph Fowke, Maha Rajah Nundocomar Bahader, and Roy Rada Churn, on the said 19th day of April, in the year aforesaid, according to the said conspiracy, combination, and agreement between themselves, before had as aforesaid, did make, frame and write, and caused to be made, framed and written, a certain writing or paper, purporting, that sums of money had been so paid and received; to wit, to Warren Hastings esq. 15,000 rupees, to Richard Barwell esq. 45,000 rupees, to Hoshyar Jung, thereby meaning George Vansittart esq. 12,000 rupees, and other sums of money to other persons; and did falsely and wickedly prevail with and force, by intreaties, menaces, and other unlawful means, the said Comaul al Deen Allee Cawn, to write words on the said paper, purporting, that he acknowledged to have paid the said sums to the said persons: whereas in truth and in fact the said Richard Barwell never received any such sum of money; and the said Comaul al Deen Allee Cawn, at the same time, and immediately thereafter, and also since that time, declared the said accusation to have been false, and violently extorted from him as aforesaid, to the great damage of the said Richard Barwell, to the evil example of all others in the like case offending; and against the peace of our said lord the king, his crown and dignity."

Signed, JA. PRITCHARD,
19th June 1775. Cl. of the Crown.
W. M. BECKWITH,
Cl. of Indictments.

Comaul O Deen Cawn sworn.

Q. Are you acquainted with Nundocomar?—*A.* Yes.

Did you ever make application to him for money?—I have often.

Did you in the month of Chyle last?—Yes; I borrowed 3000 rupees of him in that month.

Relate the conversation that passed between you and Nundocomar.—When I returned from Houghly, I went to Nundocomar's house: he was not at home: I sat down in the Dewan Connah, and Maha Rajah came soon after: I gave him a gold mohur: he asked me whether I had heard what passed between the governor and council about barramut, and the Munny Begum: I answered, I have not heard all: Maha Rajah said, Mr. John Graham is my enemy, and I am his: I was not an enemy to the governor: the governor has told me, I will think much about you, be upon your guard. I thereupon consulted with Mr. Fowke: Mr. Fowke answered me, Do you get barramuts against the governor, Mr. Barwell, Mr. Vansittart, and other gentlemen; and I will procure for you the place of the aumeen of the khalsa; I then gave him the barramut, on account of Munny Begum, and I have proved the governor to be in the wrong in the council. Nundocomar said to me, Do you get barramuts for the pergunnah* of Mysadel, Avingun, Tumlook, and whatever places you can get them from. I then answered, You have told me of getting barramuts against the governor and other gentlemen; but on hearing this, the people speak ill of you; you was before in friendship with the governor, and now you talk of getting barramuts against him; and there is now a friendship between Mr. Barwell and Mr. Vansittart; you are going backwards and forwards to their houses: Nundocomar said, They send often to call me; therefore I go: I then said, I have given nobody any thing, on account of Hidgellee. What do I know, what has been done at other places? There was other conversation passed, but I do not remember it now: he laughed and said, go and get the rupees you wanted to borrow from Roy Rada Churn, and when the Burdwan man gets his kellaut, I will talk to you further on the subject.

When did you see Nundocomar again?—It was either on the 30 Phaugoon, or the 1st Chyle.

Did you see Mr. Fowke soon after that?—Yes; a few days after I went to Mr. Fowke's with Roy Rada Churn.

On what occasion?—Maha Rajah had told me, You have had a quarrel with Mr. Fowke; go and be reconciled to him, and by his means get introduced to the general, colonel Monson, and Mr. Francis: I said, There is no great things in being reconciled to Mr. Fowke; till you get your kellaut, I would not be introduced to the gentlemen: I will not go to-day, I will go to-morrow. The next day I went with him to Mr. Fowke's: I offered Mr. Fowke a nuzzer of 5 rupees, which he did not take: he told me to sit down: he got up and went into his bed-chamber: he then called me in to him, and Roy Rada Churn and I went in together: he said many kind things to me, that he had heard of my praise of Maha Rajah: he also said, You will be on good terms with Maha Rajah: I will get the business of Purnea for you, and whatever Maha Rajah bids you do, do it: he then gave me beetle, ottar, &c. and my dismission.

When did you go again to Maha Rajah?—Two days after, in the evening; I did not choose to go sooner, because I heard bad words.

What bad words?—About the barramut.

What did you go for?—I went to get my dismission to go to Houghly.

What passed that evening?—Maha Rajah asked me, Where is the small arzee you before gave in to the governor against Mr. Fowke? I said, I have it: Maha Rajah said, Bring it to me to-morrow evening, that I may see it: when I have seen it, I will then give you your dismission: I went home; my old moonshy was gone to his house; at noon, whatever I remembered, I caused to be wrote by my new moonshy.

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* A small district consisting of several villages.

Why was the old moonshy gone from your house?—The arzee was in the possession of my old moonshy.

What did you do with what you bid your new moonshy write?—I kept the paper newly written in my possession till the evening: I sealed it, and carried it to Maha Rajah. Maha Rajah read it, and kept it, then gave me my dismission for Houghly.

Why did you imagine that Mr. Fowke and the Maha Rajah would ask you for barramuts?—They talked to me about barramuts; there was a cutcherry of barramuts, for all the jemindars: I alone do not know this; all Calcutta knows it.

You say you went to ask your dismission for Houghly: when did you return?—I went to Houghly; while I was there, I heard that Moonshy Sudder O Deen was coming: hearing that, I returned: I believe about the last of Chyle.

When did you see Maha Rajah again?—When I went for the arzee back: about the 4th or 5th Bysaak.

What then passed?—I said to Maha Rajah, Moonshy Sudder O Deen is come back, and the business with Gunga Govin Sing is settled: give me the arzee back again: then Maha Rajah said, What has been done about the rupees you spoke to Roy Rada Churn about? I answered, I have not got the rupees from Gunga Govin Sing; and I will now, if you please, give it you in writing, that when I receive them, I may give you the sum promised.

(Comaul O Deen here says, that he has not his recollection about him to-day, and accounts for it as follows):

My vakeel has been tied up by Ramchunder Sein for money, and great disgrace has fallen on me: I am the renter of Hidgelee, I let it to farm out again to Bussunt Roy, and gave security to government: Bussunt Roy pays the rent, and Ramchunder Sein, dewan of the khalsa, has tied up my vakeel without Mr. Cottrell's order, or without his being acquainted with it: Ramchunder Sein is a mutsuddy, and I am a man of reputation; the tying up my vakeel is the same as tying me up.

What did Maha Rajah say was done with the arzee?—Maha Rajah said, I have it not, Mr. Fowke has it: I then said, I deposited it with Roy Rada Churn; why has Mr. Fowke got it?

What answer did Maha Rajah make?—He said, What does it signify to you? come to-morrow: when I went the next day to Maha Rajah's, he told me, Mr. Fowke says, the large arzee which you gave to the Governor in the month of Poos, complaining against him; if you will write thus, that you did not give in the arzee on your own accord, but by the direction of Mr. John Graham and the Governor: write in this manner: Mr. Fowke having read it, will remember you in his heart; he will know that you are his own man: I then replied to Maha Rajah, Shall I tell a lie? Maha Rajah said, It must be wrote: it was necessary for me to get back the arzee against Gunga Govin Sing; and I said, Very well, I will write it when I get home. I came to my own house, and wrote in such manner, as in some measure to comply with his desire, and at the same time to save myself harmless, and left room for my own conscience: I took it to Maha Rajah's; he was out: I sat down in the dewan connah: Maha Rajah soon came, and as he was getting out of his palanquin, I gave him the arzee. He read it, and laughing, said, This is nothing; in the evening bring your Moonshy with you: I became angry, tore the arzee, and went home; every body knows, I am a passionate man when I hear a lie. In the evening I returned, and took my Moonshy with me to Maha Rajah's: I sat still in silence: Maha Rajah caused draughts to be wrote out by my Moonshy and his own, Domaun Sing; he then altered them with his own hands, and told my Moonshy to write out a fair copy; I also told him to do it; I acquainted the Maha Rajah that I had a great pain in my belly, and desired to go home. Maha Rajah asked me if my pain was very great: I said, Yes, and got my dismission. When one par of the night was past, my Moonshy and Yar Mahomed came to me: Yar Mahomed said, Maha Rajah has sent this paper, put your seal to it: I said, No; there is no agreement between Maha Rajah and me about sealing it. I then gave Yar Mahomed my hookah to smoke; he smoaked a little and went away. In the morning I went to Maha Rajah: he said to me, Rada Churn is gone before, with the arzee; do you follow him to Mr. Fowke's: I went from Maha Rajah to Mr. Cottrell's; and as I came out from Mr. Cottrell's, Rada Churn's hircarrah came to me, and said, his master was at Mr. Fowke's house, and called me thither: I then went, young Mr. Fowke and Rada Churn were sitting in his room (young Mr. Fowke's room). After the usual compliments, Rada Churn went into old Mr. Fowke's room; he came out again in about two gurrys. A little after, Acoor Munnah came to me, and said, Mr. Fowke called me. I went: Mr. Fowke was sitting upon the bed, with his feet hanging down; and ordered me a chair, to sit opposite to him. Two writers and two Bengalies stood behind me. One of the Bengalies was Acoor Munnah, and I know one of the writers. He then took out the arzee from off the bed, near the pillow, and asked me if I had given that arzee. I said, Sir, that is not an arzee; it is a jabob sawand: I wrote it according to the pleasure of Maha Rajah. Then Mr. Fowke put on an angry face. I said, There is wrote in this the words, 'gurry perivium, adawlut booster, and ershaud meshawud;' *i. e.* 'Protector of the poor, distributor of justice;' and 'it is ordered.' I said, Who is the giver of orders? Mr. Fowke then angrily told me to seal it. I was afraid; and, putting the end of my jamma about my neck,

said, Sir, for God's sake, do not require me to do such business. He then took up a large book, and said, God damn you, you son of a bitch. I said, Sir, well, give it me, and I will seal it. (C. O Deen here describes the book.) Mr. Fowke laid down the book, and I sat down on the ground: the tears ran down my cheeks, and I quivered and shook through anger and fear. I then sealed it: he took it of me; and then took out a furd, and asked me, Have you given Mr. Barwell in three years 45,000 rupees, at the rate of 15,000 rupees a year? I said, I had. Did you give Mr. Hastings 15,000 rupees? I said, I had. Did you give Mr. Vansittart 12,000 rupees? I said, Yes. Did you give Rajah Rajebullub 7,000 rupees? I said, Yes. Did you give Cantoo Baboo 5,000 rupees? I said, Yes. He said, sign it; and then put the furd into my hands: I looked at it, and saw the five names, with the different sums opposite to each. The ink-stand was lying on the bed, and I put my duskét on it—writing "Russum Rudum and Dudam." When I had signed the arzee, Mr. Fowke bid me tell the people behind me to witness it. I said, Very well, let them do so. I then gave him the furd, and he told me to go.

Where did you go?---I went out, wiping my face, and stood upon the stair-case. There was a man named Samsheer Beg standing there: I said to him, See what violence has been used with me. He answered, I see the consequence; but know nothing of the cause. I said to him, Let me fetch breath, and I will make you acquainted with the cause. Then Roy Rada Churn and young Mr. Fowke, holding each other's hand, came and stood upon the landing-place. I said to them, Tell Mr. Fowke to give me back all the papers which he has by force caused me to write, or I will spoil myself *(arab kurra)*, and, tearing my clothes, go immediately to the council. They then said, Don't be angry; be a little cool, and we will speak to Mr. Fowke. They went to him; and in about one and a half or two gurrys came out again. Young Mr. Fowke had the cover of a letter in his hand, and said to me, Your papers are all in this; I have brought them out, but will keep them with me to-day: You come to-morrow; Maha Rajah will likewise come; and whatever Maha Rajah pleases, and shall be agreeable to you, shall be done. I then came away.

After you came away, what did you do?---When four gurrys of the day were remaining, I went to Moonshy Sudder O Deen, and said to him, Mr. Fowke has by force caused me to put my seal upon an arzee, and to sign a furd: I am going to Maha Rajah; I desire, if you have an opportunity, that you will go and acquaint Mr. Barwell and Mr. Vansittart of all the circumstances.

What was he to acquaint them with?---Of these circumstances. I went to Maha Rajah's; he was in his inner apartments: I went and sat down with Samsheer Beg; we said our prayers together. I then went to Roy Rada Churn, and, talking to him, took a pillow and sat down. Maha Rajah came out into the dewan connah: I went and sat down by him; I then related to him all these circumstances. Maha Rajah consoled me, and said to me, Do you be content; I will go in the morning, and get you back your arzee. He gave me beetle, &c. and my dismission. I went away.

Where did you go to next?—I went to Moonshy Sudder O Deen, and told him all these things. The next morning I went to Mr. Fowke's: Maha Rajah, Roy Rada Churn, and old Mr. Fowke, were in the room: I stood upon the staircase, and did not go in, through fear. Soon after, Mr. Fowke came out; then Maha Rajah came out, and Rada Churn. I addressed myself to Maha Rajah, and said, Sir, what have you done for me? Maha Rajah said, What can I do for you? I have talked a great deal to Mr. Fowke; but he does not mind me. Saying this, they went down stairs to their palanquins: just as they were setting off in their palanquins, I began to tear my clothes, and called out Douy. I then got into my palanquin: hircarrahs laid hold of it, and scuffled with my people; and went on in that manner, scuffling, till I got to the Bitah Connah of Rajah Rajebullub. I went and complained to the Chief Justice.

Did you go no where else, before you went to the Chief Justice?—Yes, I went to the governor's.

What did he say to you?—He said, What can I do? They are three gentlemen, I am but two: I can do nothing for you in this. You must go and complain in the King's Adawlet; I cannot do you justice.

Whose hircarrahs laid hold of your palanquin?—How should I know? Do I write down their names? How can I tell?

Do you know whether they belonged to Mr. Fowke, Maha Rajah, or Rada Churn?—I do not know whose they were. Why should they belong to any body else but one of them? They called me to come back; sometimes Maha Rajah, sometimes Mr. Fowke, and sometimes Rada Churn, wanted me.

Why did you call Douy, when Mr. Fowke and Maha Rajah were getting into their palanquins?---Because they had taken from me, by force, a false barramud. Why should I not call out?

In what language was the furd written?---In Persian.

Had you ever seen the hand-writing before?—No.

Did you form any opinion then whose it was?---No.

When Mr. Fowke asked you, if you had paid the sums of money to Mr. Barwell, why did you say---yes?---I said so, because I knew he wanted barramuts, and in saying so I should get free.

Did you ever give those sums to Mr. Barwell, or any other sums of money?—No, never.

Had you ever any quarrel with Mr. Fowke?

—That day, and once before in the month of Poos. There was no direct quarrel: Barnassy Ghose complained to the general, and the general referred his complaint to Mr. Fowke. Barnassy Ghose told Mr. Fowke, that I had taken the farm at a very great expence: on which Mr. Fowke said to me, Do you tell true what you have given to the English gentlemen, and what to the Mutsuddies; if you do not tell, you shall be punished.

What answer did you give?—I said, I have not given any body any thing: what's the use of telling a lie?

In consequence of this, what did you do?—I had numberless thoughts in my own mind; but I went and gave the small arzee to the governor, and wrote out a little; for this reason, that the governor was a great man, and Mr. Fowke an Englishman; and that if I wrote a great deal, he might be angry.

When Mr. Fowke asked you to tell him what sum you gave to the English gentlemen, did he not say something to you about taking an oath?—No, he did not.

What, not when Mr. Fowke was examining the complaint of Barnassy Ghose?—No.

Comaul O Deen cross-examined.

Did Maha Rajah tell you to get false barramuts?—He did not tell me either true or false: he told me to bring barramuts.

Did he tell you to bring barramuts against any particular people, or only against those to whom you had given money?—He named the governor, Mr. Barwell, Mr. Vansittart, the Mutsuddies, and other people. He told me to get whatever barramuts I could find, from Hidgelee, &c. and named the names as before. I did not mean to lodge a complaint against Gunga Govin Sing; and therefore why should I write every thing that was true? I had a claim against him for 26,000 rupees.

Did you offer Maha Rajah any money, provided he should recover this sum?—I told Rada Churn that I would give 4,000 rupees to Maha Rajah, and 2,000 rupees to himself, provided he could recover the whole amount.

Was the whole 26,000 rupees *(bona fide)* due to you?—It was; but Gunga Govin Sing has told me, that he has brought the money due to me for the tecka collaries, to account of money due from me to the revenues.

Is it not customary with you, when one rupee is due, to demand four?—I am a farmer: this is a Bengally dispute. Among ourselves we say fifty different kind of things. There was at that time no complaint lodged; when a complaint is lodged, and we are put upon our oaths, we say whatever is true. Ten of my under-tenants may come to me, and I will say to one, You are indebted to me, 1,000 rupees: he will say, No; I only owe you one hundred. Till this day it never was in the custom in Bengal for zemindars, or farmers, but to say some lies and some truths, when they are not put upon their oaths.

Why did you demand more than was really due?—By my accounts, I judged a sum to that amount was due. G. G. Sing laughed, and said. Are you a fool? you have no such claim upon me. I then said, If you have any claim, you must make it on Bussunt Roy.

How much did you actually receive from Gunga Govin Sing?—By the means of Moonshy Sudder O Deen, I got 10,000 rupees. I told Moonshy Sudder O Deen, Whatever is due, do you, upon your religion and conscience, adjudge to me. And I told G. G. Sing, Do you, as a Hindoo, upon your religion and conscience, pay me what is due.

Was 10,000 rupees the whole you received in money or otherwise?—I only got 10,000 rupees. I have settled every thing from the 1st of Assin to the end of Bhaudun.

What became of the other 16 000 rupees?—Whatever was, Bussunt Roy knows; I do not.

Was it wrote off, on account of revenue?—Gunga Govin Sing told me, that whatever remained we would settle with Bussunt Roy. I got 10,000 rupees, which I thought a great deal: it is now public, and all the merchants come to me for money. The claim that was upon me from the revenue, was ended on the last of Bhaudun: from that time to this, there has been no claim on me, on account of revenues. G. G. Sing shewed me many papers, and made many demands. I do not know what was actually due.

Did Gunga Govin Sing take the 16,000 rupees to settle the accounts?—God knows: I settled them on his conscience. I was cleared; and he was satisfied in respect to all claims, except salt.

Who was to pay whatever was due before Bhaudun, on the settlement of that account?—I was.

Were the claims made by Gunga Govin Sing on your own account, or of government?—I had none but revenue accounts with him.

When was the first day you went to Mr. Fowke's?—It was when I went with Rada Churn, towards the last of Chyle.

The first time you went to Mr. Fowke's house, did you see him?—I did; and offered him a nuzzeen of five rupees, which he would not accept. It was the first time after the affair of Barnassy Ghose, about the end of Chyle.

Did you see young Mr. Fowke that day?—I saw him in his own room: I did not speak to him.

Did you at this time tell Mr. Fowke senior what had passed between you and Maha Rajah Nundocomar?—No.

In the arzee you carried to Maha Rajah, what part did Maha Rajah strike out? The arzee afterwards sent to Mr. Fowke?—How should I know what he struck out? I did not see what.

Did you hear the whole dictated to the Moonshy?—Have I not ears? Why should I not hear?

Did you make any objections?—No. What objections could I make? He told me to bring my Moonshy, to write another.

When did you go next to Mr. Fowke's?—The next day, after I had been at Mr. Cottrell's.

What time of the day was it?—I had no watch; more or less than one par.

Did you go into Mr. Fowke senior's room?—When Acoor Munnah called me, then I went.

Who went with you into Mr. Fowke senior's room?—Acoor Munnah took me there.

Were there any body else?—Acoor Munnah, another Bengally, and two writers, came afterwards.

Did these people come in directly after him?—By the time I had sat down, they came and stood behind me.

Did they stay as long as you did?—I have already told you, whilst moderate conversation lasted, they were there. When I was on the ground, I know not whether there were four or ten in the room.

When did you fall on the ground?—When I asked Mr. Fowke who was the Gurry Purwar, Adaulet Booster, &c. and when he was angry: I then went down on the ground, putting the end of my jammah round my neck, as I have already shewn.

What then passed? What made you go down on the ground?—Mr. Fowke took up a book, and called out, God damn you, you son of a bitch; when he told me to seal the arzee: on which I said, Give time, and I'll seal it.

Do you always sit when you sign and seal?—Sometimes when I am standing, and sometimes sitting.

What passed when you were down on the ground?—I cried, shook, and put my seal to the arzee.

Had you your senses at the time?—I was not absolutely gone mad, but I was in great fear.

Do you recollect any thing that passed at the time?—I put my seal to the arzee, and signed the furd. Mr. Fowke then bid me go: what more should I remember?

Do you remember the people that were in the room at the time?—My head was downwards; after he bid me seal, I could not tell who, or how can I now tell, who stands behind me?

Did any body else speak to you?—No.

Did they do any thing else?—No.

Was the door shut?—No.

When you went out, did you see the people mentioned, or know them?—No.

How long do you think you were in Mr. Fowke's room? (Mr. F. senior.)—I had no watch; about one or two gurrys.

Were you in Mr. Fowke's room more than one time that day?—No.

Was the door standing wide open, when you went in?—Both when I went in and came out.

When you went into Mr. Fowke's room, how many people were there?—I told you before.

How many people were there about the house; did you observe several?—When I went in, there were many; when I came out, there were few.

[Being further interrogated, he cannot say exactly, how many at either time.]

Do you know, or think, that the four people, two Fringies and two Bengallys, were set on you as guards?—No.

Did you ever attempt to go away before you actually did go?—When Mr. Fowke told me to go, I did go.

Did you write any thing on the arzee?—I sealed it.

Did you ever write your name on the arzee?—I did not write any thing; the Moonshy wrote my name; I did not; I do not know what Moonshy wrote; it was all wrote at Maha Rajah's house.

Did Mr. Fowke ever threaten you at any other time?—No.

Are you sure that young Mr. Fowke and Rada Churn were in the room when he threatened you?—I cannot tell; I did not see them.

When did you first see the furd you speak of?—I saw it at that time; never before or since: I heard of barramuds, but not the same mentioned in the furd.

Was the furd shewn immediately when you went down on the ground?—After I had sealed the arzee and told the Fringies to be witnesses, the furd was immediately produced.

Did any thing intervene between your sealing the arzee and the production of the furd?—I said, let them be witnesses; he then produced the furd.

Do you recollect what you wrote on the furd?—I wrote, "Russum Nudum and Dadum."

Was there any thing else wrote on the furd?—Yes.

Mr. Barwell	45,000 rupees.
Mr. Hastings	15,000
Mr. Vansittart	12,000
R. Rajebulleeb	7,000
Cantoo Baboo	5,000

Were there no other words whatever on the furd?—I saw no more.

Was there any thing of 15,000 rupees a year?—He told me that by word of mouth.

At the time you wrote this on the furd, were there any body in the room?—I don't know.

Were you frightened?—Yes; else why should I have been down?

When Mr. Fowke asked, whether you had given the sums mentioned in the furd to Mr. Barwell, &c. did he bid you say yes?—He did not bid me say yes.

Who had the pen and ink when you signed the furd?—It was upon the bed.

Did Mr. Fowke take it from the bed and give it you?—No; I took the pen and ink and wrote.

Whose hand-writing was the furd?—How should I know? How can I guess?

Was it like any body's hand that you know?—I know nothing of it.

Did you seal any other paper at Mr. Fowke's that day?—No; none except the large arzee, which was by force.

Did you never say that you guessed who

wrote the furd?—I don't remember that ever I did.

Did you ever see Rada Churn write?—He has wrote a thousand times before me.

Did the Governor General ever say to you these words, "They are three gentlemen, I am but two; I cannot redress you; you must go to the Adawlet?"—Yes; the day I went to complain.

(A paper being shewn.)

Can you form any judgment whose writing this is?—I can't tell; you may call my Moonshy. I told him to write such an arzee, or requisition, for the Adawlet of Hidgelee.

Did you ever see any other arzee on any other day at Mr. Fowke's house?—I never did.

Are you very certain?—Except that paper, I never did; what more can I say? I am on oath.

Had you any reason to think that Mr. Fowke expected you that morning?—What do I know, whether he expected me or not? A hircarrah came for me; I went.

Had you told Rada Churn the night before, that you would next day go to Mr. Fowke's?—No.

Did you never at any time tell Rada Churn that you would go to Mr. Fowke's?—No. I told Maha Rajah.

Moonshy *Sudder O Deen* sworn.

Are you acquainted with Comaul O Deen Cawn?—Yes.

What passed between you and him in the month of Bysaak last?—He spoke to me two or three times, I believe about the 3d or 4th and 8th of that month.

What did he say to you? relate it.—He told me, that Maha Rajah had said to him, that he must write an arzee on the subject of the tecka collaries; he would not give it him; he would not bring so much shame upon himself. Maha Rajah also told him to get a barramut against Mr. Barwell: he gave him a denial: this is all that passed the first meeting between Comaul O Deen and me.

Did Comaul O Deen mention any other name than Mr. Barwell's?—I well remember Mr. Barwell's name: I do not recollect any other; at that time he did not mention Mr. Hastings's name.

State what passed on the 8th Bysaak.—When about 4 gurries of the day were remaining, Comaul O Deen came to my house, and said, that he had been that day at Mr. Fowke's; and that Mr. Fowke had by force caused him to seal a paper account of tecka collaries, and had made him sign a furd; he said, he sealed the arzee and signed the furd. When he had got into his own management, he disputed with Mr. Fowke; and it was agreed upon, that in whatever manner Maha Rajah should settle it in the morning, so it should be. If, says he, Mr. Fowke will give me back my arzee and papers, it is very well; if not, I will ruin myself. You are my friend, Comaul O Deen said to me, It is proper you should acquaint Mr. Barwell and Mr. Vansittart: he then said, he was going to Maha Rajah's, and would come back at night, and acquaint me with all the particulars: he came back again after 6 gurries of the night were passed, and told me, that Maha Rajah would give him back all his papers: he said, Do you now bear the particulars.—"I gave in arzees against Gunga Govin Sing, and deposited them with Roy Rada Churn, with the knowledge of Maha Rajah, and said, Let these arzees remain as a deposit: if, upon the return of Moonshy Sudder O Deen, the difference between Gunga Govin Sing and me shall be settled; I will then take back the arzees, and give 4,000 rupees to Maha Rajah, and 2,000 rupees to you: it is now two days since I made a demand on Maha Rajah for the arzees; and Maha Rajah said, They were with Mr. Fowke: he (Maha Rajah) then said, Do you write an arzee so as to give a bad name to the Governor and Mr. Graham: I said, How can this be? But Maha Rajah said, Do one thing, write a story about the tecka collaries; and when I have shewn it to Mr. Fowke, I will get you back your arzees against Gunga Govin Sing: I then told Maha Rajah, that I had a pain in my belly, and wished to go home; I told him, my moonshy was there to write; I went home; Yar Mahomed came to me at night, and brought the arzee about the tecka collaries, and told me to seal it: I answered, There is no agreement between Maha Rajah and me, that I should seal it."—Comaul O Deen said, That he had been at Mr. Fowke's that day, and that Mr. Fowke was very angry with him, took up a book to beat him, and had caused him by force to seal an arzee, and sign a furd: I asked Comaul O Deen, what signature he had put upon it; he answered, In some I put 'russun nudun,' and some 'dadam.' Afterwards, when he became his own master, he made a disturbance about it, as before related: he told Maha Rajah of all this, and Maha Rajah said, He would give him back the paper. This is all that Comaul O Deen told me.

When did Comaul O Deen say, Maha Rajah would give back the papers?—On the morrow-morning. I likewise remember asking Comaul O Deen, whose names were on the furd? And he told me, Mr. Barwell, Mr. Hastings, Mr. Vansittart, Raja Rajebullub, Cantoo Baboo. So much I remember.

You say that Comaul O Deen desired you to acquaint Mr. Barwell what had passed. Did you?—I told Mr. Vansittart that day.

Did you ever acquaint Mr. Barwell?—There were but 4 gurries of the day remaining: I acquainted Mr. Barwell of something; but he does not know the language; I told him but little.

You speak of an arzee presented by Comaul O Deen to Rada Churn against Gunga Govin Sing: do you know any thing of the dispute?—I heard of it when I returned to Calcutta.

Was this dispute settled by your means?—Yes, it was; they both agreed.

Did Comaul O Deen acquaint you with any quarrel he had with Mr. Fowke in the month of Poos?—He did.

State what you know respecting it.—Comaul O Deen told me this: that Barnassy Ghose had lodged a complaint against him on account of the tecka collaries to the general: the general had referred it to Mr. Fowke: that Barnassy Ghose and he had conversed on the subject before Mr. Fowke; whatever questions Mr. Fowke asked him, he answered: that Barnassy Ghose had told Mr. Fowke that he got the business by giving many bribes; and Mr. Fowke said to him, Tell me what you have given to the different people: Comaul O Deen answered, That he had not given any thing to any body. Comaul O Deen came to me another day, and said, That Mr. Fowke had called on him that day, and told him, to tell truly what he had given to the gentlemen, and what to the mutsuddies; if he did not, it would not be well for him, and he should be punished. So much I remember.

You say, the dispute between C. O Deen and G. G. Sing was settled by you: how much did you settle to be paid on balancing the accounts?—I ordered 10,000 rupees.

How much was demanded by Comaul O Deen?—26,000 rupees.

After having ordered 10,000 rupees, how was the remainder settled?—Comaul O Deen made a claim of 26,000 rupees: G. G. Sing said, That amount was due from C. O Deen, on account of revenues; and that C. O Deen had no claim upon him: I told C. O Deen what claims were made on each other: C. O Deen said, he should be ruined; many demands were making on him on account of tecka collaries; if he could get 10,000 rupees, his character would be safe: I then said to G. G. Sing, You are two friends; this is a bad time to breed quarrels: a man of reputation will now-a-days rather suffer a small loss than enter into quarrels; it is become necessary to pay Comaul O Deen 10,000 rupees: Gunga Govin Sing said, It is very well, the 10,000 rupees shall be paid him, and the 16,000 rupees shall be carried to account of revenues: do you tell him that I will give him 10,000 rupees: I then told Comaul O Deen; and he agreed.

Do you know whether the 10,000 rupees were paid, or not?—Yes; I paid them.

Do you know if the 16,000 rupees were carried to account of the revenues?—I did not see the books: if they were not carried to account of revenues, why should C. O Deen be silent?

How long have you known Comaul O Deen?—I have known him 20 years; he is my friend; and I believe him to be an honest man, and to be trusted upon oath: if a Mussulman takes an oath, he must be believed: if he swears falsely, he must be ruined here and hereafter, and will certainly go to hell.

Do you believe that Comaul O Deen would swear ten times to a falsity?—No. I believe in my own mind, that a Mussulman who understands the Koran will not take a false oath.

Did you ever hear of a Mussulman taking a false oath?—I say, that a Mussulman who is acquainted with the Koran will not; others may.

Do you think that Comaul O Deen will not swear falsely, merely from his knowledge of the Koran?—I suppose he will not on that account; but he is my friend, and I know him to be an honest man: I believe he would not speak falsely in common conversation; I always found him to speak the truth, when not on oath.

Moonshy *Sudder O Deen* cross-examined.

Did Comaul O Deen tell you that Mr. Fowke lifted up any thing besides a book?—No.

Did he tell you any thing about a pillow?—No.

Why did you tell Gunga Govin Sing that it was necessary to give Comaul O Deen 10,000 rupees?—Because they are both my friends, and I wished to settle the dispute.

Are you in any employment?—I have no settled wages; but I stay about Mr. Barwell's: Mr. Graham recommended me to him when he went away.

What wages did you receive from Mr. Graham?—When at Burdwan, Mr. Graham gave 100 rupees per month. After that, I had no settled wages: he gave me what he pleased.

How long did you stay at Burdwan?—About three years.

How long, in the whole, did you live with Mr. Graham?—Eight years.

SECOND DAY.

The *Governor General* sworn.

Did you ever receive from Comaul O Deen the sum of 15,000 rupees, directly or indirectly?—I never did receive that sum, or a promise of it, nor any other sum, directly or indirectly. I do not believe I ever saw Comaul O Deen till he came to make his complaint: he might have attended in the course of business; but I did not recollect his face.

Did you ever tell Mr. Fowke, that he might get rid of his scruples, if he meant to be served?—Never, in the sense which I understand Mr. Fowke has given to them. I knew Mr. Fowke to be a man of great singularity: I might have said, I cannot serve you unless you part with this singularity. I might, out of delicacy, have said, You must part with scruples; but that I ever meant or said any thing which could imply such a meaning, that he must part with his integrity, his virtue, or his honour, I most solemnly deny. I have never betrayed such a licentiousness of sentiment, even to my most intimate friends; and I was not on terms of confidence with Mr. Fowke at the time in which this conversation is said to have passed.

Did you not promise that you would serve

Mr. Fowke?---I did; and I served him. I believe it was owing to my not having served him to the extent of his wishes, even to the gratification of his private resentments, that he has been so inveterate in his enmity to me.

Do you remember the time the complaint was made to you by Comaul O Deen?---In the month of December.

What was the complaint?---That Mr. Fowke had been very urgent with him to declare, that he had given bribes to the English gentlemen, and to the mutseddies. The complaint was made to me verbally. I desired to have it in writing.

What more passed?---I have said, that I desired him to deliver his complaint in writing. I am not certain whether he brought it to me that day or not: it was short, and I did not think it sufficient for a complaint. I told him, That, if he wished I should take public notice of what he complained, his paper should contain the whole of his injuries. Mr. Vansittart was there, and said the same words, or to that effect. Comaul O Deen took my Moonshy; they sat down, and drew out his complaint. He laid it before the board.

Did Comaul O Deen ever make any other complaint to you?---He complained to me in April last. He came to me one morning in great agony, and the collar of his jamma was torn: he complained that Mr. Fowke had compelled him to sign an arzee, misrepresenting the contents of the former.

Do you remember any particular conversation between Mr. Barwell and Mr. Fowke, at the time of the examination at the chief justice's?---Some words of heat passed, respecting the furd. Mr. Fowke addressed Mr. Barwell with much vehemence both in countenance and expression; and said, "Mr. Barwell, will you declare on your honour and your oath, that you never received the 45,000 rupees?" They were mentioned so pointed, that I believe them to be the very words: I will not say positively they are the exact words. Mr. Barwell replied, He could declare, upon his honour and his oath, that he never had. There were many more words passed.

Are you acquainted with Comaul O Deen?---I know him only from circumstances by which I am nearly affected. I have heard nothing particular of his character. The cause of his coming to Calcutta was to answer to a complaint made by sir Edward Hughes, for want of provisions to supply his ships at Ingolla. I desired the chief of the Committee of Revenue to send for him: I do not know whether he appeared.

Did you say these words to Comaul O Deen, "They are three gentlemen, I am but two"?—I do not recollect. I believe I did not make use of these words, because I did not think his complaint a matter cognizable by the council.

Were ever the contents of the furd mentioned in council, or any where else, that they came from Mr. Fowke?—I believe, from no other than Comaul O Deen, or from those I understood he had spoke to of it.

Had you ever any conversation with Comaul O Deen?—I conversed with Comaul O Deen on the day in which I sent him to the Chief Justice. On the close of the examination, the judges delivered it as their opinion, That there were grounds for a prosecution. He was allowed till the Monday to declare whether he would prosecute or not. I saw Comaul O Deen on the Saturday and Sunday: on Saturday I examined him, and cross-examined him, and put questions, to sift the truth; and warned him as to the consequences of a false complaint, of the certainty of detection, and its effects; which I told him would be infamy to him, and injury to me. He persisted in it repeatedly, with circumstances which, to my judgment, convinced me there were grounds for a prosecution. I had the precaution to ask the Judges, I think the Chief Justice, Mr. Hyde, and Mr. Justice Chambers, Whether I might, with propriety, see and question Comaul O Deen? To which they replied, That I might; I accordingly saw Comaul O Deen on the Saturday and Sunday.

Did you interrogate him thus from any distrust you had of his character, or from any doubt of his complaint?---Neither from any distrust in the character of the man, or circumstances in the story; but from this principle, that I would rather have submitted to the injury, if I had not had the strongest grounds for my own conviction.

Had Mr. Fowke any employment under government?---No.

How long have you known Mr. Fowke?---I have seen him some years.

Did you know him on the coast?---I did not know him on the coast. I do not know his character: I might have heard of him; but nothing that made any impression upon my memory. What I know of him, I know since.

Did you ever know him guilty of any dishonest or dishonourable act?—It is a difficult question. I will not pretend to say that I know him guilty of either: unless I could prove such acts, I should not care to mention them in a court of justice. He has had disputes, and those disputes have been referred to me; but people that dispute, are apt to place dishonest motives to those with whom they dispute. I always considered him of a violent and morose temper; and, while under that influence, too apt to insinuate actions in which he is concerned to base and bad motives in others. I do not recollect any dishonest or dishonourable acts; but he is violent to the last degree. The disputes were personal quarrels; I believe never determined. I acted as a mediator, never as a judge.

Mr. *Barwell* sworn.

Do you know Moonshy Sudder O Deen?—I do.

Do you remember any conversation that passed between you and him?—Yes. He gave

me information of what Comaul O Deen told him: it was at the time that Comaul O Deen made his complaint of violence by Mr. Fowke and Maha Rajah Nundocomar, which I understood was the making him prefer a complaint, in which the governor general and my name were mentioned, that papers had been taken from him, which he desired to be returned, from which ruin would be the consequence of their being delivered in to the board. I was, at the period of time Comaul O Deen first went to complain, at my gardens. Moonshy Sudder O Deen did not mention to me any sums: the first I heard of it was when I attended the judges, on a summons. The manner in which the complaint was mentioned was general.

Do you remember what passed between you and Mr. Fowke, at the examination, before the judges?—As soon as Mr. Fowke made his appearance before the judges, he declaimed a good deal on the goodness of his character, long established; that, on the charge of such a man as Comaul O Deen, who, he said, was the scum of the earth, and deserved no credit, his character should stand superior. In the course of this declamation, there were many contradictions. I was of opinion at that time, and am at present, Mr. Fowke professed much candour. In proof of this candour, I saw two papers produced, which had been delivered in as the voluntary act of a man who had positively declared they were the papers he asked back; that they were false, and must not be delivered in to the governor general and council. In the course of the declamation, Mr. Fowke further said, That he prided himself in the conduct he had taken up; and that it should be his part to bring every villain, rogue, or rascal, or words to that effect, to justice. I did not expect that he would take upon him, before the tribunal of the justices, to judge of the conduct of myself. He applied directly to me, and said, "Sir, can you, upon your honour and your oath, declare that you never received 45,000 rupees from Comaul O Deen?" I was so much hurt by this, and confess a little irritated, that I interrupted Mr. Fowke, and denied the receipt of the money in the solemn manner he had called upon me. There was more altercation between us; but he, at last, seemed satisfied with my reply: he expressed himself to that effect. This extraordinary call, at the period it was applied, had such an effect upon my mind, that I declared publicly and positively, before many other gentlemen concerned, that I would prosecute Mr. Fowke. On this, some remark was made on the vindictiveness of the assurance, and the existence of such a paper as the furd absolutely disclaimed. As I was only offended at the question which had been put to me, and which seemed to confirm the evidence of Comaul O Deen in so strong a manner, I was rendered wavering by the assurance of Mr. Fowke, imagining there might possibly be some mistake, and it might be a means artfully wove-in by a black man to engage in his cause: I therefore professed, at the close of the evening, that I would weigh all these circumstances in my mind; that a public assurance from Mr. Fowke might satisfy me; and it was not my intention to have prosecuted that gentleman. I neither asked bail, nor was bound over to prosecute. But, considering all circumstances, considering that Mr. Fowke was under prosecution, it might possibly be imputed to other motives, if I did not give him an opportunity of acquitting himself to the public: influenced by these reasons, I directed my counsel to prosecute, and left the proof to the evidence there might be produced before the court. Yet, though I have done this, I cannot end without remarking, that it is not consistent with the good of society, or the profession of candour and attention to the welfare of the community, that a private gentleman, not possessed of any public trust, should declare that he has, and proposes to hold, an office for the investigating and redressing of grievances; and, whatever may be the determination of the jury touching the innocence of Mr. Fowke respecting the furd, I flatter myself, some effectual means will be taken by them, to put a stop to all offices of inquisition but what the law authorizes.

Did you, or did you not, ever receive the 45,000 rupees, or any part of it?—I did not receive the money, or any part of it; nor ever benefited by any donation from Comaul O Deen.

Do you recollect any thing that passed, respecting a book which Mr. Fowke lifted up to strike Comaul O Deen?—What I recollect of the evidence given on the first day before the judges, and of Mr. Fowke's speech: it was declared on the complainant's side, That for refusing to authenticate the furd properly, to the best of my recollection, Mr. Fowke spurned him, and lifted up this book, putting himself in a posture to strike Comaul O Deen. Mr. Fowke, on the other side, said, The man was whining and troublesome; that he made some representations about the papers which had been delivered in to the governor and council; and Mr. Fowke, not being satisfied with his representations, retained the papers, and ordered him to go about his business; that Comaul O Deen did this in great distress; and soon after, as I understood, returned with Mr. Francis Fowke, to gain a respite of a day or two for the delivery of the papers. The disturbance that arose in the street, I believe, is publicly known to every inhabitant in the town: it was, of consequence, a declared one of the apprehension the man was in for the delivery of those papers; which however were, in despite, delivered in to the public board: as to one, it seems of a nature that I think might be in some degree admitted; that his character had been scandalised by this man, and this he thought a proper mode to restore it. Your lordship and the jury will judge how justifiable these means were, in making that the free-will of a man, which he positively declared was against it.

Cross-Examination.

What do you understand to be the cause of Mr. Fowke's lifting up the book?—I understood Mr. Fowke's reason for lifting up the book was to get rid of a man that was troublesome. Mr. Fowke did confess, that Mr. Francis Fowke sued him for a respite from presenting the papers.

Did you ever hear of the furd from any other person besides Comaul O Deen?—I never heard of the furd but from Comaul O Deen and such as he had told it to. The strong presumption I had at first to believe the existence of the furd was from the question put to me by Mr. Fowke, and his public declaration respecting the powers he proposed to execute in the investigation of complaints.

Q. by the Jury. Did Mr. Fowke deny the existence of the furd before he put the question to you, and before you declared you could not prosecute him, or after?—*A.* I do not recollect that Mr. Fowke before denied the existence of the furd; on my reply in asseveration, he said, He was satisfied; it was at or after the time I said I would prosecute him; it was not denied before the question was asked me; that was in the morning, the other in the afternoon.

Mr. *Elliot* sworn.

Do you remember any particular conversation between Mr. Barwell and Fowke at the chief justice's?—Yes; Mr. Barwell speaking to Mr. Fowke respecting his conduct in this affair: Mr. Fowke asked him, with a degree of passion, If he could give him his honour and his oath, that he had not received the 45,000 rupees? Mr. Barwell answered, That he could give him his honour and oath, he had not: on which Mr. Fowke then said, He must acquit him; as he always himself took that method of wiping away accusations brought against him; and he thought that every gentleman should do the same.

Do you remember any thing particular that passed respecting Mr. Fowke's lifting up a book to strike Comaul O Deen?—Some questions being put to Comaul O Deen by one of the judges, I do not recollect which, with a view to ascertain the fact of Mr. Fowke's having lifted up a great book; Mr. Fowke said, He would save them that trouble, by informing them, that the book he lifted up was a volume of Churchill's Voyages; that he did it because Comaul O Deen was troublesome, took hold of his legs, and demanded back the arzee which he had before given.

Keadernawaz sworn.

Were you ever with Comaul O Deen at Mr. Fowke's house?—I was.

Did you ever write an arzee by the direction of Maha Rajah?—Yes.

Relate the circumstances.—One day Comaul O Deen took me to Maha Rajah's house: he went and sat down with Maha Rajah; I staid without: about two or three gurries afterwards he called me; when I went in, Maha Rajah desired me to sit near him; he gave me a piece of paper, and bid me write out a foul draught of an arzee; I took the paper, and began to write out a draught: when I had wrote out the fair draught, I gave it to Maha Rajah; Maha Rajah gave it to Doman Sing, and bid him write it over again; I did not know his name then: Doman Sing wrote it, and gave it to Maha Rajah; Maha Rajah then said to me, Do you write a fair copy of it: Comaul O Deen, addressing the Maha Rajah, said, That he had a pain in his belly, and desired to go home; that he left me to write whatever the Maha Rajah might order, and bad me stay, saying, Do you, having wrote the fair copy of the draught, follow me: he then went away: I staid there one half par of the night; when I had wrote a fair copy of the arzee, I gave it to Maha Rajah: Maha Rajah read it; and when he had so done, he said it was well, and bid Yar Mahomed go with me to Comaul O Deen: Yar Mahomed and I came away from Maha Rajah's together, and went to Comaul O Deen's; Yar Mahomed sat near Comaul O Deen, and said, Maha Rajah had sent him; do you put your seal to this arzee: Comaul O Deen then took the arzee, and read it; and said, There was no agreement between the Maha Rajah and him, that he should seal it; he said, He never would seal it; that he caused it to be written only for the Maha Rajah's pleasure; and if hereafter he should be called upon, he could not prove it: Comaul O Deen said, How can I seal it? Yar Mahomed then said, You may do as you please; if you won't seal it, I'll go away: Comaul O Deen then gave Yar Mahomed his hooka to smoke; he soon after went away; and when he had got on the stair-case, I also went away: Comaul O Deen, when Yar Mahomed was going away, asked me, What do you think would have been the consequence had I put my seal as Maha Rajah desired: I answered, It would be very bad; whatever you do, look to the consequences.

Were you at Mr. Fowke's with Comaul O Deen, the day the disputes happened?—I was.

Relate them.—Comaul O Deen went up stairs; I staid below; about two or three gurries after, at first Mr. Fowke, then Maha Rajah, and after Comaul O Deen, came down; Mr. Fowke had got into his palanquin, Maha Rajah was getting in, when Comaul O Deen went up to him, and said, Get me back those false papers of barramutts, that you and Mr. Fowke have caused me to write against the gentlemen; I cannot by any means prove them; this will be very bad both for you and me; but more so for me, both my honour and fortune will be affected; for God's sake, get me them again; and begged by the Duoy of the Company and the council for them again: I saw this; when Maha Rajah gave him no answer, he then cried out again Duoy, and attempted to get into his palanquin: Yar Mahomed and Nettoo Sing asked him, Where he

was going? he disengaged himself, and got into his palanquin: when he had got out of the lane which leads from Mr. Fowke's house on to the great road, a hircarrah came up to him, and said, Where are you going? you must turn back; Mr. Fowke and Maha Rajah call you: having disengaged himself from the hircarrah, he went to the governor's: I staid below; Comaul O Deen went up to acquaint him.

Whose servants were Yar Mahomed and Nettoo Sing?—I now hear they are Maha Rajah's.

Did you know whose hircarrah it was that came up to C. O Deen?—I did not know then; I since hear he was Maha Rajah's.

Hussein Alli sworn.

Whose servant are you?—Comaul O Deen's.

What is your employment?—I am his consuma; all the expences of his house and his wardrobes are under my charge.

Have you the custody of his seal?—Yes.

Can it be used without your knowledge?—When he goes to Durbar, he takes the small seal upon his finger; when it is in my possession, he cannot use it without my privity; it is always in my possession but when he goes out.

Is that (the arzee being shewn) the impression of the seal which Comaul O Deen used to wear on his finger?—It is.

Do you know Yar Mahomed?—Yes.

Whose servant is he?—I hear, Maha Rajah's.

Did you ever see him at Comaul O Deen's house?—Yes; that night he brought the paper to seal.

Give an account what passed.—As he and Kewdernawaz were going up stairs, Kewdernawaz said to me, Bring the sina dwoit and the box, in which the seal is, perhaps there will be a paper to be sealed. I went and got the sina dwoit, and the box with the seal, and gave them to Huttoo, and told him to stand with them on the stair-case; Huttoo is Comaul O Deen's cook: I then went to where C. O Deen was sitting, and walked up and down the veranda. I did not hear what conversation passed between Comaul O Deen and Yar Mahomed. C. O Deen gave him his hooka to smoke, and when he had done, he went away; I followed: Huttoo then said to me, Do you want the sina dwoit and the seal; I said, the business for which it was wanted perhaps will not be done; I took the sina dwoit and the box away, and put them in their proper place, in the josha connah; I then went to my own apartment.

Do you know Mr. Fowke?—Yes.

Were you ever with Comaul O Deen at Mr. Fowke's house?—I was, about two or three days after this.

State what passed.—What passed out of doors I know not: Mr. Fowke first came out, then Maha Rajah, and then Comaul O Deen: Comaul O Deen said to Maha Rajah, The false barramut, which you have caused me to write against the gentlemen, I cannot prove: this will be very bad for me; give me the papers back: whether Maha Rajah gave him any answer or no, I did not hear: Comaul O Deen then tore the collar of his jammah, and began to cry out, Duoy upon the king, the company, and the court; he went to get into his palanquin, but Yar Mahomed and Hetto Sing laid hold of his hands: he disengaged himself from them, and, crying out Duoy, got into his palanquin, and went away: when the palanquin had got out of the lane upon the great road, there were two hircarrahs, one laid hold of the palanquin before, and the other was behind: I was at that time at a distance, and did not hear what passed between them: the palanquin went on, and I went on towards the Lilla cutcherry.

Comaul O Deen again called.

At the time Mr. Fowke lifted up the book, and fell in a passion with you, what was the occasion of it?—When he asked me to seal the arzee, I said, this is not an arzee, this is a jabeb sawaul.

Did Mr. Fowke say any thing to you that day about bribes?—Not that day; we took out the furd, but said nothing about bribes before he flew in a passion, after I sealed the arzee, and was down on the ground.

Did Mr. Fowke ever direct you to write any thing particular upon the furd?—He did not tell me what particular words to write: I wrote 'Roosaa needeew' and 'Dadum.'

Kemijet sworn.

Did you see any disturbance, some time ago, about Comaul O Deen's palanquin in the road?—Yes.

What did you see?—I was going on the road near the Bitah Connah of Rajah Rajebullub: I saw Comaul O Deen in his palanquin with the collar of his jammah torn; a hircarrah from behind called out, Comaul O Deen, stop your palanquin. C. O Deen did not mind him, and went on. The hircarrah ran up, got hold of his palanquin, pulled it, and said, Where are you going? Maha Rajah calls you, and Saub calls you. The palanquin stopped, and Comaul O Deen called out, Duoy upon the king, the company, the audalet, and the governor; and said, They have caused me by force to write out a paper, and now have sent a hircarrah, and are making disputes: having disengaged from the hircarrah, he went on. This is all I saw.

Mushurer Mahomed sworn.

Do you know Comaul O Deen?—Yes.

Do you know Mr. Fowke?—Yes.

Do you know his house?—Yes.

Did you never see Comaul O Deen there?—One day I saw him there.

How long since?—It may be two, two quarters, or two half months ago.

Relate what passed when you saw Comaul O Deen come out of Mr. Fowke's house.—Mr. Fowke came out first, then Maha Rajah

and Comaul O Deen. Comaul O Deen said to Maha Rajah, Give me back again the false papers which you have caused me by force to write: I have given no one any money; give me back the papers: he then called out, Duoy upon the king, the council, and the company, and tore the collar of his jammah: he got into his palanquin; and when he had got upon the great road, a hircarrah, or hircarrahs, ran up, and laid hold of his palanquin, and said, Maha Rajah calls you, and Mr. Fowke calls you, turn back. They disputed for some time; Comaul O Deen then went away to the governor; and I came by the council-house to my own house.

Cross-Examination.

Whose servant are you?—I am the servant of Tyzulla Salem, his vakeel.

How came you to go to Mr. Fowke's house?—There is a durbar there; every body goes there.

Did any body order you to go there?—My particular business was, to go there to see if any complaints were lodged against my master.

Were you up stairs?—No; I was at the outer gate.

Did you not usually go up stairs to the durbar?—If I had heard of any complaints, I should have gone up: I had heard there was to be a complaint made against my master by one Permany, and I went there; but upon enquiry, I found that the complaint was not there; I therefore went away: when I had business, I used to go up stairs; when I only wanted to make an enquiry, I staid below.

Colonel *Thornton* sworn.

Were you formerly acquainted with Maha Rajah Nundocomar?—I have seen him.

Were you one of his bail?—I was.

Were you one of those gentlemen who formed the processional visit to Maha Rajah Nundocomar?—I visited him; I went in my chaise, but not in procession.

Who went with you?—General Clavering, colonel Monson, Mr. Fowke, Mr. Addison; and I believe captain Webber, but I do not perfectly remember.

Do you remember the day on which this visit was paid?—I do not recollect; I think it was the day after, or two days after, the examination before the judges.

Was the visit made before you gave bail, or after?—I cannot recollect.

At the time of the visit, was you acquainted with the examination?—Yes.

Upon what occasion was this visit made?—I confess that I thought the accusation against Maha Rajah unjust, and that he was very much injured, from what Mr. Fowke told me; therefore I paid him a visit.

Do you visit every man you think unjustly accused?—No.

Did you ever visit Maha Rajah Nundocomar before?—Yes; and have received visits from him.

Did you ever visit him in company before?—No.

Do you think that his being looked upon as an injured man, was the general reason for the visit?—I do not know; I only answer for myself.

Were you present at the examination at the Chief Justice's?—I was some part of the time; I went upon what I heard from others, not believing the existence of the paper.

Were any of the other gentlemen present?—Captain Webber was present at times; none of the other gentlemen who were on the visit there.

Did you ever hear the gentlemen at any time declare their reason for making this visit?—No, never.

What passed between Nundocomar and the gentlemen during the visit?—Nothing but salams and the common ceremonies.

Cross-Examination.

How long have you known Mr. Fowke?—I have known him 14 or 15 years, three of which he has been in India; my acquaintance with him preceded his coming out.

Do you believe him to be an honest man?—I do, from my soul, believe him to be an honest man, of strict honour, and I think incapable of telling a lie on any occasion; I never heard any thing against him, but a great deal to his honour.

Per Court. Did you never hear, before or after the visit, any reason given by general Clavering?—I did not.

Did you ever hear that general Clavering paid any other visit, before or since, to Maha Rajah Nundocomar.—I think not; I do not know.

Capt. *James Webber* sworn.

Are you acquainted with Maha Rajah Nundocomar?—I am.

How long have you been acquainted?—Since my arrival.

Were you bail for him?—I was.

Did you ever visit him?—But once; about three months ago, as the general's aid de camp, and attended him, as my duty.

Who were of the party?—The general, col. Monson, Mr. Francis, colonel Thornton, Mr. Fowke, Mr. Addison, and myself. The general called on me at my house, in his carriage: it was but an hour or two before that I was given to understand the general meant to pay the visit.

Did you ever hear the general, before or since, give any reason for making the visit?—I do not recollect that I ever did.

Do you remember the day on which this visit was paid?—I can't recollect whether it was the day after the examination, or whether it was before or after I gave bail. I think I recollect it was after the first examination.

Do you recollect what passed at the visit?—No. I believe Mr. Fowke might interpret the common compliments.

Did you not think the visit an extraordinary one?—No, I did not.

Did you ever know these gentlemen pay Maha Rajah a visit before?—I do not know if they had been there before. It is my duty to go on visits with the general; I generally do.

Did you know the character of Maha Rajah Nundocomar?—I had heard a bad character of him; but I thought people prejudiced. I heard Mr. Fowke speak well of him.

Did you ever know general Clavering pay visits to other black men?—I never knew general Clavering visit any black man, except him and Mahomed Reza Cawn.

What do you believe was the reason for this visit?—I believe they visited Maha Rajah Nundocomar, because he had been formerly minister of this country.

Do you believe they had, or had not, other motives?

[The above question repeated.]—I believe they had.

Mr. *Francis Fowke* sworn.

Did you ever see your father lift up a book to Comaul O Deen?—I did.

Where was it?—In my father's bed-chamber.

Were you in your father's bedchamber before Comaul O Deen? or was he there first?—I was there first.

Which of you went out first?—Comaul O Deen did.

Upon what occasion did your father lift up the book to Comaul O Deen?—Comaul O Deen came to my father's bed-chamber: I think the words that he said were, "I will write it over again." When he came into the room, I observed the end of his jammah over his neck, and his hands in a supplicating posture. He advanced, repeating, I believe, the same words. My father was sitting on the bed: Comaul O Deen threw himself at his feet, and attempted to take hold of his legs. My father threw himself back, or rather obliquely, on the bed; and his legs, I believe, passed through Comaul O Deen's arms. I am not perfectly clear whether my father had the book in his hand or not: I rather think it was lying on the bed. My father immediately lifted up the book, and peremptorily ordered Comaul O Deen to leave the room. Comaul O Deen immediately did leave it.

While Comaul O Deen was on the ground, was any paper produced to him by your father?—Not that I saw.

If he had produced any paper, should you not have seen it?—I think I should.

Did you see your father and Comaul O Deen the whole time?—I did.

Were you near to them?—I was.

Did you hear your father ask any questions while Comaul O Deen was on the ground?—I did not.

If he had, should you have heard him?—I think I should.

Have you heard all that Comaul O Deen has said, respecting the furd, while he was on the ground?—There was no furd produced.

Who did you hear first mention it?—I never heard of it till the day of the examination; I then heard of it first from Comaul O Deen.

Had Comaul O Deen made any noise or clamour in your father's house respecting an arzee?—He had.

Did he seal any arzee in your father's house that day?—He did, in my writing-room.

Who was in the room at the time your father lifted up the book?—Rada Churn, and no other except myself.

You have said that Comaul O Deen sealed an arzee in your writing-room: were there any threats made use of, to frighten him, in order to force him to seal it?—No.

Did he ask to have that arzee back again?—He wanted to have it changed, and to have it wrote over again.

Did he give any reason why he wanted to have it changed, and wrote over again?—There was an expression in the beginning of it ["ershaud mishawud"] which he objected to, and wished to have it wrote over again. These words mean, in English, "It is ordered, or required."

What did he say respecting these words?—Looking at the words, he said, Who orders or requires? This does not respect the arzee sealed in my room.

What arzee did he seal in your room?—He sealed a small arzee, which he said was the real arzee he delivered to the governor. He did not seal the great arzee in my room (presence.)

Did he bring the long arzee ready sealed to your father's house?—I cannot answer positively to this: I rather think that I recollect the mark of the seal upon the large arzee.

Let us know all that you know respecting the sealing and signing of any papers at your father's house, the day he lifted up the book to Comaul O Deen.—Comaul O Deen came to my father's house in the morning of the 18th of April. In my father's bed-chamber, he acknowledged his seal affixed to the large arzee before two witnesses, who attested the acknowledgment to it. In my writing-room, he affixed his seal to the small arzee, No. 2. There were present, myself, Roy Rada Churn, my Moonshy, Geercustullah, and the two Portuguese writers who attested the long arzee. He sealed the arzee in presence of these two; and also acknowledged the seal, which they attested. My father ordered these two arzees, and the translations of them, to be made up, and directed to the governor general and council. Comaul O Deen objected to their being laid before the governor and council; and desired that the two other arzees, relating to Gunga Govin Sing, might first be sent into council. My father did not consent to this: Comaul O Deen urged him for some time: and afterwards made the objection beforementioned to that expression in the long arzee. He

asked my father, When he should be called before the council? and asked, Who had ordered or required? who he should say? My father answered him, by asking, Who he would say? Comaul O Deen's reply, I think, implied that he would make use of the general's name. My father asked him, Whether the general, or he (Mr. Fowke) in the general's name, had ordered or required him? He said, They had not; but urged the distress he should be under, if that question should be put to him in council. I believe he repeatedly urged it. My father did not alter his intention of sending the papers into council. Comaul O Deen soon after left the room: Rada Churn went out likewise; I do not remember whether immediately, or some time after. Rada Churn soon after returned into the room, and said, That Comaul O Deen was crying, and tearing his jammah, because the arzees were to be sent into council that day. Comaul O Deen, soon after this, came to the door of my father's bed-chamber, and then that passed which I have before related.

You have told us that Comaul O Deen left the room before you did; did you see him when you went out?---Yes, I saw him in the hall.

What passed between C. O Deen and you then?---He begged of me to intercede with my father that the papers might not be sent in that day, repeating the difficulty he should be exposed to from that expression; and saying, That he would bring his Moonshy the next day, and write it over again. I returned to my father, and urged him to comply with Comaul O Deen's request, which for a long time he refused: he did at last, very reluctantly, comply. I went to the Portuguese writer, took the cover from him, as it was folded, and carried it into my writing-room, where I lock it up. I do not know whether I told C. O Deen that I had got the papers, or whether he saw them in my hand; but he met me at the door of my writing-room, and thanked me, in very warm terms, for having brought back the arzees. He stooped down, and touched my feet: he said, He would bring his Moonshy with him very early the next morning, to write it anew. He asked me, If he should go in, and take leave of my father. I told him, not to go; that my father paid no great attention to those ceremonies. It was near one o'clock; I was going out to dinner. Myself, Rada Churn, and Comaul O Deen, went down stairs together: when I got into my palanquin, Comaul O Deen came to the door of it, and again repeated his acknowledgments of gratitude.

Did any other circumstance pass, on the 18th, respecting the arzees?---There was another circumstance, I did not mention, relating to the arzees. In the long arzee it was written, that the cause of Barnassy Ghose and Comaul O Deen was referred to my father for decision: I told Comaul O Deen, that the expression was wrong; that it was referred for enquiry only, in which he acquiesced. About the time the small arzee was sealed, with his acquiescence, I scratched out, in my writing-room, the word in Persian which signifies 'decision;' and Comaul O Deen, in the presence of the two Portuguese writers who had attested the long arzee, wrote with his own hand the Persian word signifying 'inquiry.'

Did you ever hear Comaul O Deen declare that day, that the long arzee was false?---I did not.

At any other time, did you ever hear him declare it, at your father's house?---No, never.

Is there any other material circumstance relating to the arzees?---When Comaul O Deen was going to write the word, he asked Roy Rada Churn how to spell it; Rada Churn told him the letters; he desired him however to write it down on separate paper, that he might copy it. He did so; and, when he had written it, the ink had not marked well, owing to some pounce; and Roy Rada Churn asked him if he should make it plain: C. O Deen gave him leave, and he made it plainer.

Cross-Examination.

At what time in the morning, of the 18th, did Comaul O Deen come to your father's house?---About nine or ten o'clock in the morning.

Did you see him come into the house?---I cannot say that I saw him come in.

In what part of the house did you first see him?---I think I first saw him in the hall.

Had you been out of doors, or did you come out of your own room?---I believe I had not been out of the house, and might have been in my own room?

How long did he stay in the hall?---I really cannot say.

Did you stay with him all the time he was in the hall?---I cannot recollect.

When did he come into your writing-room?---After the attestation of the long arzee; he then came into my room, and sealed the little one.

Where did he acknowledge the seal to the long arzee?---In my father's bed-chamber?

Were you there at the time?---I was.

Whether did Comaul O Deen or you go first into your father's bed-chamber at that time?---I do not recollect.

What time had you the long arzee in your hands?---On the 16th, two days before.

Who shewed you it?---Rada Churn.

Was it then sealed?---I cannot positively declare it was then; but, I think, I have a recollection that it was sealed.

Was it in your father's house that Rada Churn shewed it to you?---Yes.

Do you know what Rada Churn did with it, after he had shewn it to you?---He left it with me. I translated it: I began to translate it on the 16th; and had not quite finished it that day.

After translating it, what did you do with it?---I kept the original.

How long did you keep it?---I believe I had it in my possession till the 18th.

Did you give it to your father before Comaul O Deen came to your house, or after?---I cannot recollect.

What were the words Comaul O Deen made use of when he acknowledged it?---I do not recollect the particular words.

Was it before or after he acknowleged it, that he objected to those words?---After.

After finding fault with these words, how long did he stay in the room?---He did not go immediately; I cannot precisely say.

Where did you see Comaul O Deen after that?---In the hall.

After acknowledging the long arzee, where did C. O Deen go to?---Into my writing-room.

Who desired him to go there?---I do not recollect.

Did you stay behind in your father's room?---I do not recollect whether I went out first, or he.

Where did you see him next?---The first time I recollect seeing him was when he sealed the small arzee in my writing-room.

What conversation passed between you and Comaul O Deen in your writing-room, respecting the small arzee?---I do not recollect any particular conversation.

Who desired him to seal the small arzee?---I do not recollect.

Do you recollect any body talking to him in your writing-room?---The two writers asked him whether he acknowledged the seal.

Had Comaul O Deen the little arzee in his own possession?---He had it; but I don't know exactly how it came into his possession.

Did he bring it with him?---To the best of my recollection, the small arzee was given to me, with the long one, by Roy Rada Churn; but I am not clear.

Did you translate the small arzee?---Yes, I did.

Are you sure the long arzee was, or was not, sealed before?---I cannot charge my memory whether it was or not.

Is it usual to put two seals to an arzee?---I remember that, when he put the seal to it, it was blotted, having been laid down carelessly: I believe it was a wet blot: he dipt the seal in the ink; I saw him put the seal to the paper; I do not think the blot was occasioned by sealing twice.

After sealing the small arzee, did you go into your father's room?---I cannot precisely say when I went into my father's room.

You have acknowledged both the arzees to be sealed the same day: how comes it that one is dated the 17th, and the other the 18th?---It is very true; when I wrote the acknowledgment of the large one, one of the writers told me, I had made a mistake in the date; I thought it immaterial, and did not alter it.

After sealing the little arzee, did you leave Comaul O Deen in your writing-room?---I do not recollect; I am more disposed to think that Comaul O Deen went into the hall.

Did you soon after go into your father's room?---I did; not long after.

†

Who was there?---Roy Rada Churn was there.

Any other person?---I believe Accoor Munnah was there.

What conversation passed between your father, Rada Churn, Accoor Munnah, and yourself, in your father's room?---I do not recollect any particular conversation.

Can you mark by any transaction, when Rada Churn told you, that C. O Deen was crying?---It was after sealing and attesting both arzees.

How long after sealing the small arzee?---I cannot precisely say.

Cannot you guess?---I cannot recollect.

Was there any conversation passed between the sealing of the small arzee, and the time when Rada Churn told you Comaul O Deen was crying?---There was.

Relate it.---Comaul O Deen desired my father to send in to the council the arzees against Gunga Govin Sing before these; which my father did not consent to: after this, Comaul O Deen objected to the words mentioned before, and asked my father, If he (C. O Deen) should be interrogated in council, who had ordered or required, who he should say?

Where did this conversation pass?---It was in my father's bed-chamber.

How often was Comaul O Deen in your father's room that morning?---I recollect these three times; when he acknowledged the long arzee, at this conversation, and when my father lifted up the book.

Upon what account did Comaul O Deen want the arzee altered?---I have already said, because of the words 'ershaud meuhaweed,' which mean 'it is ordered or required.'

Do you think, if there had been no other thing but the alteration of these words, that it was an adequate occasion for his tearing his jammah, &c.?---It is very difficult for me to form a determinate opinion of what may be the ideas of the natives of this country: my opinion at that time wavered: if I was to judge for myself, it would not; but I considered the timid disposition of the natives of this country; I did not know but C. O Deen might conclude, that, if he did not answer that question, it might be attended with bad consequences to him.

Did you hear Comaul O Deen that day speak of any false papers that had been forced from him?---I did not.

Is Roy Rada Churn your father's banyan? or does he do business for him?---No; no business at all.

Did he formerly?---I do not recollect.

What conversation had your father with Maha Rajah Nundocomar? Did you conceive that he promised him patronage or protection?---I do not know that he made any promise like it; there was an acquaintance between them.

Was he employed by your father in investigating any sources of corruption in this country?---I do not know.

[The Judges here put a stop to any further questions of the above nature.]

Was Maha Rajah Nundocomar at your father's house, the day after the 19th?---He was; and Roy Rada Churn in the morning.

Was there any particular conversation between your father, Maha Rajah, Rada Churn, and yourself, that morning?---I do not recollect any particular conversation.

Did you see Comaul O Deen there that morning?---Yes; I asked him, if he had brought his Moonshy? He said, he had, or that he was coming: he also asked me, if my father was calm that morning; and I said, he was.

Did Comaul O Deen see your father?---I think he did not in my presence.

Did you hear any noise?---I think I heard a noise, as though in the street.

What did you distinguish?---I did not hear any words; I heard a person calling out.

Was it Comaul O Deen's voice?---I cannot say; it seemed at a distance.

Did Comaul O Deen say any thing more to you, than ask if your father was cool?---Yes; he likewise observed some circumstances that had irritated my father the morning before, and attributed his having been in a passion with him to that irritation; he mentioned the translations of the arzees, one or both of which had been lost on a sudden, and we hunted a long while for them; my father was angry at it; the other was, that a person called Douly Chund had come into my father's bed-chamber, and was obstinate in not going out again; he also had made my father angry; and Comaul O Deen marked this circumstance.

How do you account for Comaul O Deen's coming into the room as he did, with his jammah over his neck, and in a supplicating posture?---I never saw any one do it before or since; I have heard it is a mark of supplication; I cannot tell from whom I heard it; but I have that idea.

Do you mean to swear that he had not been before in your father's room?---I do not pretend to swear that he was never in the room when I was not present.

Was there not a possibility that such a transaction might pass in your absence?---I answered this in my last reply.

You say that Comaul O Deen objected to some words in the large arzee?---He did.

Did you ever understand the great arzee was not his production?---No doubt entered my mind when he objected to the words: I considered it as his production.

When your father lifted up the book, was it in a very threatening posture?---No; it was not in a very threatening posture.

Was your father calm then?---No; he was irritated; he was angry.

Did your father call Comaul O Deen any names at that time?---He might make use of some harsh words; but I do not think that he dammed him for a son of a bitch, because I never heard my father make use of those words to any black man.

Why should a seal be put to the small arzee, which the governor did not send in to the council?---I never understood that to be a copy of the small arzee; I understood it was the original; I thought it was not to authenticate it as an arzee, but an acknowledgment of that part likewise.

Had Comaul O Deen attested it before he came with his jammah torn?---He had.

How long was the interval between his going out the second time, and coming in with his jammah torn?---I believe a very short time.

Mr. *F. Fowke* recollecting himself, says,

I now clearly recollect, that Comaul O Deen had twice before that time repeated the whole contents of that arzee before me and my father; and he repeatedly said, they were true; and that he was ready to take his oath: he insisted very strongly on his innocence respecting the arzee of the 13th of December, grounding it on the contents of the long one. I was sitting in the hall, I saw him and Roy Rada Churn pass through it into my father's room: soon after Rada Churn came out, and gave me this arzee, on the 17th; there were particulars of it I did not understand; I asked him concerning those parts, and he explained them to me.

Mr. *Elliot*. Maha Rajah Nundocomar and Roy Rada Churn had repeatedly requested of me to introduce Rajah Nundocomar to the general; I refused, assigning as a reason, that they were well acquainted with my connection with Mr. Hastings; and that I would not introduce him without his permission. One morning Roy Rada Churn came to my house early, and told me, that he came by direction of Mr. Hastings, to request that I would introduce his father-in-law to the general: I answered him, it was very possible; but I begged leave to have Mr. Hastings's order from his own mouth, before I would comply with his request: I accompanied him to the governor's, where I met Rajah Nundocomar in one of the outer rooms: Rajah Nundocomar accompanied me into the room where Mr. Hastings was sitting, but fell back when we came to the door, and said, As Mr. Hastings is conversing with some English gentlemen, he wished I would ask him if I might not introduce him to the general. Every suspicion was by this time removed from me; and I went up in a hurry to Mr. Hastings, and asked him, if I should introduce Rajah Nundocomar to the general: he said, I might if I pleased: I went from thence with Rajah Nundocomar to the general's: when I went into the general's, he was at breakfast: I put Rajah Nundocomar into another room, and went in to the general myself: when the general got up from breakfast, he retired with me to a window, and asked me the character of the person I was to introduce: I painted his character as I had always understood it to be; a man of deep intrigue, and

who would not stick at any thing to carry any point he might have at heart: from thence we went and sat down with Rajah Nundocomar; and I had soon an opportunity of seeing that Rajah Nundocomar did not, though I had introduced him, consider me as his friend; for Mr. Addison, who had in the interim entered into conversation with him, informed the general, that he only wished to make his salam then, and would wait upon him on business another time: I understood what Maha Rajah meant very well; and what passed that day was nothing but general conversation. The next time I waited upon Mr. Hastings, I made more particular enquiry respecting his wishes of having Rajah Nundocomar introduced to the general; and I then found, that the story of Rada Churu was a fiction; and that I had not been desired by the governor to introduce Rajah Nundocomar to the general.

Did you ever introduce any other black man to the general?—I am not sure whether I introduced Rajah Rajebullub to the general, by desire of the governor; I now recollect that the governor had first.

Did you consider this as an introduction from the governor general?—I did not consider it as an introduction from the governor general, but by his permission.

Mr. *Elliot* recollects, that it was not the same morning in which he saw Rajah Nundocomar at the governor's that he introduced him to the general.

General *Clavering* sworn.

A little time after my arrival, Mr. Elliot came to me, to propose himself to be my interpreter. I acquainted him, That I understood there was an interpreter on the establishment, who was then with the army, and I had heard a very good character of him, and therefore I did not chuse to make any disposition of it at that time, but would wait till the interpreter returned to Calcutta. Mr. Elliot understood it as explained by me, and was pleased to offer me his services, till such time as my interpreter arrived. From that time I am not conscious that I received any Persian letter, or petition, that I did not put into his hands. In the mean time, divisions in the council had broke out. Mr. Elliot, I understood, had been admitted a private secretary to the governor. About a month after his tendering his services, Mr. Elliot came to me, and acquainted me, that he understood, that the interpreter to the commander in chief had been recommended by the governor to the late commander; but, on my making some difficulty to accept an interpreter that might have been recommended by the governor to the late commander, Mr. Elliot opened himself further to me, and told me, in a very honourable manner, that I must be sensible, from his close connection with the governor general, how unpleasant a thing it would be to him, to accept of such a trust from me.

[Mr. Elliot here wishes that the general would recollect, whether the occasion of this conversation, was not a letter received from the king at Delhi.]

Mr. Elliot, however, still offered to translate such papers as might be sent to me. I accordingly did send them, I believe, all to him. About the middle of January, I was assaulted in my palanquin by a number of petitioners, who had nearly overset it: they were the molungies of the 24 pergunnahs. I ordered my palanquin to be set down, and took their petition from them: I read it, in my way to the council-house; and seeing in it what I thought some very gross abuse of power, and that the several petitions which I had before laid before the council, which had been presented in the streets to me, had had no effect in redressing their grievances, I resolved to inquire into this myself, as well as I could. I therefore told my servant to go to the salt contractor's house, and tell him to be with me at my return from council. The manner in which the contractor explained himself to me, rendered it necessary that I should have an interpreter. The man teazed me with evasions and contradictions; and having frequently told him that there was now a court of justice established in Calcutta, where such grievances would be redressed, I thought he would do better to furnish me with means of redressing them, by procuring them their full weight and full play. I then sent for Mr. Fowke, who, I believe, before that time, had not been above three or four times in my house, nor had once dined with me since my arrival. I referred the complaint to him, as a person of whose honour and integrity I had the highest opinion; more from general report which his reputation bore in England, than from any personal acquaintance with him here. He was acquainted with the language in which this complaint was to be examined, and, as I imagined, with the manners and customs of the country. The contractor, fearing that Mr. Fowke's report to me would not be so favourable to his cause as he wished, went to complain to the governor general; when, on the following day, I presented the petition to the council, I found the governor had been apprized of the reference made to Mr. Fowke; and reproached me warmly, for taking up a business in which he was so immediately concerned. I, at first, did not understand his allusion. He told me, "You must know that captain Weller was connected with me." I told him, that I had been intirely uninformed of it, till Mr. Fowke had acquainted me with it, upon the examination of the molungies. The governor, on that, said many things against Mr. Fowke; and, as I saw no occasion why Mr. Fowke should have concealed that circumstance from me, I refused to comply with his request of not trusting any more petitions to Mr. Fowke. Some time after this, came the petition of Barnassy Ghose, which I likewise referred to Mr. Fowke, after having previously sent to Comaul O Deen. This reference produced another complaint of

the governor general against Mr. Fowke (the arzee), requesting again that I would withdraw my confidence from Mr. Fowke; or, at least, that I would not suffer him to examine petitions but in my presence. As this complaint and the petitions which accompanied it were to stand upon our consultations, it was the opinion of the council, that Mr. Fowke should be desired to come there himself, to explain his whole conduct. I assured the council, that, if Mr. Fowke had acted improperly in the execution of the trust which I had committed to him, I would withdraw it. But the governor general not choosing that Mr. Fowke should come there to explain his conduct, I had no other means left than to examine him myself, at his return. I desired him to write a letter to the council, and to give them the same explanation which had satisfied me; and I think, but am not positive, that I took his affidavit to the truth of the contents of the letter: but, as I still thought that the assertions made by Comaul O Deen should not, for Mr. Fowke's honour and mine, stand—I desired Mr. Fowke to examine his own servants, who had been present at the examination, and to send their depositions in to the council. The persons themselves being examined, I was of opinion that all the assurances of Comaul O Deen were entirely false and groundless. Mr. Roberts, my Persian interpreter, came to me soon after this; and, from that time to this day, I am not conscious that I ever sent one petition to Mr. Fowke. All my Persian papers I have regularly sent to Mr. Roberts, and the English to Mr. Elliot. Mr. Elliot was, about the 20th of December, appointed superintendant of the khalsa records, with the intention of receiving all petitions. This was done with an intent to prevent my employing Mr. Fowke, and I acquiesced in it: there was no office to receive and examine petitions. Either Mr. Elliot or Mr. Roberts ever since received all petitions sent to me. From the 15th of November, to the 20th of December, was the only time in which I sent petitions to Mr. Fowke.

In regard to Maha Rajah Nundocomar, whether I received my opinion of him from Mr. Elliot, or from other people, it sufficeth to say, that I considered him of an intriguing character; and never, upon any occasion that I know of, intrusted him with the smallest confidence. His having been accused of forgery was not known to me till late; I cannot say exactly, but before the 18th of April. As I understood, he constantly visited the governor general, I did imagine that, if there were any kind of grounds for it, the circumstances must be known to him, as they had all been in the dewanny court of Audaulet, which was immediately under his own inspection.

Is the dewanny court of Audaulet a court of criminal jurisdiction?---It is not.

Does the governor general sit in that court, or superintend it?---I do not know that he does.

[This answered by the counsel, It is not.]

Are the proceedings in the ordinary course of business laid before him?---No, I do not know that they are.

How could there be a charge of felony in a civil court? or how could the governor general know it, if there was?---I do not know; but I have reason to think the governor general did know it. In the visits which Maha Rajah made to me, I took for my interpreter the first person who presented himself to me; but always Mr. Roberts, if he was with me: his general conversation was, the declared hatred that the governor had shewn him. He said, "His enemies were admitted to the governor: I am told, Mohun Persaud; but I do not assert it as a fact." My answer was, That no innocent man need fear oppression; but would be protected by the English laws. I saw the Maha Rajah twice with Mr. Fowke: once by chance at Mr. Fowke's house, where I called in; and at another time, by his own appointment, at my own house: these times were without my interpreter. At Mr. Fowke's, as much as I remember, he was giving an account of his long services, as minister of this country; and I remember it ended with a tale, which I understand is in some of the Persian books; the purport of which was, "A number of people saying the same thing, though it be not true, is at least believed to be true." I understood from this, he meant to recommend himself to me. I remember now—it was a story about a kid being said to be a dog; and that so many people said the kid was a dog, that at last it was taken for a dog. The other conversation was in my own room; and, as much as I recollect, to offer to give me a state of the country, of the manner in which the government of it would be best administered. I believe I desired him to draw up his thoughts on paper, to get rid of the subject; and, in consequence of this, in about a week or ten days afterwards, he did bring me, I think, an English translated paper. I have never read it to this day, nor do I know what I have done with it. Maha Rajah had heard that col. Monson, Mr. Fowke, and myself, had paid a visit to Mahomed Reza Cawn; and believe he had, some how or other, discovered that Mahomed Reza Cawn had given us such a paper of his ideas of the government of this country. Mahomed Reza Cawn's paper I delivered into council. On or about the 10th of March, Maha Rajah sent a letter to the council; in consequence of which, the council gave directions to their attorney to consult the counsel, whether an action might not lie against the governor general on account of the matter contained in that letter. As to the visit, Maha Rajah was summoned about the 19th of April; and I understood, after having undergone a very long and exact scrutiny of his conduct, there was not found sufficient matter to hold to bail.

Q. by the Court. Were you informed that the judges declared there was not sufficient matter to hold to bail?—*A.* I was.

Chief Justice. You were much abused and

imposed on. The chief justice declared that night, that he did not think there was sufficient matter to hold Mr. Francis Fowke to bail.

Will you inform the Court who told you so?—I think, Mr. Fowke told me.

Did Mr. Fowke tell you, that the judges declared him innocent?---I do not remember that he did.

Did not Mr. Fowke acquaint you that he was ordered to attend the Monday following; and that the parties were then to declare whether they would prosecute or not?—I think he did.

As a justice of the peace, would you, in a misdemeanor, bind over the person complained against, if the opposite parties would not undertake to prosecute? —I most certainly would.

To what purpose?---I would do it.

Did not your aid de camp attend on the Monday to be bail, with your knowledge for some of the parties?—He did.

Could you then think that the judges thought the parties innocent?---I did, because the judges suffered them to go without bail that night.

That was by consent of the prosecutors. The examination began early in the morning, and lasted till late at night. Would it not have been severe, when the prosecutors did not desire it, to oblige the persons accused to find bail that night?---I would have done it in a charge of so high a nature; though the prosecutor did not desire it, yet I think it should have been done. I understood that there had not been sufficient matter to hold parties to bail, and consequently I was to understand it an unjust accusation; and a crime of so black a die, of accusing innocent people, and particularly such persons as the governor general and Mr. Barwell, that they would not have been suffered to go out without bail, had there been any reason to suppose them guilty. I had reason to consider this as an attack made on Nundocomar, who had produced an accusation in council, and to prevent his appearing as an evidence to maintain his charge. It was on that ground, considering him as an innocent man, and the victim of state policy, I went to see him: I would have done the same thing to any other man in the settlement. Mr. Fowke certainly did acquaint me, that he was to appear before you on Monday; but I did still imagine there was no ground to suppose him guilty. I conceived, that if you judged there was sufficient matter for a prosecution, you would have taken bail, without the consent of the parties; and I conceived an idea that the prosecution was done to frustrate the enquiry in council. Mr. Fowke came to me in the month of April, and told me Comaul O Deen——[Stopped.]

Cross-Examination.

Did you give Mr. Fowke any particular instructions?—I gave him instructions to enquire into the grounds of Barnassy Ghose's complaint, and report them to me.

Do you remember the substance of Barnassy Ghose's complaint?—I understand that Comaul O Deen had let out portions of salt works of the tecka collaries to different people, and afterwards resumed them.

On what grounds did the governor general found his complaint against Mr. Fowke?—That he exceeded his duty and trust.

Why was not Mr. Fowke examined before the council?—The majority of the council acquiesced with the governor general, that Mr. Fowke should not be examined.

In what manner did you employ him?—Only to receive petitions through my hands.

Who gave you the information of what passed at the chief justice's?---Mr. Fowke, and from thence I drew the inference.

You say, that if there had been sufficient matter for a prosecution, and though the prosecutors did not desire it, you would have obliged them to find bail, or committed them that night?—I would.

On what day did you pay the visit to Maha Rajah?---The day after the examination.

In what light did you consider the prosecution against him?---I understood it as a prosecution to frustrate that ordered by the board.

Are not you first in council, next to the governor general?—I am.

In case of death, resignation, or removal, are you not to succeed him?---I am.

What may your salary be, as second in council?—Ten thousand pounds per year.

Don't you think that the governor general might be discharged, on complaints of peculation from hence to the court of directors?---I think he might.

Do the letters from the council mention that the prosecution is ordered to be carried on against the governor general?---I believe they do.

Is not this prosecution principally founded on the evidence of Nundocomar and Roy Radá Churn?—No.

Did you never authorise Mr. Fowke to offer the Kallaut of the Khalsa, or of Purnea, to any body?---No, never.

Has not some of Maha Rajah's family been appointed to the first office under government, since the commencement of the prosecution?—I cannot tell that any places have been given to Maha Rajah's family.

Were not every means taken to afford Nundocomar influence?---I never did; and should have been sorry to join in any act to give Nundocomar any influence whatsoever.

Don't you know that any one of Nundocomar's family is provided for?---I do not know Maha Rajah's family or friends; I do not know that any one has had preferment: Rajah Goordasses; I do not know it; I have been told so.

Mr. *Roberts* examined.

What do you think was the general's opinion of Nundocomar?---I have always heard general Clavering say, that he thought Maha Rajah Nundocomar to be a very busy, troublesome man.

Do you recollect the subject-matter of what passed at the visit paid to Maha Rajah?---I do not recollect any conversation but such as might pass in a visit of compliment.

Q. by Mr. Just. Lemaistre. Where are the four writers that were at Mr. Fowke's that morning? Where is Accoor Mussnah, Mr. Fowke's moonshy? Are they alive?

Defendant's Counsel answers, Yes.
Are they in Calcutta?---Yes.

The Verdict on this Prosecution was as follows:

JOSEPH FOWKE, *Guilty.*
NUNDOCOMAR, *Guilty.*
RADA CHURN, *Not Guilty.*

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559. The Trials* on the Informations which in pursuance of an Order of the House of Commons, were filed by his Majesty's Attorney General† against RICHARD SMITH and THOMAS BRAND HOLLIS, esqrs. for having been Guilty of notorious Bribery, and thereby procuring themselves to be elected and returned Burgesses to serve in Parliament for the Borough of Hindon. Tried by a Special Jury on Tuesday the 12th of March, at the Assize holden at Salisbury for the County of Wilts: Before the Hon. Sir Beaumont Hotham, knt. one of the Barons of his Majesty's Court of Exchequer: 16 GEORGE III. A. D. 1776.

ON January 31, 1775, a committee of the House of Commons was appointed under Mr. Grenville's Act (see stat. 10 Geo. 3, c. 16, 14 Geo. 3, c. 15, and Parl. Hist. vol. 16, pp. 902, *et seq.* vol. 17, p. 1061,) to try the matter of a Petition of James Calthorpe and Richard Beckford, complaining of the return of Richard Smith and Thomas Brand Hollis, as burgesses to serve in parliament for the borough of Hindon. On February 14, the chairman of the Committee informed the House that neither of the persons returned or of the petitioners was duly elected to serve for the said borough, and he at the same time acquainted the House,

"That in the course of the examination into the merits of the petition of James Calthorpe, esq. and Richard Beckford, esq. it having appeared to the committee, that the most flagrant and notorious acts of bribery and corruption had been practised; and that a very considerable majority of the electors of the borough of Hindon had been bribed and corrupted, in a very gross and extraordinary manner; and that several others of the said electors had been concerned as agents for that purpose; the committee, desirous that the House may adopt such measures as may discourage, and, if possible, put an end to a practice so subversive of the freedom of elections, had directed him to lay before the House, the whole of the evidence given before the said committee, with their opinions thereupon; and he read the report in his place, and afterwards delivered it in at the table, where the same was read; and the resolutions of the Committee are as followeth:

"Resolved, That it appears to this committee, that Richard Smith, esq. by his agents, has been guilty of notorious bribery, in endeavouring to procure himself to be elected and returned a burgess to serve in this present parliament for the borough of Hindon, in the county of Wilts."

The like resolution respecting Mr. Hollis.

"Resolved, That it appears to this committee, that James Calthorpe, esq. by his agents, has been guilty of notorious bribery, in endeavouring to procure himself to be elected and returned a burgess to serve in this present parliament for the said borough of Hindon.

"Resolved, That it appears to this committee, that Richard Beckford, esq. has, by his agent, endeavoured by promise of money, to procure himself to elected, and returned a burgess, to serve in this present parliament for the said borough of Hindon.

"Resolved, That it appears to this committee, that the rev. John Nairn, of Hindon, Fasham Nairn, esq. late of Bury-street, St. James's, Francis Ward, of Sherbone-lane, London, —— Stevens, a butcher, at Salisbury, commonly called Jobber Stevens, &c. (in all, thirteen, specified by name) have acted as agents, and have been accessary to, and concerned in, the notorious acts of bribery and

* Taken in Short-hand by Joseph Gurney. *Note*, Into this Report I have incorporated from the Election Cases of Mr. Douglas (lord Glenbervie) such particulars as I thought would render it satisfactory.

† Mr. Thurlow.

corruption, that have been practised at the last election for the said borough of Hindon.

"Resolved, that it is the opinion of this committee, that the House be moved, for leave to bring in a Bill, to disfranchise the said borough of Hindon, in the county of Wilts."

On the 8th of May following, the House ordered that the Attorney General should forthwith prosecute the said Richard Smith, Thomas Brand Hollis, James Calthorpe, and Richard Beckford, for their said offences.

In Trinity term 15 George 3, the Attorney General filed the following Information against general Smith.*

"Wiltshire,

"Be it remembered, That Edward Thurlow, esquire, Attorney General of our present sovereign lord the king, who for our said lord the king in this behalf prosecuteth, in his proper person, cometh here into the court of our said lord the king, before the king himself, at Westminster, on Friday next after the morrow of the Holy Trinity, in this same term, and for our said lord the king, gives the court here to understand and be informed, that the borough of Hindon in the county of Wilts is an ancient borough, and for a long space of time two burgesses of the said borough have been elected and sent, and have used and been accustomed and of right ought to be elected and sent, to serve as burgesses for the said borough in the parliament of this kingdom (to wit) at the borough of Hindon aforesaid, in the said county of Wilts: and the said Attorney General of our said lord the king, for our said lord the king, giveth the court here to understand and be informed, that on the first day of October, in the 14th year of the reign of our present sovereign lord George the 3d, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. a certain writ of our said lord the king, under the great seal of Great Britain, issued out of his majesty's court of Chancery (the said court then and still being at Westminster in the county of Middlesex) directed to the sheriff of the county of Wilts; by which said writ, our said lord the king, reciting, that whereas by the advice and assent of his majesty's council, for certain arduous and urgent affairs concerning his said majesty, the state and defence of his kingdom of Great Britain and the church, his majesty ordered a certain parliament to be holden at the city of Westminster, on the 29th day of November then next ensuing, and there to treat and have conference with the prelates, great men, and peers of his realm; his majesty by his said writ did command and strictly enjoin the said sheriff, that proclamation being made of the day and place aforesaid in the said sheriff's then next county court to be holden after the receipt of that his said majesty's writ, two knights of the most fit and discreet of the said county, girt with swords, and of every city of his said county two citizens, and of every borough in the same county two burgesses, of the most sufficient and discreet, freely and indifferently by those who at such proclamation should be present, according to the form of the statute in that case made and provided, the said then sheriff should cause to be elected, and the names of those knights, citizens, and burgesses, so to be elected, whether they should be present or absent, the said then sheriff should cause to be inserted in certain indentures to be thereupon made, between the said then sheriff and those who should be present at such election, and them at the day and place aforesaid the said then sheriff should cause to come in such manner that the said knights for themselves and the commonalty of the same county, and the said citizens and burgesses for themselves and the commonalty of the said cities and boroughs respectively, might have from them full and sufficient power to do and consent to those things which then and there by the common council of his said majesty's kingdom, by the blessing of God, should happen to be ordained upon the aforesaid affairs, so that for want of such power, or through an improvident election of the said knights, citizens, or burgesses, the aforesaid affairs might in no wise remain unfinished; willing nevertheless, that neither the said then sheriff, nor any other sheriff of this his majesty's said kingdom, should be in any wise elected; and the election in the said then sheriff's full county so made distinctly and openly under the said then sheriff's seal, and the seals of those who should be present at such election, the said then sheriff should certify to his majesty in his Chancery, at the day and place without delay, remitting to his majesty one part of the aforesaid indentures annexed to the said writ, together with the said writ; and the said Attorney General of our said lord the king, for our said lord the king, gives the court here further to understand and be informed, that the said writ afterwards, and before the return thereof (to wit) on the said 1st day of October in the 14th year aforesaid, was delivered to Thomas Estcourt, esq. then and continually from thenceforth until and at and after the return of the said writ being sheriff of the said county of Wilts, to be executed in due form of law (to wit) at the borough of Hindon aforesaid: and the said Attorney General of our said lord the king, for our said lord the king, gives the court here further to understand and be informed, that by virtue of the said writ, the said Thomas Estcourt, so being sheriff as aforesaid, afterwards, and before the return of the said writ, (that is to say) on the said 1st day of October, in the 14th year aforesaid, and in the year of our Lord 1774, at the borough of Hindon aforesaid, in the said county of Wilts, made his precept in writing,

* He was a general officer in the East Indies. During several years he was a member of the House of Commons, and a frequent speaker there. He was particularly active upon matters relating to the East Indies, as to which, see the New Parl. History.

sealed with the seal of his office of sheriff of the said county of Wilts, directed to the then bailiff of the borough of Hindon in the said county of Wilts, of and for the election within the said borough, of two burgesses of the borough aforesaid, according to the form and effect of the said writ: and the said Attorney General of our said lord the king, for our said lord the king, gives the court here further to understand and be informed, that by virtue of the said precept afterwards, and before the return thereof (to wit) on the 10th day of October, in the 14th year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, the election of two burgesses to serve as burgesses for the said borough, in the then next parliament to be holden as aforesaid, was had and made; which said election was the first and next election of burgesses to serve as burgesses for the said borough, in the parliament of this kingdom, after the committing of the several offences hereinafter firstly, secondly, thirdly, and fourthly mentioned: and the said Attorney General of our said lord the king, for our said lord the king, gives the court here further to understand and be informed, that before the issuing of the said writ, a general election of representatives to serve in parliament for the several counties, cities, and boroughs in this kingdom, being expected, James Calthorpe, esquire, Richard Beckford, esquire, Richard Smith, esquire, and Thomas Brand Hollis, esq. were candidates, that of them two might be chosen and returned to serve as burgesses for the said borough, in the then next parliament for this kingdom; and the said James Calthorpe, Richard Beckford, Richard Smith, and Thomas Brand Hollis, remained and continued candidates for the purpose aforesaid, until and at the time of the said election, to wit, at the borough of Hindon aforesaid, in the said county of Wilts: and the said Attorney General of our said lord the king, for our said lord the king, gives the court here further to understand and be informed, that the said Richard Smith late of the said borough of Hindon, in the said county of Wilts, esquire, well knowing the premises, but being a person of a depraved, corrupt, and wicked mind and disposition, and unlawfully and wickedly intending, as much as in him the said Richard Smith lay, to interrupt and prevent the free and indifferent election of burgesses to serve for the same borough of Hindon, in the then next parliament of this kingdom, and by illegal and corrupt means to procure himself to be elected a burgess to serve for the said borough in the then next parliament of this kingdom, before the said election, to wit, on the 15th day of February, in the 13th year of the reign of our sovereign lord George the 3d, now king of Great Britain, &c. at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly did solicit, urge, and endeavour to procure Thomas Moore, Charles Simpson, John Baldwyn, Jeremiah Lucas, Robert Tyley, Thomas Farrell, Jos. Norton, Jos. Cuff, John Edwards, William Stephens, John Maishment, John Larkham, Renalder Bowles, Jos. Cholsey the younger, John Davis the elder, Richard Erwood, William Cheverall, Samuel Dorr, Thomas Harden, James Edwards, Jos. Cholsey the elder, Thomas Spencer, James Smart, John Randall, Edward Ranger, John Dewy, Luke Beckett, Philip Beckett, Henry Dukes, Edward Beckett, Isaac Moody, William Hacker, John Bishop, Edward Hollowday, George Spender the younger, John Cheverall, John Dukes the elder, John Dukes the younger, Robert Wyer, Moses Weeks, George Dukes, George Hayward, Edward Trewlock, Matthew Davis, Philip Beckett the younger, Henry Jerret, John Davis the younger, William Day, Samuel Collier, Walter Percy, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, John Hooper the younger, William Newton the elder, William Newton the younger, James Percy, Henry Huffe the elder, Henry Huffe the younger, Benjamin Cholsey the younger, John Bell, George Spender the elder, James Anderson the younger, William Lambe, Jos. Lambe, Edward White, Robert Wyer, Matthew White the younger, Matthew Stevens, William White, Richard Ingram, Francis Ranger, William Percy, Elias Pitman, William Cuff the elder, Mathew White the elder, William Stevens, George Stevens, John Stevens the elder, James Stevens, John Stevens the younger, John Wyer, Benjamin Cholsey the elder, William Ranger, Francis Cheverall, Charles Wyer, James Wyer, John White, William Wyer, James Anderson the elder, John Beckett, Thomas Wyer, Luke Beckett the elder, Roger Spender, Robert Day, William Cuff the younger, Elias Steevens, James Steevens, William Gilham, Henry Savage, Jarvis Gilbert, Thomas Percy, John Ranger, Edward Percy, William Percy the younger, Robert Gilbert, William Dukes, Thomas Dukes, Roger Norton, Joseph Moody, James Gilbert, John Gane, Luke Mead, Nathaniel Philips, Joseph Norton, Samuel Norton, John Ransome, Thomas Brooks, Samuel Philips, Joseph Scamell, William Sandall the elder, Luke Maishment the younger, Luke Maishment the elder, John Maishment, William Sandall the younger, James Burleigh, William Harden, Samuel Field, John Bowles, Robert Ranger, Thomas Lanham, John Richardson, William Spender, Henry Obourne, John Penny, Richard Pitman, William Nisbeck, James Davies, Joseph Gilbert, James Gough, James Wier, John Gilbert, and John Stevens, respectively, each and every of them, then and there, and until and at the time of the said election, having a right to vote at and in the election of burgesses, to serve as burgesses for the same borough in the parliament of this kingdom, for him the said Richard Smith, and the more effectually to tempt, corrupt, and procure the said several persons who had a right to vote as aforesaid, to give their respective votes for him the said Richard Smith in the said election, he the said Richard Smith

did then and there, to wit, on the said 15th day of February, in the 13th year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly give, and cause and procure to be given, to the said several persons respectively, who had such a right to vote as aforesaid, a certain sum of money, to wit, the sum of five guineas of lawful money of Great Britain, as a bribe and reward, to engage, corrupt, and procure the said several persons respectively, so having such right to vote as aforesaid, to give their respective votes in the said election of burgesses to serve as burgesses for the said borough in the then next parliament of this kingdom, for him the said Richard Smith, in order that he the said Richard Smith might be elected and returned, to serve as a burgess for the said borough, in the then said next parliament of this kingdom, to the great obstruction and hindrance of a free, indifferent, and unbiassed election of burgesses to serve in parliament for the same borough, in manifest violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity: and the said Attorney-General of our said lord the king, for our said lord the king, giveth the court here further to understand and be informed, that the said Richard Smith, being such person as aforesaid, and unlawfully and wickedly intending (as much as in him the said Richard Smith lay) to interrupt and prevent a free and indifferent election of burgesses to serve for the said borough of Hindon in the then next parliament of this kingdom, and by illegal and corrupt means to procure himself to be elected to serve as burgess for the said borough in the then next parliament of this kingdom, before the said election, (to wit) on the third day of October, in the 14th year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly, in the presence and hearing of divers persons, who had then and there a right to vote in the election of burgesses to serve for the said borough in the parliament of this kingdom, did declare, and with a loud voice publish, that he would give to each and every person who had a right to vote in the said election of burgesses to serve for the said borough of Hindon in the then next parliament of this kingdom, bribes and rewards to vote in that election for him the said Richard Smith, with intent unlawfully to tempt, corrupt, and procure the persons having a right to vote in that election, to give their votes in that election, for him the said Richard Smith, that he the said Richard Smith might be elected and returned a burgess to serve for the said borough in the said then next parliament of this kingdom; to the great obstruction of a free, quiet, and indifferent election of burgesses to serve in parliament as burgesses for the same borough, in manifest violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity: and the said Attorney General of our said lord the king, for our said lord the king, gives the court here further to understand and be informed, that the said Richard Smith, being such person as aforesaid, and again unlawfully, wickedly, and corruptly intending (as much as in him the said Richard Smith lay) to interrupt and prevent the free and indifferent election of burgesses to serve as burgesses for the said borough in the parliament of this kingdom, and by illegal and corrupt means to procure himself to be elected a burgess to serve as a burgess for the said borough in the parliament of this kingdom, he the said Richard Smith afterwards, and before the said election so had and made as aforesaid, to wit, on the 4th day of April, in the 14th year of the reign of our lord the now king, at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly did give, and cause and procure to be given, to divers other persons, namely, Thomas Moore, Charles Simpson, John Baldwin, Jeremiah Lucas, Robert Tyler, Thomas Farrell, Joseph Norton, Joseph Cuff, John Edwards, William Stevens, John Maidment, John Larkham, Reuaider Bowles, Joseph Cholsey the younger, John Davis the elder, Richard Erwood, William Chiverall, Samuel Daw, Thomas Harden, James Edwards, Joseph Cholsey the younger, Thomas Spencer, James Smart, John Randle, Edward Ranger, John Dewey, Luke Becket, Philip Becket, Henry Dukes, Edward Becket, Isaac Moody, William Hacker, John Bishop, Edward Hollowday, George Spencer the younger, John Cheverall, John Dukes the elder, John Dukes the younger, Robert Wyer, Moses Weeks, George Dukes, George Hayward, Edward Trewlook, Matthew Davis, Philip Bechet the younger, Henry Jerret, John Davis the younger, William Day, Samuel Collier, Walter Percy, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, John Hooper the younger, William Hooper the elder, William Newton the younger, James Percy, Henry Huff the elder, Henry Huff the younger, Benjamin Cholsey, the younger, John Bell, George Spender the elder, James Anderson the younger, William Lambe, Joseph Lambe, Edward White, Robert Wyer, Mathew White the younger, Mathew Steevens, William White, Richard Ingram, Francis Ranger, William Percy, Elias Pitman, William Cuff the elder, Mathew White the elder, William Steevens, George Steevens, John Steevens the elder, James Steevens, John Steeveens the elder, James Steevens, John Steeveens the younger, John Wyer, Benjamin Cholsey the elder, William Ranger, Francis Chiverall, Charles Wyer, James Wyer, John White, William Wyer, James Anderson the

elder, John Beckett, Thomas Wyer, Luke Beckett the elder, Roger Spender, Robert Day, William Cuff the younger, Elias Steevens, James Steevens, William Gilham, Henry Savage, Charles Gilbert, Thomas Percy, John Ranger, Edward Percy, William Percy the younger, Robert Gilbert, William Dukes, Thomas Dukes, Roger Norton, Jos. Moody, James Gilbert, John Gane, Luke Mead, Nathaniel Philips, Joseph Norton, Samuel Norton, John Randsome, Thomas Brookes, Samuel Philips, Joseph Scamell, William Sandall the elder, Luke Maishment the younger, Luke Maishment the elder, John Maishment, William Sendle, James Burleigh, William Harden, Samuel Field, John Bowles, Robert Ranger, Thomas Lanham, John Richardson, William Spender, Henry Obourne, John Penny, Richard Pittman, William Nisbeck, James Davis, Joseph Gilbert, James Gough, James Wire, John Gilbert, and John Stevens, respectively, each and every of them then and there, and until and at the time of the said election having a right to vote at and in the election of burgesses to serve as burgesses for the said borough of Hindon in the parliament of this kingdom, another large sum of money (to wit) the sum of five guineas of like lawful money, as a bribe and reward to each of them the said several persons last-mentioned having such right to vote as aforesaid, to engage, corrupt, and procure the said persons respectively to give their respective votes at and in the then next election of burgesses to serve as burgesses for the same borough in the said then next parliament of this kingdom, for him the said Richard Smith, in order that he the said Richard Smith might be elected a burgess to serve for the said borough in the said then next parliament of this kingdom, to the great obstruction and hindrance of a free, quiet, indifferent, and unbiassed election of burgesses to serve in parliament as burgesses for the same borough, in violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity: and the said Attorney General of our said lord the king, for our said lord the king, gives the court here further to understand and be informed, that the said Richard Smith, being such person as aforesaid, and again unlawfully, wickedly, and corruptly intending (as much as in him the said Richard Smith lay) to interrupt and prevent the free and indifferent election of burgesses to serve as burgesses for the same borough in the parliament of this kingdom, and by illegal and corrupt means to procure himself to be elected a burgess to serve as a burgess for the said borough in parliament; he the said Richard Smith, before the said election, (to wit) on the 8th day of October, in the fourteenth year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, did unlawfully, wickedly, and corruptly give, and cause and procure to be given, to divers other persons, namely, Joseph Norton, Jos. Cuffe, John Edwards, labourer, William Stevens, John Marshman, John Edwards, glazier, John Larkham, Renalder Bowles, Joseph Cholsey the younger, John Davis the elder, Richard Erwood, William Chiverall, Samuel Daw, Thomas Hardeu, James Edwards, Joseph Cholsey the elder, Thomas Spencer, Henry Obourne, John Penny, James Smart, John Randle, Edward Ranger, Stephen Harding, John Dewey, William Snook, Harry Jukes, Edward Beckett, Richard Pitman, Thomas Wier, Isaac Moody, William Hacker, John Bishop, Edward Halliday, Walter Beckett, George Spender the younger, John Chiverall, John Dukes the elder, John Dukes the younger, Robert Wier, Moses Weeks, George Dukes, Thomas Steevens, William Spender, John Hart, George Hayward, Edward Tulick, Mathew Davis, John Ingram the younger, Philip Becket the younger, Andrew Farrett, Henry Jerrard, William Brookes, John Gilbert, John Steevens, Elias Steevens, John Davis, Thomas Howell, William Day, Walter Piercy, John Beckett, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, William Newton, William Nesbick, John Hooper the younger, William Lucas, William Newton the younger, James Piercy, William Abraham, Henry Huffe the elder, Henry Huffe the younger, John Moore, Benjamin Cholsey the younger, John Bell, George Spender, James Anderson, William Lambe, Joseph Lambe, Edward White, Robert Wyer, Mathew White the younger, Mathew Stevens, William White, Richard Ingram, Francis Ranger, Elias Pittman, William Cuffe, Mathew White, William Steevens, George Steevens, John Steevens the elder, James Steevens, John Steevens the younger, John Wyer, Benjamin Cholsey the elder, William Ranger, Thomas Steevens, Francis Chiverell, Charles Wier, John White, William Wyer, James Anderson, John Beckett, Thomas Wier, Luke Beckett, Roger Spender, Robert Day, John Nairn, William Cuff, Elias Steevens, James Steevens, Isaac Savage, William Gilham, Archibald Hunter, Henry Savage, James Lambert, John Steevens, James Cuffe, Jervoise Gilbert, Thomas Piercy, John Ranger, Edward Piercy, Robert Gilbert, Thomas Lanham, Jos. Gilbert, John Richardson, William Dukes, Richard Smith, Henry Lambert, James Warne, Thomas Dukes, Roger Norton, Joseph Moody, James Davis, James Gilbert, Thomas Philips, John Gane, Luke Mead, Nathaniel Philips, Joseph Norton, Samuel Norton, John Randsome, Thomas Brookes Thomas Harden, John Harden, Samuel Philips, Jos. Scammell, William Sandle the elder, Luke Marshman the younger, James Goffe, Luke Marshman the elder, John Marshman, Richard Harden, William Sandle the younger, James Burleigh, William Harden, Thomas Field, Samuel Field, Richard Beckett, and Robert Ranger, respectively, each and every of them then and there respectively hav-

ing a right to vote in the election of burgesses to serve for the same borough in the parliament of this kingdom, a large sum of money, to wit, the sum of five guineas of like lawful money, as a bribe and reward to engage, corrupt, and procure the said several last-mentioned persons respectively to give their respective votes in the election of burgesses, to serve as burgesses for the same borough in the said then next parliament of this kingdom, for him the said Richard Smith, in order that he the said Richard Smith might be elected and returned a burgess to serve for the said borough in the said then next parliament of this kingdom; by means whereof the said several persons last above-named, who had such right to vote as aforesaid, were respectively tempted, corrupted, and procured to give, and did give their votes at and in the said election so had and made as aforesaid, for the said Richard Smith, for the purpose aforesaid; that is to say, at the borough of Hindon aforesaid, in the said county of Wilts, to the great obstruction and hindrance of a free, quiet, indifferent, and unbiassed election of burgesses to serve in parliament for the same borough, in violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity: and the said Attorney General of our said lord the king, for our said lord the king, gives the court here further to understand and be informed, that the said Richard Smith, well knowing the premises, but being such person as aforesaid, and again unlawfully, wickedly, and corruptly intending, as much as in him the said Richard Smith lay, to interrupt and prevent the free and indifferent election of burgesses to serve as burgesses for the same borough in the parliament of this kingdom, and by illegal and corrupt means to procure himself to be elected to serve as a burgess for the said borough in the parliament of this kingdom, the said Richard Smith, before the said election, (to wit) on the said 8th day of October, in the 14th year aforesaid, at Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly did give, and cause and procure to be given, to divers other persons, namely, Thomas Moore, Charles Simpson, John Baldwin, Jeremiah Lucas, Robert Tyley, Thomas Farrell, Joseph Norton, Joseph Kirk, John Edwards, William Stephens, John Maishment, John Larkham, Renalder Bowles, Joseph Cholsey the younger, John Davis the elder, Richard Erwood, William Cheverall, Samuel Daw, Thomas Harden, James Edwards, Joseph Cholsey the elder, Thomas Spencer, James Smart, John Randall, Edward Ranger, John Dewey, Luke Beckett, Philip Beckett, Henry Dukes, Edward Beckett, Isaac Moody, William Hacker, John Bishop, Edward Hollowday, George Spender the younger, John Chiverall, John Dukes the elder, John Dukes the younger, Robert Wyer, Moses Weeks, George Dukes, George Hayward, Edward Trewlock, Matthew Davis, Philip Beckett the younger, Henry Jerrett, John Davis the younger, William Day, Samuel Collier, Walter Piercy, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, John Hooper the younger, William Newton the elder, William Newton the younger, James Piercy, Henry Huffe the elder, Henry Huffe the younger, Benjamin Cholsey the younger, John Bell, George Spender the elder, James Anderson the younger, William Lambe, Jos. Lambe, Edward White, Robert Wyer, Matthew Whyte the younger, Matthew Steevens, William White, Richard Ingram, Francis Ranger, William Percy, Elias Pitman, William Cuff the elder, Matthew Whyte the elder, William Steevens, George Steevens, John Steevens the elder, James Steevens, John Steevens the younger, John Wyer, Benjamin Cholsey the elder, William Ranger, Francis Chiverall, Charles Wyer, James Wyer, John White, William Wyer, James Anderson the elder, John Beckett, Thomas Wyer, Luke Beckett the elder, Roger Spender, Robert Day, William Cuff the younger, Elias Stevens, James Steevens, William Gilham, Henry Savage, Jarvis Gilbert, Thomas Percy, John Ranger, Edward Percy, William Percy the younger, Robert Gilbert, William Dukes, Thomas Dukes, Roger Norton, Joseph Moody, James Gilbert, John Gane, Luke Mead, Nathaniel Philips, Joseph Norton, Samuel Norton, John Randsome, Thomas Brookes, Samuel Philips, Joseph Scamel, William Sandall the elder, Luke Maishment the younger, Luke Maishment the elder, John Maishment, William Sendle, James Burleigh, William Harden, Samuel Field, John Bowles, Robert Ranger, Thomas Lanham, John Richardson, William Spender, Henry Obourne, John Penny, Richard Pittman, William Nisbeck, James Davis, Joseph Gilbert, James Gough, James Wire, John Gilbert, and John Steevens, respectively, each and every of them, then and there, and until and at the time of the said election so had and made as aforesaid, claiming a right to vote in the election of burgesses to serve for the said borough in the parliament of this kingdom, a large sum of money, to wit, the sum of five guineas, of like lawful money, as a bribe and reward to engage, corrupt, and procure the said several persons so claiming a right to vote as aforesaid respectively, to give their respective votes at the said election of burgesses to serve in parliament for the same borough, for him the said Richard Smith, in order that he the said Richard Smith might be elected and returned a burgess to serve for the said borough in the said then next parliament of this kingdom, to the great obstruction and hindrance of a free, quiet, and indifferent election of burgesses to serve in parliament for the same borough, in violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to

the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity: and the said Attorney General of our said lord the king, for our said lord the king, gives the court here further to understand and be informed, that the said borough of Hindon, in the said county of Wilts, is an ancient borough, and for a long space of time two burgesses have been elected and sent, and of right ought to be elected and sent, to serve for the said borough in the parliament of this kingdom, to wit, at the borough of Hindon aforesaid, in the said county of Wilts: and the said Attorney General of our said lord the king, for our said lord the king, gives the court here further to understand and be informed, that the said Richard Smith, being a person of a depraved, corrupt, and wicked mind and disposition, and unlawfully and wickedly intending, as much as in him the said Richard Smith lay, to prevent and interrupt the free and indifferent election of burgesses to serve for the same borough in the parliament of this kingdom, and by illegal and corrupt means to procure himself to be elected to serve as a burgess for the said borough in the parliament of this kingdom, on the 8th day of October, in the 14th year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly did give, and cause and procure to be given, to divers persons, namely, Jeremiah Lucas, Thomas Moore, Charles Simpson, John Baldwin, Jeremiah Lucas, Robert Tyley, Thomas Farrell, Jos. Norton, Jos. Cuff, John Edwards, William Steevens, John Maishment, John Larkham, Renalder Bowles, Joseph Cholsey the younger, John Davis the elder, Richard Erwood, William Chiverall, Samuel Daw, Thomas Harden, James Edwards, Jos. Cholsey the elder, Thomas Spencer, James Smart, John Randle, Edward Ranger, John Dewey, Luke Beckett, Philip Beckett, Henry Dukes, Edward Beckett, Isaac Moody, William Hacker, John Bishop, Edward Hollowday, George Spender the younger, John Chiverall, John Dukes the elder, John Dukes the younger, Robert Wyer, Moses Weeks, George Dukes, George Hayward, Edward Trewlock, Matthew Davis, Philip Beckett the younger, Henry Jerrett, John Davies the younger, William Day, Samuel Collier, Walter Percy, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, John Hooper the younger, William Newton the elder, William Newton junior, James Percy, Henry Huffe the elder, Henry Huffe the younger, Benjamin Cholsey the younger, John Bell, George Spender the elder, James Anderson the younger, William Lambe, Joseph Lambe, Edward White, Robert Wyer, Matthew White the younger, Matthew Steevens, William White, Richard Ingram, Francis Ranger, William Percy, Elias Pittman, William Cuff the elder, Matthew White the elder, William Steevens, George Steevens, John Steevens the elder, James Steevens, John Steevens the younger, John Wyer, Benjamin Cholsey the elder, William Ranger, Francis Cheverall, Charles Wyer, James Wyer, John White, William Wyer, James Anderson the elder, John Beckett, Thomas Wyer, Luke Beckett the elder, Roger Spender, Robert Day, William Cuff the younger, Elias Steevens, James Steevens, William Gilham, Henry Savage, Jarvis Gilbert, Thomas Percy, John Ranger, Edward Penny, William Percy the younger, Robert Gilbert, William Dukes, Thomas Dukes, Roger Norton, Jos. Moody, James Gilbert, John Gane, Luke Mead, Nathaniel Philips, Jos. Norton, Samuel Norton, John Ransome, Thomas Brookes, Samuel Phillips, Jos. Scamell, Wm. Sandall the elder, John Maishment the younger, Luke Maishment the elder, John Maishment, W. Sendell, James Burleigh, William Harden, Samuel Field, John Bowles, Robert Ranger, Thomas Lanham, John Richardson, William Spender, Henry Obourne, John Penny, Richard Pitman, William Nisbeck, James Davis, Jos. Gilbert, James Gough, James Wire, John Gilbert, John Steevens, respectively, each and every of them then and there having a right to vote at and in the election of burgesses to serve for the same borough in the parliament of this kingdom, another large sum of money (to wit,) the sum of five guineas of like lawful money, as a bribe and reward to engage, corrupt, and procure the said several last-mentioned persons respectively to give their respective votes at and in the then next election of burgesses to serve in parliament for the same borough, for him the said Richard Smith, in order that he the said Richard Smith might be elected and returned a burgess to serve for the said borough, at the then next election of burgesses to serve in the parliament of this kingdom, to the great obstruction of a free, indifferent, and unbiassed election of burgesses to serve in parliament for the same borough, in violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity: and the said Attorney General of our said lord the king, for our said lord the king, giveth the court here further to understand and be informed, that the said Richard Smith, being such person as aforesaid, and again unlawfully and wickedly intending, as far as in him lay, to interrupt and prevent the free and indifferent election of burgesses to serve for the said borough of Hindon in the parliament of this kingdom, and by illegal and corrupt means to procure himself to be elected and returned to serve as a burgess for the said borough in the parliament of this kingdom, he the said Richard Smith, on the 10th day of October, in the 14th year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly did lend, and cause and procure to be lent, to divers other persons,

namely, Thomas More, Charles Simpson, John Baldwin, Jeremiah Lucas, Robert Tyley, Thomas Farrell, Jos. Norton, Joseph Kirk, John Edwards, William Stephens, John Maishment, John Larkham, Renalder Bowles, Jos. Cholsey the younger, John Davies the elder, Richard Erwood, William Cheverall, Samuel Daw, Thomas Harden, James Edwards, Jos. Cholsey the elder, Thomas Spencer, James Smart, John Randall, Edward Ranger, John Dewy, Luke Beckett, Philip Beckett, Henry Dukes, Edward Beckett, Isaac Moody, William Hacker, John Bishop, Edward Hollowday, George Spender the younger, John Cheverall, John Dukes the elder, John Dukes the younger, Robert Wyer, Moses Weeks, George Dukes, George Hayward, Edward Trewlock, Mathew Davis, Philip Beckett the younger, Henry Jerrett, John Davis the younger, William Day, Samuel Collier, Walter Percy, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, John Hooper the younger, William Newton the elder, William Newton the younger, James Percy, Henry Huff the elder, Henry Huff the younger, Benjamin Cholsey the younger, John Bell, George Spender the elder, James Anderson the younger, William Lambe, Jos. Lambe, Edward White, Robert Wyer, Mathew White the younger, Mathew Steevens, William White, Richard Ingram, Francis Ranger, William Percy, Elias Pittman, William Cuffe the elder, Mathew Whyte the elder, William Steevens, George Steevens, John Steevens the elder, James Steevens, John Steevens the younger, John Wyer, Benjamin Cholsey the elder, William Ranger, Francis Cheverall, Charles Wyer, James Wyer, John Whyte, William Wyer, James Anderson the elder, John Beckett, Thomas Wyer, Luke Beckett the elder, Roger Spender, Robert Day, William Cuffe the younger, Elias Steevens, James Steevens, William Gilham, Henry Savage, Jarvis Gilbert, Thomas Percy, John Ranger, Edward Percy, William Percy the younger, Robert Gilbert, William Dukes, Thomas Dukes, Roger Norton, Joseph Moody, James Gilbert, John Gane, Luke Mead, Nathaniel Philips, Joseph Norton, Samuel Norton, John Ransome, Thomas Brookes, Samuel Philips, Joseph Scamell, William Sandall the elder, Luke Maishment the younger, Luke Maishment the elder, John Maishment, William Sendle, James Burleigh, William Harden, Samuel Field, John Bowles, Robert Ranger, Thomas Lanham, John Richardson, William Spender, Henry Obourne, John Penny, Richard Pittman, William Nesbick, James Davis, Joseph Gilbert, James Gough, James Wire, John Gilbert, and John Steevens, respectively, each and every of them then and there having a right to vote at and in the election of burgesses to serve in parliament for the same borough, a large sum of money (to wit) five guineas of lawful money of Great Britain, as a bribe and reward to engage, corrupt, and procure the said several persons last above-named, having a right to vote as aforesaid, respectively to give their respective votes in the then next election of burgesses to serve for the said borough in the parliament of this kingdom, for the said Richard Smith, in order that he the said Richard Smith might be elected and returned a burgess to serve for the said borough in the then next parliament of this kingdom, to the great obstruction and hindrance of a free, indifferent, and unbiassed election of burgesses to serve in parliament for the said borough, in violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity."

At the same time, he filed a like Information, *mutatis mutandis*, against each of the others, whom the House of Commons had ordered him to prosecute.

In Hilary term, 16 Geo. 3, the Defendant pleaded Not Guilty, and thereupon issues were joined.

Proceedings on the Trial of the Information against Richard Smith, esq.

Counsel for the Crown.—Mr. Serj. Grose,* Mr. Serj. Heath,† Mr. Popham, Mr. Morris, Mr. Moysey, Mr. Buller ‡

Counsel for the Defendant.—Mr. Serj. Davy, Mr. Mansfield,§ Mr. Batt.

Mr. Buller opened the Information, and then Mr. Serjeant Grose stated the facts upon which the charge against the defendant was founded, and then proceeded to examine the witnesses.

Mr. *White* sworn.

Here is a copy of the original writ for the election, and of the return, and also the copy of an ancient return in 1716, (putting them into court.)

Counsel for the Defendant. We admit it to be an ancient borough.

Mr. *Salmon* sworn.

This precept was made out by my father as under sheriff; it is his hand-writing.

Mr. *Thomas Noyes* sworn.

This precept was delivered to me; I delivered it to Mr. Sull, the bailiff of Hindon.

Mr. *James Still* sworn.

Examined by Mr. *Morris*.

I was returning officer for the borough of Hindon.

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* Afterwards a judge of B. R.

† At this time (Jan. 1814) one of the justices of C. B.

‡ Afterwards a judge first of B. R. and then of C. B.

§ At this time (1814) C. J. of C. P.

Do you remember who were candidates at that election?—James Calthorpe, esq. was nominated by four of the electors; he was not present; Richard Beckford, esq. was present; Richard Smith, esq. and Thomas Brand Hollis, esq. were the candidates; this is the original poll taken under my inspection, and signed by me. (It is put into court.)

Francis Meade sworn.

Examined by Mr. *Popham*.

Where do you live?—At Hindon.

Are you a voter for Hindon?—Yes, ever since I have been of age.

Do you know capt. Nairn and parson Nairn?—I do.

Do you remember their coming to you at any time?—Yes, in January, 1773, at Mr. Lucas's, who keeps the George, a public house.

What did they say to you?—Capt. Nairn sent for me and five or six more, and told us he had a gentleman to recommend to us.

For what?—To be a member for the town; that was what we took it to be.

Mr. Serj. *Davy*. Don't say what you took it to be; tell the Court what he said.—*A*. He said he had a gentleman to recommend to us of a large extent of fortune; that he would not have him flung for 10,000*l*. he would not have him flung for the Indies.

Who were in the room?—William Lucas, John Beckett, Thomas Howell, myself, and John Hart; William Penny came in afterwards.

Mr. Serj. *Davy*. Was capt. Nairn there?—*A*. Yes, and parson Nairn.

Mr. *Popham*. Then it was that capt. Nairn said he had a gentleman to recommend to you?—*A*. Yes.

Did he say for what?—He said, To be a member for the borough.

What did he say of this gentleman that he meant to recommend to you?—He said he would lay down 3,000*l*. one thousand in a small trifle of time, one thousand at the next fall of the year, and one thousand just before the election, and he would not stand for 3, 4, or 500, over and above the 3,000.

Was the proposal agreeable to the people that were present?—Yes, they liked it very well; we had a bottle or two of shrub together, and some of the people in the room were talking about captain Gold of Shaftesbury;* we said we would be higher than them, it should be general Gold.

Mr. Serj. *Davy*. Who said that?—I cannot recollect which of the company; we drank general Gold's health; then capt. Nairn said, He is a brave general; he has faced the mouth of many a cannon. The company asked capt. Nairn, in what manner and how the money was to be let go? he said, Once in a fortnight or thereabouts he would send somebody, or something of that kind.

Was there any thing more passed at this time?—I do not recollect that there was.

What was the next thing you know of this business?—One Francis Ward, esq. coming down from London, that was some time in February, I think, about the 9th, he came down to Hindon; there was another gentleman along with him and his lady; I saw him at Lucas's, the George.

Who was with you?—John Beckett and the rest I nominated before.

All the same people as before?—Yes, to the best of my knowledge.

William Lucas, John Beckett, Thomas Howell, yourself, John Hart and William Penny?—Yes.

What did Mr. Ward say to you?—That he was come in behalf of capt. Nairn, or his friend; and he had brought down some bank notes which he wanted to get changed; he and Mr. Hart went to Shaftesbury to change them, and he gave 10*s*. in the 100*l*. to get them changed.

Did he say what he brought these bank notes for?—On behalf of capt. Nairn and his friend.

What did they do with them?—They went to Mere to change them: they could not get them all changed there; they changed some at Shaftesbury: Thomas Howell and I went to Shaftesbury; I went there to assist in getting the notes changed, which they could not get changed at Mere.

Where was Beckett at this time?—He staid at home to draw notes of hand, the notes were for twenty guineas; there were four in each note.

How many people were to sign these notes?—Four.

Was this settled before you went out?—Yes, for Beckett to draw the notes, that was settled.

And he was to draw them as twenty guinea notes?—Yes.

Where did you go after your return?—We went to Lucas's that night; that was the Thursday night; it was Wednesday night we saw Ward first; it was Thursday we went to Shaftesbury; we came home together upon Thursday night from Shaftesbury.

Did you settle any thing at Lucas's that night after your return from Shaftesbury?—I packed up the money in papers, five guineas in a paper.

What did you determine to do with it?—To give it away to the borough-men, as far as I know.

What was in fact done with it?—It was carried to a little cottage-house by Ward.

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* See the Case of this Borough in vol. 2 of Mr. Douglas's Election Reports, Case 19; and the Supplement to it in vol. 4 of the same work. For more concerning bribery, see Mr. Douglas's Note (B.) to the Case of Saint Ives in vol. 2. In Dodington's Diary, the portrait drawn by an eminent practitioner of corruption and venality in polished 'High Life,' and the language applied by him to corruption and venality in uneducated 'Low Life' are very striking, and certainly not less humiliating.

Was that settled at Lucas's too, that you were to go there?---Yes.

Whose house was that cottage-house?---George Hayward's.

When was it you were to go to George Hayward's?---The next day, the Friday night, the votesmen came there and received the five guineas a piece; I suppose it was money, they took the parcels I saw made up at Lucas's.

Was it a pretty large assembly at Hayward's?---Yes, a good many were there.

Was he to receive any thing?---He had a guinea for the rent of the room.

How many people might be there that night?---Six or seven score I suppose.

Do you recollect any persons going in?---Yes.

Name any that you recollect?---I would rather go by the copy of the poll.

John Norton; was he one?---I won't say that all I shall nominate took the money at George Hayward's; some took it at Lucas's upon Sunday.

You remember being at Hayward's at this time?---Yes.

Who did you see there?---I cannot recollect all the persons that were there.

I don't mean you should recollect all the persons; I ask you now simply who you saw there?---A vast many of the voters; Mr. Ward, Mr. Hart, and John Beckett the baker.

Now is John Beckett a voter?---Yes, and so was Mr. Hart.

Who was there besides?---Mr. Hart's wife.

Mention only the voters; who did you see there besides?---There and at Lucas's, I could nominate some.

Recollect as well as you can at Hayward's?---I cannot separately.

Were the same people at Lucas's that were at Hayward's?---Some were.

After you had done at Hayward's, you went to Lucas's the next night?---Yes.

And the same kind of business was carried on at Lucas's?---Just the same.

If I understand you, there is a little confusion in your mind, about whether they were at Hayward's or Lucas's; but you say you can name some that were at one or the other places, but you are not certain which?---I can nominate pretty nigh an hundred voters that were at both places.

I see your anxiety is about recollecting all of them; that is not material: now name those that you are sure of that were either at Hayward's or Lucas's?---Joseph Norton, Joseph Cuffe, John Edwards labourer, John Mashman, John Larkham, Renolder Bowles, Joseph Cholsey junior, John Davis senior, Richard Earwood, Samuel Daw, Thomas Harding, James Edwards, Joseph Cholsey senior, Thomas Spencer, William Scammel otherwise Target, John Dewey, Luke Beckett, Philip Beckett, Edward Beckeft, Richard Pitman, John Bishop, Edward Halliday, James Gilbert; but I believe he was not polled: John Chiverell, John Dukes junior, Robert Wyer, Moses Weeks, George Dukes, Edward Tulick, Henry Jerrard.

Were these several persons that you have named, voters of Hindon at this time?---They were.

Did you see them either at Hayward's or the George next evening?---Yes, either at the one or the other of those places.

Can you say whether you saw those persons you have named either at one place or the other?---What I learnt so ready by, was having the list from John Beckett; he kept a list of them four in each, as they were drawn up in the notes.

You left off I belive with Henry Jerrard; go on to name some more?---John Davis, junior, Edward White, John Hooper senior, John Hooper, junior, Henry Huffe senior, Henry Huff junior, Benjamin Cholsey junior, James Wyer, John Bell, George Spender senior, William Lamb, Joseph Lamb, Robert Wyer, Matthew Stevens, William White, Richard Ingram, Francis Ranger, William Piercy, William Cuffe, senior, Matthew White the elder, William Stevens, George Stevens, John Stevens Hagg, James Stevens Hagg, John Stevens junior, John Wyer the sawyer, Benjamin Cholsey, William Ranger, Thomas Stevens, Francis Chiverell, Charles Wyer, James Wyer.

You mentioned James Wyer before?---There are two; one is a shoemaker, the other a labourer; James Anderson senior, John Beckett a seevyer,* Thomas Wyer a seevyer, Luke Beckett the elder, Roger Splender, Robert Day, Robert Taylor otherwise Small, James Stevens, Elias Stevens, Isaac Savage, William Gillham, Edward Piercy, Thomas Piercy, William Dukes, Roger Norton, James Gilbert, John Gane junior, John Gane senior; James Elwood's wife came for him; Nathaniel Phillips, Joseph Norton, Samuel Norton, John Ransom, Thomas Brookes, Joseph Scammell, William Sandel the elder and the younger, Luke Marshman senior.

Was the other there?---I am not certain only to one. There was John Marshman senior, John Marshman junior, William Harding labourer, Thomas Field, Samuel Field, John Bowles, Obadiah Ranger.

Is Obadiah Ranger called by any other name?---Sometimes they call him Robert.

Were those persons you have named at either Hayward's or Lucas's?---Yes, at one or other of them, or both, to the best of my knowledge.

Did any of them receive the money?---The money was put in paper, they took the paper off the board.

When did you first see general Smith at Hindon?---May be about a week or a fortnight before the election.

What did you do after this business at Hayward's and Lucas's?---We had a bit of a journey to London.

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* So in orig.

Who went to London?---I went along with Mr. Hart.

How long afterwards?---I cannot rightly recollect: it was some time afterwards we went to Mr. Ward's, at No. 16, in Sherborne-lane.

What was your conversation with Mr. Ward?---Something about guineas instead of pounds. Mr. Hart told me he had orders from the town that it should be guineas instead of pounds: he gave Mr. Ward a paper, but what was in it, I don't know.

What did Mr. Ward say to that?---He said he would talk with the principal concerning of it.

Did he say any thing about the sum?---That it should be 3,000 guineas instead of pounds.

Mr. Serj. *Davy*. Was the sum 3,000 mentioned?---It was meant.

Did you see any thing of the principal there?---I did not: he said he would apply to the place of meeting over Westminster-bridge, the Gun tavern or Gun alehouse, I think. Ward came, the principal did not.

Did any thing material happen at that meeting?---No, there was a letter came to us to appoint a meeting in Scotland-yard, I think: we were not at home when the letter came; the next morning I went to the place where this gentleman was to meet us, and met Mr. Brown in the Strand.

Mr. Brown was the man that came down with Mr. Ward?---Yes.

Mr. Serj. *Davy*. Is every gentleman that was in company with Mr. Ward, at any time, or upon any occasion, to be considered as an agent of general Smith?

Mr. *Popham*. If I do not carry it to Mr. Ward, from Mr. Ward up to capt. Nairn, and from capt. Nairn up to general Smith, I do nothing.

Meade. I met Mr. Brown in King-street, but I never met Mr. Ward afterwards.

Did you write any letter to capt. Nairn about this?---Yes.

Did you receive any answer?---Yes.

[The Letter shewn the witness.]

Meade. This is the letter I wrote, this is the answer: I am certain that is the letter by the writing at the bottom of it.

[The Letter read.]

"*Bury-street, St. James's, March* 1, 1774.

"Dear Sir; I received your favour, dated the 26th instant, and am very much surprized that you, or any body in Hindon, should doubt the truth of what I formerly told you, or that I wouldneglect to acquaint them immediately of any accident or any intention in my friend to decline continuing in the first principle in which he set off. You may be assured, and I desire you will let the rest of my friends know, that he scorns to put another man's shoe on his foot, or let another man put his on; that he is a man of honour and large property, and not a very great distance from Hindon. If my agents, as you call them, did not give you a satisfactory answer, why did not Mr. Lucas, as I desired, write to me? And I request it may be so, that I may know the wishes of the town; for it was their interest and welfare I had at heart, and the motive of my interfering; and shall be, while with truth and honour I can call myself their's and your obedient faithful friend, F. Nairn."

Was there any uneasiness in the town at this time?---Yes, there was.

What was that about?---Because Mr. Nairn had not kept his word according to the time that he promised, because he did not advance the money as he had promised.

Was that the second payment?---Yes.

About what time was that uneasiness in the town?---I cannot recollect now, it was some time in the winter.

It was further on in the spring than the other passages you have been speaking of?---Yes.

What was the next thing done?---Some money to be given away at Lucas's.

When was that to be?---It was on Easter-eve, 1774.

You say there was money to be given away at Lucas's?---That was the report.

Whom did you hear it from?---All the people as they came down stairs from taking the money.

Whom did you hear it from before the money was given away?---Mr. Lucas ordered me to come and glaze a window for him, before they came, to get the room for their reception.

When was that?---The Saturday morning, the day before Easter.

Do you know any thing that passed upon Easter-eve?---Parson Nairn said to me, go round to all those people who have not received the first eight guineas, tell them they shall all come in on Monday night and receive ten guineas each.

Did you invite the people?---Yes, I did go round with a lie in my mouth from a parson; that is the worst luck.

What was this money for?---I don't know, without it was for election-work.

What did parson Nairn say it was for?---He did not tell me what it was for, to my knowledge.

What passed the day after Easter-day?---The greater part of the people came to receive their ten guineas each.

About how many were there, fifty, a hundred, or twenty?---Not so many, I went up only towards the conclusion: on Monday night there were a vast number in the yard and round the house.

But you cannot tell how many?---I cannot tell how many took it.

Did you go up into the room?---I went up into the room on Monday; they would not let some of the people have it that the parson sent me to.

Why would they not let them have it?---

Because the parson said afterwards there was none for them, it was all gone.

Had the rest the money?---So far as I know they had.

When was it that you first saw general Smith at Hindon?—I believe about a week before the election.

When did general Smith first come to Hindon?—I was not at home when he came.

Who did he come with when you saw him?---Parson Nairn and captain Nairn.

Were you present when either of them talked of general Smith?---I did not hear either of them mention general Smith's name.

Did you see them canvassing the town?—I saw them go up and down the town: I did not see them go into any particular house, except Lucas's, where they quartered.

Were captain Nairn and parson Nairn with them?—Yes, when I saw them walking in the street.

What name was general Smith generally known by in Hindon at this time?—General Gold they used to call him before he came down.

Did the name continue after he came down?—One man, Thomas Brookes, voted for him upon the poll by the name of general Gold.

Were you present at any time when any talk was had in the presence of general Smith, about general Gold?—Not to my knowledge.

Do you know any thing about Punch dancing at Hindon?—I was not at home.

Cross-examined by Mr. Serjeant *Davy*.

So when you went to Lucas's to glaze the window on Easter-Monday, they would not let the men have the money, and among the rest I suppose did not let you have the money?—I did not ask for it; I did not intend to have it.

Did they never say they would not let you have it?—That must have been a mistake upon the committee: I said they would not let those people have it the parson sent me after.

So it was a mistake when the committee wrote it down, and you swore it, 'that they would not let you have it, and it was a damn'd roguish trick?'—That was John Beckett and them.

So they made a mistake in that?—They might as well make a mistake in that, as to call me John when my name is Francis.

You never swore before the committee that they would not let you have the money?—I cannot recollect that I did; not myself in particular.

You told us just now they would not let the people have it?—That was one and all.

I ask you whether you did or did not swear before the committee that they would not let you have the money; and therefore you said it was a damn'd piece of roguery, and you would have nothing to do with it?—I said before the committee that I went up into the room, and Thomas Spencer said it was a damn'd piece of roguery, and I said it was a damn'd piece of roguery all round, and I would have no concern with it.

Hear the question out: Did you swear this, 'that there was an excuse at that time that they would not let those who had not received any, have it—They would not let me have it?'—The meaning of the word signified the whole.

Did you swear that?—There might be a mistake in that.

Did you or not swear it?—I cannot say now.

You glazed that room upon Easter-eve?—Yes.

Then on Easter-Monday you went into the room?—Yes.

You said towards night. Did you see them give money to any body?—No, not while I was present.

Did you never swear you went into the room where they were giving money to the voters?—Where they had been giving money.

Did they then give money or no?—Not then; they had been giving, and gave some afterwards; they had done it before, and have since.

Then it is not true that you went into the room where they were giving money?—They had given some.

But is it true that you went into the room where they were giving?—I did not see them give any whilst I was there.

Consequently you cannot tell who gave it, of your own knowledge?—No.

You cannot tell, of your own knowledge whether it was given at all?—No farther than what the parson told me, and the voters told me they received five guineas a-piece.

Consequently you cannot tell any one that received it: now had you any money at that time?—No.

None at all?—No.

Neither the first five guineas nor the second five guineas?—No.

How came you not to have it?—Because I did not have it, that was the reason.

Why did not you have it?—That is to myself.

But I will know; at least you shall swear something.—I did not ask for it.

Nor they did not offer it to you?—No.

And why was that?—I cannot tell.

My friend, among the people that you have given us an account of receiving the money, I think you say that Matthew White junior was not there?—Not that I can recollect now.

Richard Pitman, was he there?—He was, to the best of my knowledge, and so were all the rest.

Why, here are a vast number; you stopped at Ranger, and here are thirteen more that you swore to before the committee, thirteen all in a line.—I cannot recollect them all again.

What list did you swear from then?—Them that I nominated by word of mouth.

You stop now, both by memory and the list, at Ranger, and omit thirteen names which immediately follow, besides about twenty more.

—If I don't recollect them, I can't mention them.

Don't you remember, before the committee, upon the cross-examination, you were examined touching the business of the malt-house, though that does not concern general Smith?—It does not.

You were examined touching the business of the malt-house?—Yes; but I don't know that I have any right to answer that now, as I have got an order to attend the House of Commons.

Did you, or did you not, say that you never saw any money given at the malt-house?—Yes, I did, and I will swear it again.

Did you never see a note put into the hole of the malt-house?—I never did, nor I never saw the hole till a year afterwards.

Did not you say, that you were not at the malt-house?—No, it was at a house adjoining to the malt-house.

I think you said you came into the room at Lucas's after the money had been given?—After some had been given.

Was any money given while you was there at Easter?—None at all: there was none given when I was present.

Were you present at the making of the bargain about selling those votes?—I was there when Nairn made the proposal.

Did not you agree to it?—I did, along with the rest of my neighbours.

You were one of the parties making this corrupt agreement to sell this borough?—I cannot help it now.

Mr. *Popham.* He repents of it.

Mr. Serj. *Davy.* Then you are a sad, repenting miserable sinner, are you? You made a bargain for the money with the rest of them.—*A.* We consented to it all of us.

William Penny sworn.

Examined by Mr. *Moysey.*

You live at Hindon?—Yes.

Do you recollect having any conversation with captain Nairn, in February 1773, about the election?—Yes.

What day was it?—I cannot tell; I believe it was on a Thursday; the captain came to my house; he shook hands with me; he asked me some questions; then he went to Lucas's, and sent Thomas Howell for me; he sent a second time, and then I went.

Who were there?—Thomas Howell, John Hart, Francis Mead, the rev. John Nairn, William Lucas, and captain Nairn.

What passed?—He desired me to sit down: then captain Nairn said, he had a particular friend that he should be glad to present to the borough of Hindon, and he would not have him deceived, not for the Indies.

What passed then?—Then he said, his friend should produce 3,000*l.* and that he would not stand for 200 or 300 beyond the 3,000.

Did he say thing more?—Yes, that one thousand should be disposed of in a very little time, but he must go to London first; then there was some money brought, and let go, at William Lucas's, at the George: when he spoke these words, I was coming from him; he desired me to stop and drink a glass of something; he ordered a bottle of shrub to be brought.

Have you told us all that was said by captain Nairn before the shrub was brought?—To the best of my remembrance.

Have you told us all he said about the money?—One thousand was to be let go immediately; one thousand at the fall; and a thousand about a week or a fortnight before the election.

Is that the whole he said about the money?—Yes.

What was said, in answer to this, by any of you? did they refuse it or accept it?—They accepted his proposal.

Was any thing more added to the proposal, or said about the proposal, before the shrub was called for?—Not that I recollect; as soon as the shrub was called for, the conversation about the money dropped.

Was any thing more said about the election?—Not at that time.

Did you hear any thing more said by Nairn, who was to be their candidate?—The captain said, he did not know the names of all the voters that were there in company; he desired his brother, the rev. Mr. Nairn, to write the names down of those that were present: then I drank some shrub by his desire and came away. I did not stay till the meeting was broke up; I left some people there.

Did you drink any body's health there?—When Lucas brought the bottle of shrub, Meade said, Whose health shall we drink? Lucas said, Captain Gold: Meade's answer was, He would not drink captain Gold; Then, said Meade, it shall be general Gold: Yes, said the captain, he is a brave fellow; he has faced the mouth of many a cannon.

Was any thing more said about captain Gold?—Not that I heard; I left both the Nairns there, and the rest of the company.

Do you know Mr. Ward?—I did soon after I came from Lucas's.

About how long after this was it you met him at the George?—I was in company with him at the George the first time I saw him.

How long after what you have been speaking of?—About three weeks, or between three and four weeks.

Were you sent for there, or did you go of your own accord?—A message came to me that a Mr. Ward wanted to see me; I went to the George.

Whom did you find there?—This Francis Ward, as he told me his name was; there were more people there, I cannot recollect every one.

Recollect those you happen to remember.—There was John Hart and Thomas Howell, and Beckett the baker.

How many might there be in number?—I

cannot tell; a great many people came after me.

What was done?---There was some money let go, I believe.

From whom and to whom did the money pass?---From Francis Ward.

How did he begin: did he say for what purpose he produced the money?---He said he would lend five guineas to any neighbour of mine that was a voter in the borough of Hindon.

Was that upon your coming into the room?---It was some time after I was in that room.

What might Ward say to you as soon as you came in?---He asked me how I did.

You never saw him before, I believe?---No, we had a great deal of discourse.

I want to know all he said about the election.---It is impossible for me to recollect.

What, did he say he would lend some money to your friends?---They were his friends, not mine: he pulled out some money.

How much money did he pull out?---I cannot tell; there were some in papers, and some loose.

What did you see him do with that money?---He delivered it to those who signed a note.

Were there a great many of those present?---Yes.

Did you see a great many sign the notes?---Yes.

And of course saw a great many receive the money?---I did.

How long might this money be giving, and the signing notes last?---It might end at about eight in the evening.

When did it begin?---I imagine, about one o'clock.

At what time was it you went there?---About one o'clock.

Then they were there from one till eight?---Yes.

And giving money all that time?---Yes, as fast as people came; but they came in very slow.

Was any thing said about the purpose for which that money was given?---No more than general Gold's health was drank at that time.

I suppose whenever they delivered any money his health was drank?---Yes.

There must have been a good many receive the money that day?---Yes.

This was at the George?---Yes.

When did you leave them?---About nine or ten o'clock I went away.

Did you leave Ward there?---Yes.

Ward did not tell you who he was, or whom he came from, did he?---No.

You had never seen him before?---No.

When did you see him again?---I have not seen Mr. Ward since, to my knowledge.

You did not see him at Hayward's?---No.

This was in February, 1773?---Yes.

Do you remember any thing of this sort in Easter, 1774?---No.

Do you recollect seeing parson Nairn about Easter, 1774?---He sent for me up to John Beckett's at the Swan.

Did you go?---Yes, to be sure, as he sent for me.

Whom did you find there?---John Nairn; he was by himself when I went up stairs; he asked me what news was going about the town? my answer was, that I was informed that one Jobber Stevens, a butcher, was bringing some friend with some more money: John Nairn said, to the best of my remembrance, I will supply the poor that want some money, in a very little time.

What did you say to that?---I asked him whether his friend was in London or in the country? He told me he could not satisfy me then; I desired him to write a letter to his friend; I said, Your friend, if he be at home, it is but a day's ride to go there and back again.

Did you understand who it was then?---I understood it was general Smith; then Nairn sat by the fire-side, and said in a sneering manner, Aye, you don't know, it is not general Smith: my answer was, Then the reverend Charles Humphries has told me a lie.

Did any thing more pass about general Gold at this time?---Not that I can recollect.

There was no one present but you two, were there?---John Beckett and Francis Meade came in,

Was any thing more said about the election after they came in?---They said, The way was, to let people have more money.

What did Nairn say?---It should be done very soon; but he must go to London first.

Did he mention the sum that was to be distributed?---Not that I recollect.

Was any thing more said about the money?---That was all that passed then.

Did you see any money given any where on Easter eve?---No.

Did you see any money distributed on Easter eve?---No.

Do you know of any other occasion when money was distributed relative to the election?---I never knew any pass but with papers.

Do you know of any money passing without papers?---No.

When did you see general Smith?---I never changed a word with him in my life; parson Nairn told me it was general Smith, just before the election at Hindon.

What was he doing when you saw him?---Parson Nairn came and shook me by the hand, and told me that was general Smith.

Who was with him besides the rev. John Nairn?---A vast many.

Did any body speak to you about him at that time besides John Nairn?---No.

Did you see any thing of Punch?---No.

Can you recollect any other names of those that were present at the time of the money given by Mr. Ward in February, 1773?---I can remember, Daniel Lambert, the apothecary, came, and received five guineas for himself and five for his father; and I saw William Newton, sen. and William Newton, jun. receive it.

Any body else?---Not that I can recollect.

Cross-examined by Mr. *Mansfield*.

What are you?---An innholder commonly called.

You are one of the men that made this bargain at first for captain Gold?---A bargain!

Yes, a bargain.---I made no bargain, because it was just what Nairn pleased; I could make no bargain.

What were you with captain Nairn for at Lucas's when the captain sent for you? what did you do there?---How could I make a bargain for the town? I could not make a bargain for myself.

Then, when Nairn proposed, as you said, to have a friend of his represent the borough, and there was 3,000*l.* to produce, you said it was very wrong, and it should not be, I suppose.---You may suppose what you please.

But was it so?---I asked them that were there how they liked the proposal; they said, Very well.

You are one of them?---I was in company at the time.

Were you one of those that liked it?---I was in the company certainly.

But did you make any objection?---How could I.

You might have said you did not like it; did you upon your oath make any objection?---I did not find fault.

Upon your oath, did not you approve of it as well as the rest?---I asked them how they liked the proposal; they said, Very well.

Did you not give captain Nairn to understand that you liked it very well?---I am upon my oath: what I have told you is truth hitherto.

Then you did not give captain Nairn to understand that you approved of this proposal for the 3,000*l.*---No farther than what I have told already.

You must answer yes or no; and men that will not answer are to be punished. Upon your oath, did you mean that captain Nairn should understand that you approved of the proposal?---I cannot say farther than I have.

Court. Come, Sir, give an answer.---I looked round, and said, Gentlemen, how do you like the proposal? And they said they liked it very well: I did not say I misliked it.

But what I ask of you is, whether you meant captain Nairn should understand that you liked the proposal?---I made no objection against it, because the rest of the company were agreeable to it.

Then you liked the proposal?---I made no objections to it.

Did you like it?---I did not make any reply against it or for it.

How did you feel yourself? Did you like it?---I did not say.

Court. You have given very trifling answers; if you don't immediately answer the question, I will commit you: did you like it, or did you not like it?---Yes, I did.

You have told us that you went to this place; no mention was made who the person was, for whom this 3,000*l.* was to be distributed?---General Smith's health was drank.

Was general Smith's name mentioned?---General Gold.

And that was mentioned after captain Nairn had said they should drink captain Gold?---Yes.

After this, you tell us, Ward came to the George: what time did you go to him?---It might be about one in the afternoon.

You swore before the committee, that it was about seven or eight in the evening when Ward came. Was it so?---It might be seven or eight o'clock.

Then how came you to say it was one?---I was there in the day time; I did not stay long there.

You said, 'The first time I went to him was about seven or eight in the evening:' how came you to differ in your accounts? Which is the true account, or is neither of them true?---It is truth what I have spoke.

It cannot be all truth, because they are different stories: what time did you go to Mr. Ward?---It was in the day time.

Did you go to him once or twice?---Once.

What did you mean by saying just now you went at one o'clock, and again at eight?---I was with him twice; it was all in one afternoon.

Then you went two separate times to him, did you?---Yes.

How long did you stay with him the first time?---I cannot tell rightly how long.

How came you not to say, when you were examined before, that you went to him in the day-time, about one o'clock?---I was with him about one o'clock, and I was with him at seven, eight, and nine.

Do you mean that you staid with him from one o'clock to seven or eight?---No.

You have said, Hart, Howell, and Beckett were there?---Yes.

Did they receive money?---Not that I saw.

Are you sure you saw Lambert receive money, or did Lambert tell you so?---I saw Lambert take the money, and I saw him sign.

Daniel Lambert sworn.

Examined by Mr. *Buller*.

What are you?---An apothecary.

Do you live at Hindon?---Yes.

Do you know Mr. Ward?---I saw him once.

When?---In 1773.

What part of the year?---In Feb. 1773.

Had you any conversation with him then?---Yes.

What was it about?---He desired to know whether I was a voter; I told him I hoped I was. He asked to know whether I would receive the favour or not, I told him I would. I hope it will not criminate myself, my receiving the money that I am going to discover.

Mr. Serj. *Davy*. You have no right to ask him to that.

Mr. *Buller.* Whom did you see at Lucas's, when you were with Mr. Ward?---William Penny.

Whom else?---I cannot recollect.

Was it at Lucas's that you saw Mr. Ward first?---Yes.

Whom did you see besides?---There were others there.

Tell some of them.---I cannot, I do not know them.

Was Beckett there?---Not as I saw.

Or William Bennett?---William Bennett came in afterwards.

Were you at Beckett's upon Easter-eve, 1774?---Yes.

Was any money given then?---I suppose I shall hurt myself if I give an answer to that.

Mr. *Mansfield.* You need not say any thing of any money given to yourself.

Mr. Serj. *Grose.* But you may of any money given to other persons.---I did not see any money given to any body else.

Do you remember general Smith coming to Hindon?---Yes.

When did he come?---On the 27th of August, 1774.

Was he known to be a candidate before that time?---No, a general Gold was known.

Who did that general Gold turn out to be?---General Smith.

How do you know that?---By the reverend Charles Humphries.

General Smith came himself first of all on the 27th of August?---Yes.

What passed then?---He went to the Cross.

Who went with him?---A great crowd of people.

Mention some.---Robin Bennett was there.

Were the two Nairns there?---Yes.

What was done at the Cross?---Some words arose at the Cross. Bennett said, One and all, or none at all.

Did any body answer that?---Yes; general Smith himself. General Smith looked round upon parson Nairn, and said, it should be one and all.

Was there any complaint made at that time by any voter?---I cannot recollect what complaint.

Was there any?---I don't remember, not particularly; besides——

Besides what?---About one and all they hallowed out, It shall be one and all.

What was done afterwards? when they went from the Cross, where did they go?---The voters were ordered to public houses.

To what public-houses did they go?---Some were ordered to one public-house, some to the other.

Did general Smith go to any of those houses?---Yes.

Which did you see him at?---The White Hart.

What passed there?---general Smith asked them for their votes at the next election. One Thomas Richardson was there, and said if his friend Nairn had been as good as his word, he need not have come to canvass them.

Was any thing said what Nairn's word was? Was it explained what Nairn had said?---No.

What did general Smith say?---That he did not know but they were all easy: upon which parson Nairn put his hat before Richardson's face; then captain Nairn and some more of them led general Smith out of the room.

What was Richardson doing when he put his hat before his face?---It was while he was speaking.

Was it before or after the hat was put up, that general Smith said he thought they were all easy?---Just at the same time.

Were you at Hindon on the 8th of October, 1774?---Yes.

Was there any cry in the street then about general Smith?---One and all, or else no Smith, was the cry in the streets.

What passed after that?---A figure dressed in disguise, or something like it, that appeared.

What disguise was it dressed in?---In women's apparel; it passed by my father's door.

Who were with her?---John Stevens, Hagg, and several others.

Can you mention any of the other person's names?---I cannot recollect.

Was Thomas Spencer with her?---I believe he was.

Where did she go?---I don't know; I did not follow her.

Was general Smith known to be a candidate before the time he came?---I heard so.

It was the talk of the town, was it?---No, I heard it by parson Humphries.

Was she in any disguise, or not?---It was in women's apparel: I thought by its walk that it was a man.

Thomas Douglas sworn.

Examined by Mr. Serjeant *Grose.*

What are you?---An officer in the excise at Hindon.

Are you a voter at Hindon?---I am.

Do you remember general Smith's coming to Hindon before the last general election?---Yes.

When did you first see him?---It might be about two or three months before the election.

Do you remember in what month?---I believe it might be in August. I saw him go to the Cross.

Where was he when you first saw him?---Coming in at the lower end of the town in a carriage.

Who were with him?---I think both the Mr. Nairns were with him.

What passed when you saw him at the Cross?---He made a speech at the Cross, as gentlemen generally do upon this occasion.

Representing himself as a candidate?---Yes.

Do you recollect any complaint about that time in the town in your presence?---Robin Burnett at the Cross said, 'one and all.'

Before or after the speech?---After the speech.

Was any answer given to that?---General Smith said, it should be one and all.

Who was with general Smith when he said this?---I think the Mr. Nairns on one side of him, and Burnett upon the other.

Were both the Nairns near him at that time?---They were.

Where did general Smith go from the Cross?---I think he went to Lucas's; but I am not certain.

Did you see him any where that day afterwards?---I saw him at James Cuffe's, the White Hart, upon the same day.

Can you recollect what passed at Cuffe's?---Thomas Richardson was along with us at Cuffe's, he told the general, that if Mr. Nairn had been as good as his word, he need not have come at that time to them.

Were those the very words, or only the purport of the words?---The purport.

What answer was made to this?---I did not hear any answer.

Was Mr. Nairn there?---Yes, while Mr. Richardson was talking, Mr. Nairn put his hat towards Richardson's face.

What was done then?---Nothing more.

Did he go away immediately?---He went soon afterwards.

Charles Simpson sworn.

Examined by Mr. Serjeant *Heath*.

Were you a voter at Hindon at the last general election?---Yes.

Were you at the house of general Hayward in the month of February 1773?---I believe it was about that time, but I cannot recollect particularly the favour of general Gold was distributing.

Did you go there?---Yes.

What time did you go there?---I cannot recollect; it was in the evening.

Did you see a great many people there?---There were a great many people at the door.

Did you go up stairs where the business was transacting?---Yes.

What was doing there?---There was a man sat by the table; I was to set my hand to a paper, which accordingly I did.

Mr. Serjeant *Davy*. You are not bound to give an account of what you took yourself---I saw a man there sitting at a table; they called him Ward.

What voters were in the room when you were there?---Francis Meade, Thomas Howell, John Beckett and Joseph Moody.

What did Ward do?---I put my hand to a paper; I did not presume to read it over whether it was a note or what.

At whose request did you put your hand to the paper?---I cannot tell positively who desired me.

What did you find in the paper?---Five good golden guineas: I carried them home.

Did any body else sign the paper with you?---I don't remember any person did. When I had got the paper, my business was done, I went away.

For what purpose did you take this money; was any thing said to you in the room?---No, no more than to sign the paper.

Do you remember any thing passing on Easter Monday 1774, the year afterwards?---At the George, William Lucas's.

What was your errand there?---It was for the same purpose: it was a general report that the office was opened at Mr. Lucas's.

Did you go into the room where the business was transacting?---Yes.

Did you see any voters there?---Thomas Spencer the carpenter, and Beckett the baker.

Was any body distributing any thing?---I know not who it was.

Was there any body?---It must be a substance, or else I could not have lifted up my hand, and had it put into it; Thomas Spencer ordered me to sign; I put my hand over the door and I received a paper.

Did you see who delivered it to you?---No, I don't know whether it was man, woman, or child.

Where was the person whose hand delivered you that paper?---Invisible to me.

Was he in the next room, or where?---In the fore room.

Did you see any body else take the money?---No.

What did they give you this last time?---I carried it home, and I found five golden guineas.

Do you remember general Smith's coming to Hindon?---Yes, I think that was the 27th of August.

Who was in his company?---The two Mr. Nairns.

Where did he go?---He went upon the Cross.

I suppose a great number of people assembled?---A great many, both strangers and voters.

Did Mr. Nairn say any thing at that time?---Mr. Smith got up and made his declaration that he came to offer himself as a candidate for the borough.

Did he say any thing about Mr. Nairn, or did Mr. Nairn say any thing at all?---He looked about and said something, it should be one and all.

But before that?---I cannot recollect, the inhabitants cried, One and all, or none at all.

Did the captain say any thing first?---It was he desired it should be one and all.

What did the general say?---He said it was his desire it should be one and all.

Was any thing said at that time to explain the meaning of One and all?---No, we knew what it was very well.

After this meeting was over, did the general come where you were?---He went from the Cross down to the George; he came through the town afterwards.

Did you know who general Gold was before general Smith came?---He was called general Gold; we were very uneasy to know who he was; and it proved to be Richard Smith, esq. who lives at Chilton lodge near Hungerford.

Andrew Farrat sworn.

Examined by Mr. *Popham.*

Are you a voter at Hindon?---Yes.

How long have you lived there?---Eleven years last August.

Do you remember any thing about the distribution of favours, or any thing of that sort?---Yes.

When was it?---On Easter eve 1774; I never received any before that.

Where did you receive that?---At Lucas's, at the George.

What did you receive that for?---To vote for general Smith, as I apprehend.

Was general Smith's name mentioned to you?---Not as I apprehended.

How came you to mention general Smith's name?---It was reported such about the town.

Was there any other name mentioned?---Not at that time.

What did you receive?---Five guineas.

Who was there besides?---Beckett, Thomas Howell, Thomas Spencer.

Did you see them receive any thing?---No.

They were in the room?---Yes.

Were there other people there voters of Hindon?---Yes.

Where did you receive this money?---Through a hole in the upper part of the door.

Did you see the person that gave it you?---No.

Did you sign any thing?---Yes, some writing that was upon a paper: I did not read it.

Did those people you have named receive it likewise?---Yes.

Did they sign the paper at the same time?---No.

Who did then?---James Wyer a grocer, Thomas Penny a carpenter, and Harry Savage a breeches-maker.

Did you see them receive the money?---I saw them put their hands up to the hole.

Was any thing said about voting?---After I had signed the paper, Thomas Howell bid me put my hand up to the hole of the door; I did, and received a paper.

What did he say more?---Nothing more to the best of my knowledge.

Do you remember when general Smith came to Hindon?---I was not at home then.

Did you come home while general Smith was at Hindon?---No; I met him upon the road.

Were you at Hindon when general Smith was there at any time?---Yes, about a week before the election; I was not at home when he came to Hindon first; as I was coming into town in my return he was going out.

Jeremiah Lucas sworn.

Examined by Mr. *Moysey.*

Do you remember when general Smith came just before the election?---Yes.

You saw him?---Yes.

Where?---At Mr. Lucas's.

What passed when you saw him there?---I did not speak to him.

What was said to him?---He went up to the Cross; and as he was going up the inhabitants cried, One and all.

What did the general say to that?---He stood upon the Cross, and he repeated the words.

He said, One and all?---Yes.

Did he say that more than once?---I don't remember that he did.

Was it constantly said by the voters, One and all?---Yes.

And did he constantly make that answer to them?---Yes.

Mr. Serj. *Davy.* Did he say it more than once?---*A.* No.

Mr. *Moysey.* Did he constantly make that answer when they constantly said it?---*A.* Yes.

Did you say, One and all?---No.

Repeat again what general Smith said.---General Smith was up at the Cross, and the inhabitants cried, One and all. He stood at the Cross, and repeated those words, One and all; and he did not know but what they were all made easy.

Were you at the George upon Easter Monday?---Yes.

Some money was given you?---Yes.

Who were present then?---Thomas Spencer carpenter, John Beckett a baker, and Thomas Howell. I do not remember any body else: it was upon a Monday or Saturday.

There were some notes given, were there not?---Yes.

Who gave notes?---We put our hands to a paper.

Who put their hands to the paper at the same time as you?---John Baldwin, Edward Beckett, and Robert Tyley.

They all received the same money as you, five guineas?---I never saw theirs.

George Spender sworn.

Examined by Mr. *Buller.*

Were you at the George, at Lucas's?---Yes.

When?---I cannot recollect what time.

How long before the election?---Some time.

What time of the year?---I cannot say exactly what month it was.

What was done there?---I went up into a chamber. There was a gentleman there: they told me his name was Ward: whether it was or was not, I do not know. He said, his money was out; but he would borrow some. I put my hand to a paper, and he put a paper into my hand which contained five guineas.

Did any body else receive any thing at that time?---My son was with me; I believe he received the same.

Was it mentioned in whose favour this was given?---I don't remember that it was.

Were you at the George on Easter Monday?---Yes.

Who was there then?---Thomas Spencer the carpenter and John Beckett.

What is Beckett?—A baker.

What was done then?—We signed a note then.

Was your son there?—Yes.

Did he receive any thing?—I suppose he did; I did not see him receive it. We both put our hands to a paper.

Do you remember when general Smith came to Hindon?—Yes.

Did you hear the cry 'One and all?'—Yes.

Did you cry, 'One and all?'—Yes.

What did you mean by that?—That we should all be satisfied.

Had there been any uneasiness in the town before?—I cannot recollect any uneasiness.

Were you at Hindon on the Saturday before the election?—Yes.

Was there any cry in the streets then?—There was a talk of Punch.

Whom was that talk of Punch among?—I cannot say who; one neighbour to another.

Was there any Punch came?—In the evening there was something went about in disguise.

What did that something do?—He came, and Elias Stevens knocked at my door with a long stick. I held out my hand, and somebody put a paper into my hand.

Who put that into your hand?—The person in disguise, to the best of my knowledge.

What was in that paper?—It contained five guineas.

Reuben Burnet sworn.

Examined by Mr. Serj. *Grose*.

Do you live at Hindon?—Yes.

You are a voter, are you?—Yes, I voted last time.

Do you remember general Smith's coming to Hindon?—Yes.

Who came with him?—Mr. Nairn, the parson.

Did the captain come with him?—I cannot say; very likely he was there; I saw the parson there.

Do you remember their coming to the Cross?—I do; I saw them at the Cross: when general Smith came to the Cross, he said he came to offer himself for the borough, and hoped it would be agreeable to all: I stood by, and cried, 'One and all.'

Was any thing else said but 'One and all?'—Nothing at all.

What was said upon that?—The general looked upon the parson, and then turned round and said 'it should be one and all.'

Was this repeated?—No.

Did several other persons cry out 'One and all?'—Yes, there were a great many voters round the Cross, they all cried, 'One and all.'

Were there any words followed after 'One and all?'—Nothing mentioned.

Thomas Richardson sworn.

Examined by Mr. Serj. *Heath*.

Were you a voter at the last general election for Hindon?—Yes.

Do you remember general Smith's coming to Hindon?—Yes.

Where did he go?—To the Cross.

What did he say there?—I did not hear him.

Did general Smith speak to you?—Yes, at the White Hart.

Who was in company with him?—Daniel Lambert and Thomas Douglas.

Was any body else in company?—Yes, one or two more, but I do not remember who they were.

What did the general say to you?—He asked me for my vote and interest. I said, if Mr. Nairn had done what he ought to have done, he would have had no occasion to come canvassing the town that day.

Was Mr. Nairn in company?—Yes, both the Nairns: the parson put his hat up against my face, and said, Hush! hush! we must have no more of that.

What passed then?—The general was hustled off; captain Nairn took him by one arm, and another person took Nairn by his arm, and they hustled him off. I took the general by the arm, and said, Please to hear what I have to say; but he went off, and there was no more conversation at that time.

Had you any conversation with him afterwards?—He came to my shop another day, and there he asked me for my vote and interest: I told him as I did before, that if Mr. Nairn had done what he ought to have done, there would have been no occasion to have come canvassing then.

Who was in company with him?—Parson Nairn said I was a liar, he had promised nothing: I told him he was a liar, he had.

Was general Smith present at this conversation?—He was; he went back a little from the shop-door, then another man whispered in his ear, and he came back and whispered in my ear, and said, Madam Beckford at Fonthill desired her trades-people to support his interest.

Was any mention made of what money you were to have?—No.

Did you say what Mr. Nairn promised?—I did not say farther than what I mentioned.

Did you say what he ought to have done?—That would have made the town easy.

What was the conversation that passed?—We gave one another the lie, and then said no more.

Had Mr. Nairn promised you any thing?—He had promised me nothing in particular, but he had promised that every man in the town should be made easy alike.

When was that promise made?—At the first beginning of it.

What time was it you talked with Francis Meade about this money?—At Easter eve.

What did he desire you to say to them?—He desired that those who had not received money should stay till Monday, and to those that had, it should be made up ten.

John Baldwin sworn.

Examined by Mr. *Popham*.

Are you a voter at Hindon?---Yes.

How long have you been a voter?---When I came of age: I voted at the last election.

Do you remember any money being given?---Yes.

At what time?---Upon Easter Monday at the George.

Did you receive any?---Yes, I had a small paper there.

How much did it contain?---Five guineas; I had it through the hole over the door.

Did you see the person that gave it you?---No.

Did you see any body else receive it?---Yes, Jeremiah Lucas, Edward Beckett and Robert Tyler.

Did they sign a note with you?---Yes.

Whose money was this?---I don't know, they did not tell me.

Do you remember any others receiving it at this time?---No.

Or at any other time?---Not upon that account.

Who was talked of as the candidate for Hindon at this time?---General Gold.

Whom did you at that time understand by general Gold?---We did not understand any other, but that it was general Gold at that time.

Who did general Gold turn out to be at that time?---General Smith.

Was general Smith called by any other name?---Only general Gold and general Smith.

Cross-examined by Mr. Serj. *Davy*.

How do you know that general Gold and general Smith is the same person?---I understood it so.

Do you know that there is not such a person as general Gold?---I don't know.

When you heard of general Gold, you had not heard of any other person; afterwards general Gold dropped it, and in his stead came general Smith; and then when general Smith came you did not know but it was the same person: that was all you knew of it?---Yes.

Mr. *Popham*. Did captain Nairn or parson Nairn introduce any other person by the name of general Gold?---*A*. When they came to town they produced general Smith.

Thomas Penny sworn.

Examined by Mr. *Morris*.

You live at Hindon with your father?---Yes.

What is his name?---William Penny.

Do you remember general Smith's coming to town?---I don't remember any thing of his coming to town.

Do you remember any thing of his being at your father's?---Yes, about a week before the election.

What conversation passed there?---Some of the voters cried, One and all,

What said the general to that?---It is so long ago I cannot recollect what answer he made to it.

Did he make any?---Somebody made answer, and said, it should be one and all, whether it was him or no I cannot say.

Who was it if it was not he?---I be not certain.

Who do you think it was?---Captain Nairn was with him.

Was it either he or captain Nairn?---I do not know.

In February, 1773, were you at Hayward's?---Yes.

What passed there?---I saw some voters sign their hands to the notes.

Did you sign yours?---Yes.

Who signed with you?---Thomas Wyer, Robert Wyer, and John Wyer.

They joined with you in a note?---Yes.

Did you get any thing for that note?---Yes, five guineas.

Had they any thing?---They took off the table, as I did, something wrapped up in a bit of brown paper.

Were you at Lucas's, the White-horse, upon Easter eve?---Yes.

What passed there?---There was a favour there.

The same as it was at Hayward's?---Yes.

Who were the people that signed with you there?---Andrew Farrat, Henry Savage, and James Wyer.

Who were there besides?---Beckett, Spencer and Howell.

How did they act?---John Beckett kept on writing.

What did Spencer do?---I imagine he took the notes we signed.

What did Howell do?---He was there.

But did he act at all?---I cannot remember that he did, but he was in the room along with them.

Thomas Moore sworn.

Examined by Mr. *Moysey*.

Do you remember being at the Angel at Hindon just before the election?---Yes.

Was general Smith there?---Yes.

Do you remember any conversation there about the election?---Yes.

What was said?---I asked the general why he had not made all the voters alike one and all; he said he meant, one and all, and it should be done and soon.

Do you recollect upon what day this was?---No, it was some time in September.

The September just before the election?---Yes.

What was said besides?---Parson Nairn took me by the hand and desired me to proceed no farther, not just then, for the general and him would wait upon every man at his own house that had not received the favour.

Did he say any more?---Mr. Nairn took his leave and went away directly.

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Was there any thing more said by general Smith at that time?—Not as I remember.

You saw Mr. Nairn afterwards, did not you?—Yes, opposite the barber's shop.

When was this?—The Saturday before the election, which was upon a Monday.

How soon after that meeting was it?—About a week or ten days: I asked him why he did not make them all easy, he said it should be done soon.

Did he say any thing more?—No.

How soon after this conversation was it that Punch danced?—The same evening, I believe; I did not see Punch.

Cross-examined by Mr. Serj. *Davy.*

Who was in the room at the Angel, besides you and general Smith and Mr. Nairn?—Henry Huff, John Hooper, Robert Rawden.

Who besides?—These were some, there were others; young Henry Huff was there, and I believe one of the Stevens's was there.

Was Penny there?—I believe not.

Or Lambert?—No.

Or Douglas?—I don't recollect that he was.

I believe Simpson was there, was he not?—I cannot remember.

Was Andrew Farrat or Spender there?—I cannot say.

Or Robert Burnett or Thomas Richardson?—Thomas Richardson was not there.

Thomas Penny?—He was not there.

There were a great many people there?—Yes.

And this was said loud in the hearing of a great many people?—Yes.

They all heard it then as well as you?—Yes.

But what was said by the barber's shop nobody heard but yourself?—I don't know that any body might; there was Luke Meade stood close by us; whether he heard what we said I cannot tell.

He was near enough to hear without listening, was he?—Yes.

Elias Stephens sworn.

Examined by Mr. *Buller.*

Did general Smith come at any time to your house at Hindon?—Yes.

Who were with him?—Beckett and the Nairns.

What was said by general Smith to you?—He asked me to give him my vote at the next election; I said I would not promise him; he asked me for what reason; I said because he had not been as good as his promise; said he, what do you mean by that, I don't know what you mean by it; the general popp'd back, and then Nairn said, As sure as God is God, every thing shall be to your expectation.

Which Nairn was that?—The parson.

Did you tell general Smith what the promise was that he had not been so good as?—I cannot say whether I did or not. I told him the town were uneasy in general; and therefore I should not promise my vote.

Cross-examined by Mr. *Mansfield.*

So when you said he had not been as good as his word, he asked you what you meant by that?—The parson did.

What did general Smith say to you?—No more, only asked me for my vote; and when I told him I would not promise him, then he struck out at the door, and then it was parson Nairn spoke to me.

Mr. *Buller.* Was it to general Smith or to Mr. Nairn that you said you had been deceived?—To parson Nairn.

Was any thing said about your being deceived before general Smith turned out?—No, I told Mr. Nairn the town were uneasy: he asked me what I meant by it; I told him it was reported that 500 or 5,000 guineas were to be given at separate times, that it was to be given to the town all in general, that they had not been so good as their word, and therefore I would not promise my vote.

That then he used the expression, that, as sure as God is God every thing should be to your expectation?—Yes.

Mr. Serj. *Davy.* General Smith heard nothing of what you had said about being deceived?—No, he was gone out at the door.

Was it before general Smith went away that Mr. Nairn said, As sure as God is God you shall have no reason to complain?—No, it was after he was gone out at the door.

Court. Do you know where general Smith went when he went out of the house?—He went to every voter's house.

Did he wait for captain Nairn?—I cannot take upon me to say whether he did or not, because I was in the house.

Mr. Serj. *Davy.* He had a great many people with him besides captain Nairn, had he not?—Yes, he had.

The Evidence in support of the Information being closed, Mr. Serjeant Davy made a Speech to the Jury in defence of his Client, but did not call any witnesses.

After Mr. Baron Hotham had summed up the Evidence to the Jury, they returned a verdict, finding the Defendant Guilty of the Charge alleged in the Information.

The remainder of the Record in this Case, as reported in Douglas's Controverted Elections, is as follows:

"Whereupon the said Attorney General of our said lord the king, who for our said lord the king in this behalf prosecuteth, for our said lord the king prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said Richard Smith in this behalf, to make him answer to our said lord the king touching and concerning the premises aforesaid: wherefore the sheriff of the said county of Wilts was com-

manded that he should not forbear by reason of any liberty in his bailiwick, but that he should cause him to come to answer to our said lord the king touching and concerning the premises aforesaid. And now (that is to say) on Tuesday next after the octave of Saint Hilary, in the same term, before our said lord the king at Westminster cometh the said Richard Smith, by William Sidgwick his attorney, and having heard the said information read, he saith that he is Not Guilty thereof, and hereupon he putteth himself upon the country; and the aforesaid Edward Thurlow, esquire, who prosecuteth for our said lord the king in this behalf, doth the like: Therefore let a jury thereupon come before our said lord the king, on the octave of the purification of the blessed Virgin Mary, wheresoever he shall then be in England, by whom the truth of the matter may be the better known, and who are not of the kindred of the said Richard Smith, to try upon their oath whether the said Richard Smith be guilty of the premises aforesaid or not: because as well the said Edward Thurlow, esquire, who prosecuteth for our said lord the king in this behalf, as the said Richard Smith, have thereupon put themselves upon the said jury, the same day is given as well to the said Edward Thurlow, esquire, who prosecuteth for our said lord the king in this behalf, as to the said Richard Smith; at which said time (to wit) on the octave of the Purification of the blessed Virgin Mary aforesaid, before our said lord the king at Westminster come as well the said Edward Thurlow, esquire, who prosecuteth for our said lord the king in this behalf, as the said Richard Smith by his attorney aforesaid: and the sheriff of the said county of Wilts returned the names of twelve jurors, none of whom come to try in form aforesaid, therefore the sheriff of the said county of Wilts is commanded that he do not forbear by reason of any liberty in his bailiwick, but that he distrain the jurors last aforesaid by all their lands and chattles in his bailiwick, so that neither they, nor any one for them, do put their hands to the same, until he shall have another command from our said lord the king for that purpose, and that he answer to our said lord the king for the issues thereof, so that he may have their bodies before our said lord the king, in fifteen days from the feast day of Easter, wheresoever he shall then be in England, or before the justices of our said lord the king assigned to hold the assizes in and for the said county of Wilts, if they shall come before that time (that is to say) on Saturday the 9th day of March next, at New Sarum, in the said county, according to the form of the statute in that case made and provided, to try upon their oath whether the said Richard Smith be guilty of the premises aforesaid or not, in default of the jurors aforesaid who came not to try in form aforesaid; therefore let the sheriff of the said county have the bodies of the same jurors accordingly to try in form aforesaid: the same day is given, as well to the said Edward Thurlow, esquire, who prosecuteth for our said lord the king in this behalf, as to the said Richard Smith; at which time (to wit) in fifteen days from the feast day of Easter aforesaid, before our said lord the king at Westminster come as well the said Edward Thurlow, esquire, who prosecuteth for our said lord the king in this behalf, as the said Richard Smith by his attorney aforesaid: and the aforesaid justices of assize, before whom the said jury came to try in form aforesaid, sent here their record had before them in these words; (that is to say) afterwards, on the day and at the place last within mentioned, before sir James Eyre, knight, and sir Beaumont Hotham, knight, two of the barons of his majesty's court of Exchequer, justices of our said lord the king assigned to hold the assizes in and for the county of Wilts within mentioned, according to the form of the statute in such case made and provided, come as well the within-named Edward Thurlow, esquire, who prosecuteth for our said lord the king in this behalf, as the within named Richard Smith by his attorney within mentioned; and the jurors of the jury, whereof there is mention within made, being called, some of them (to wit) William Benne of Norton Bavant, esquire, Richard Southby of Bulford, esquire, William Hayter of Newton Toney, esquire, Thomas Moore of Durrington, esquire, Francis Dugdale Astley of Everley, esquire, and John Whitelock of Eastridge, esquire, come and are sworn upon the said jury; and because the rest of the said jury do not appear, therefore others of the bystanders, being chosen for this purpose by the sheriff of the said county at the request of the said Edward Thurlow, esquire, by the command of the said justices are anew appointed, whose names are affiled in the pannel within written, according to the form of the statute in such case made and provided; and the jurors so anew appointed as aforesaid, (to wit) James Hancock of Smallbrook, Edward Bracher of Stockton, John Ferris of Warminster, John Ford of Potterne, John Jerrard of Funthill Gifford, and William Lawrence of Alderbury, being called, likewise come and are sworn upon the said jury; and thereupon public proclamation being made for our said lord the king, as the custom is, that if any one will inform the justices aforesaid, the king's serjeant at law, the king's attorney general, or the jurors of the jury aforesaid, concerning the matters within contained, he should come forth, and should be heard. and hereupon Nash Grose, serjeant at law, offereth himself on the behalf of our said lord the king to do this; whereupon the Court here proceedeth to take the said inquest by the jurors aforesaid, now here appearing for the purpose aforesaid; who being elected, tried, and sworn to speak the truth concerning the matters within contained, say upon their oath that the said Richard Smith is Guilty of the premises, in the information within specified and charged upon him, in manner and form as in and by the said information is within alleged against him."

Proceedings against Thomas Brand Hollis, Esq. for Bribery, upon the Information* filed against him by the Attorney General, by order of the House of Commons, 16 Geo. 3. A. D. 1776.

Counsel for the Crown.—Mr. Serj. Davy, Mr. Serj. Grose, Mr. Serj. Heath, Mr. Popham, Mr. Morris, Mr. Moysey.

Counsel for the Defendant.—Mr. Mansfield, Mr. Buller, Mr. Batt.

Mr. *Moysey* opened the Information. After which, Mr. Serjeant *Davy* stated the facts upon which the charge against the defendant was founded, and then the Counsel for the prosecution proceeded to examine the witnesses.

A Copy of the Writ for the Election—of the Return—of the Precept—and the Poll, were produced, as on the former Trial.

Francis Meade sworn.

Examined by Mr. Serjeant *Grose.*

Do you remember Mr. Hollis coming to Hindon?—Yes, a month or six weeks before the election he was with one John Stevens, a butcher.

What has passed concerning Mr. Hollis and Stevens in your presence?—I was billetted at the Swan, the same as the rest of the voters were, I believe, by Henry Huffe and old Benjamin Cholsey; Mr. Stevens said he had brought a gentleman to propose to the borough; I told him I thought he had no right to propose a gentleman.

What Stevens was that?—Jobber Stevens.

Did you ever see Mr. Hollis before?—No, not since; I saw him at this time at the Cross: Mr. Hollis said, he was a gentleman of honour, and that he would be as good as any gentleman that should come to the borough: then there was a cry, 'One and all:' Mr. Hollis said, It should be one and all.

Did any thing else pass?—Nothing more.

When was this?—About a month, or thereabouts, before the election.

Was Mr. Hollis known at Hindon at that time?—Only by the representation Stevens gave of him; he was a stranger in the borough before that time.

Do you ever remember Mr. Hollis's saying, they should be satisfied?—I think Mr. Hollis said so; but I cannot be certain to every word that passed, it being so long ago; he said it should be one and all, and I think he said, they should all be satisfied.

Do you know of any money given by Mr. Hollis or Stevens?—Not of my own knowledge.

Cross-examined by Mr. *Mansfield.*

You were a witness before the Committee of the House of Commons; have you been a witness in any other cause relating to Hindon?—Yes, on the trial this morning.

Any other?—I was called in once before the House of Commons.

Aye, I know you were before the Committee, we have an account of that, and shall never forget you. You tell us Mr. Hollis said, he was a gentleman of honour, and should be as good as any gentleman that should come to the borough; then there was a cry, 'One and all?'—Yes.

How came you to say Mr. Hollis said so?—Because I heard him.

Was any thing said, what one and all meant, any thing said about money?—Not a word.

You think there was something said about being satisfied: will you swear there was?—I cannot take upon me to say so; I believe it.

But will you take upon you to say it; or that there was a word said about satisfaction?—I cannot.

Whom did you vote for?—Calthorpe and Beckford.

You had none of this charming money?—Not a farthing.

Daniel Lambert sworn.

Examined by Mr. Serjeant *Heath.*

Do you know Jobber Stevens?—Yes.

Had you any conversation with him about bringing a candidate to Hindon?—I heard him say that he had a friend to bring to Hindon, if it was agreeable to the town.

To whom did he say so; to you or to any other person?—To other persons.

Were they voters?—Yes.

Do you remember Mr. Hollis coming to Hindon?—Yes.

Was Jobber Stevens with him when he came?—Yes.

Where did he go when he came to town?—He went to the Cross.

What did he say there?—I cannot tell; I was not handy to him.

Did you hear Jobber Stevens say any thing to him?—No, I saw Stevens get upon the Cross; but I did not hear what he said.

Were you billetted that day?—Yes, at the Red Lion.

Who ordered you to go there?—I believe, one Huffe.

Did Hollis and Stevens come to you to the Red Lion?—Yes, Mr. Hollis came to ask our votes for the general election.

How many voters were present?—Ten or a dozen.

Do you remember their names?—No.

What answer did they make?—They said they had no objection, if he would be as good as any other gentleman; some said it must be 'down and down.' Mr. Hollis said, he knew the meaning of it.

Did he say any thing besides?—Not that I recollect.

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* The Information was the same, *mutatis mutandis*, with that against Smith. See p. 1927.

Was any thing else said by the voters?—I cannot say there was.

Was Mr. Hollis known to the town before he came there?—No, he was a stranger.

Was there any mention made, when it was to be down?—Somebody made answer, 'It must be once within a week.'

Did Mr. Hollis say any thing to that?—No.

Do you know of any money being distributed upon account of the election?—Not upon Mr. Hollis's account.

Cross-examined by Mr. *Batt*.

I understand you, that upon the voters saying to Mr. Hollis, 'It must be down and down,' he said he knew the meaning of that expression: do you mean to swear, that Mr. Hollis said, upon that being said by the voters, that he knew their meaning?—He said so.

You are very sure he said so in these words?—He said so.

Who were present?—Several people in the room.

Mention some of them.—I cannot recollect who were in the room; there was one James Gilbert there, I believe; William Prior, I believe.

Did Mr. Hollis say this loud?—Yes.

So that all might have heard it that were in the room?—Yes, I think they did.

How came you not to swear this before the committee, when you were examined upon this subject?—Very likely I was not asked the question.

But you were asked what Mr. Hollis said: How came you not to give that account to the committee?—I don't know that I was asked the question.

Mr. *Batt*. You were not asked it. Now you were asked to tell every thing that Mr. Hollis said, and you made use of no such words.

Reuben Burnett sworn.

Examined by Mr. *Popham*.

Are you a voter at Hindon?—Yes.

Do you know Mr. Hollis?—Yes.

Do you know Jobber Stevens?—Yes.

Do you remember when Mr. Hollis and Jobber Stevens were together at the Swan at Hindon?—Yes.

How long was it before the election?—I don't know, it was a little while before the election.

Was that the first time you saw Mr. Hollis?—Yes; when Jobber Stevens first came, he said he had brought a gentleman to represent the borough of Hindon, and he hoped it would be agreeable to all friends. Mr. Meade stood by; he said, Has the gentleman got nothing to say for himself? He stood back, and the gentleman came forward. Mr. Hollis said, Gentlemen, I came to represent the borough, and hope it will be agreeable to all friends. Edward Piercy said, Down and down: Jobber Stevens said, in regard to down and down, it would not be wanted.

Was Mr. Hollis present at that time?—He was.

Cross-examined by Mr. *Buller*.

Were there many people there at the time?—Yes, there might be half a score, or fourteen or fifteen.

All talking together?—Yes, when the gentleman came in.

Was Lambert there?—I don't recollect his being there, but he might be there.

What house was this at?—The Swan.

What was done with Piercy, when he said, Down and down?—Beckett said, if you do not give the gentleman liberty to speak for himself, I will kick you out at the door.

Was not Piercy turned out of the room, upon saying it must be down and down?—I do not know that he was.

Did not you swear before the committee, that Piercy, when he said that, was ordered out of the house?—No.

Was Piercy ordered out at all?—He was ordered out at the time.

When?—When he said, Down and down.

Who ordered him out?—The landlord, John Beckett, because he did not give the gentleman liberty to speak.

Where was Mr. Hollis when this was said?—In the same room, the kitchen.

And must therefore hear this. How near was he to Stevens when he said that would not be wanting?—A little distance.

Did Mr. Hollis hear Stevens say that would not be wanted?—I don't know that he did hear it.

Was Mr. Hollis as near to Stevens as you was?—No, he was not.

Was Mr. Hollis near enough to Stevens to hear?—He might be near enough: he might hear it, or he might not.

Stevens was his friend?—Yes.

Did you ever see Mr. Hollis there without Jobber Stevens?—No.

Andrew Farrat sworn.

Examined by Mr. *Moysey*.

Do you remember when Mr. Hollis came to Hindon?—Yes, the 29th of August 1774.

How did he come?—In a post chaise.

Do you recollect who was with him?—John Stevens, the butcher.

Any body else?—And another gentleman unknown: they came there in a chaise.

Did you see him when you came to the Cross?—Yes.

What passed at the Cross?—Mr. Hollis said he was a gentleman recommended by Stevens, the person who was with him.

What else did he say?—That he came as a candidate to the borough.

Did he say any thing more?—Yes, he said he was an honourable gentleman, and he would always behave honourably by the town.

Was that all he said?—I don't remember any thing more.

What did the people say?—Some people

cried, One and all: Jobber Stevens said, they had no cause to dispute that: I don't remember any thing else that was said.

Was Mr. Hollis present?—Yes, close to him.

So there was a great hollowing of One and all.—Yes.

Was that explained?—Not then.

Where were you quartered?—At the Queen's Head, William Penny's.

Were there many people quartered there besides you?—Eighteen or nineteen voters.

Were you at the Swan that day?—Yes.

Was Mr. Hollis at the Swan?—Yes.

What passed at the Swan?—Mr. Hollis and Mr. Stevens came there.

What passed?—They asked the votesmen for their votes and interest.

Which asked the voters for their votes and interest?—Stevens first asked; he said it was a gentleman that he recommended to the borough: Francis Meade was present; he said he did not know that he had any business to recommend a gentleman to the borough, and asked Stevens if the gentleman had any thing to say for himself; Mr. Stevens drew back, and said he had.

Was any thing said?—Yes, the gentleman said, he was recommended by Mr. Stevens; that he was an honourable gentleman, and would always behave good to the town, and would be as good as any gentleman.

Was any thing more said by Mr. Hollis or Mr. Stevens?—No, not that I remember.

You were at Salisbury, I believe, just afterwards.—Yes, the Friday following.

Did you see Stevens there?—Yes.

What did he say to you, or you to him?—I was coming along the street; I saw him; I asked him when he would come to Hindon, that Mr. Hollis's friends were very uneasy.

What did he say to that?—He said he should be there in a short time; for he had got every thing in order to bring; he said he should not be there himself, but he would send some friend who would answer the purpose as well; I was going away; he called me back again, and told me to give his compliments to Mr. Lucas at the George, and desire him to meet a friend of his at the White Horse, next night.

Whom does the White Horse belong to?—One William Harding.

Did you go there?—Yes, I went, and delivered my message to Mr. Lucas, and he sent me there; the next evening two gentlemen came in a carriage to the White Horse; I went to the White Horse; when I came to the back part of the house, there were a great many people there; it was a back-house; some time after I was there I got in, and went up into a room.

Whom did you find there?—I found one Harry Huffe, a baker, there, and Jack Stevens, a brother to Jobber Stevens, and an unknown gentleman in black. They ordered Thomas Stevens Hagg, John Edwards a labourer, and James Lambert, and myself, to put our names to a note; the other three made their marks; I put my name: the gentleman said, it did not signify, as they could not write their names, but they knew what it was for.

How much money did you get?—Fourteen guineas, and two half guineas.

Did they all get alike?—Yes, as far as I know.

What was the manner of giving the money?—Through a hole over the door.

Did these other three people you mention put up their hand to the hole too?—Yes, and received the money in the same way.

Cross-examined by Mr. *Mansfield.*

Whom did you vote for?—Richard Beckford, esq. and general Smith.

Did you ever tell any body what you would swear concerning Mr. Smith and Mr. Hollis?—No.

Then you never said, that you would be revenged of Hollis and Smith, and you would be damned if Beckford should not sit in the House?—I never spoke such a word.

You know that was sworn about you before the committee.—Yes, but it was very false.

There was a false thing sworn about you?—Yes.

But every body at Hindon believed you said so.—No, they did not.

The people there were so cruel to you, that they believed you had said so?—I do not imagine they did.

You know John Fricker?—Yes.

Had you any conversation with him about it?—Never in my life.

That was false too that was sworn about you and Frickes?—Yes, it was.

Then a great number of your neighbours traduce and speak ill of you, and all without cause. I dare say you have a good memory, and let nothing slip that you heard said. Now Mr. Hollis began by saying, I am an honourable gentleman, and that he was recommended by Stevens?—Yes.

You know he was recommended by Stevens, they came in a chaise together, and before Mr. Hollis spoke, Stevens spoke; and then Becket desired to know whether Mr. Hollis had not something to say for himself: so Stevens makes a speech, recommending Mr. Hollis; upon which Mr. Hollis is asked if he has not something to say for himself, and then he says, Gentlemen, I am recommended by Mr. Stevens?—Yes.

Mr. Serj. *Davy.* Where were these 15 guineas given you?—At the back-house belonging to the White-Horse.

John Baldwin sworn.

Examined by Mr. Serj. *Davy.*

You are a voter at Hindon?—Yes.

Do you remember Mr. Hollis's coming there?—Yes.

Who came with him?—Jobber Stevens, who lives at Salisbury.

When did they come together?—In August 1774, a little before the election.

Where did they go?—They went to the Cross first, and afterwards, I believe, they went to the George.

You don't know what passed at the Cross?—I don't know what Mr. Hollis said.

That was the place of billetting, I believe.—He told the people they should go to the same house they had been billetted to the Saturday before.

Which house was you billetted to?—The Rose and Crown.

Who came to you at the Rose and Crown?—Mr. Hollis and Jobber Stevens, and a person I did not know, came together.

Was that the same day Mr. Hollis came to the town first?—Yes.

What did Mr. Hollis say?—That he came to canvass the town, and he hoped he should find friends in the town: the voters said, It must be one and all; Jobber Stevens, I think it was, said, there was no doubt.

Was Mr. Hollis present when that was said?—Yes, one Joseph Lamb a voter said, the sooner they had the dose the easier it would be.

Did the people say any thing about playing-up?—The voters told him, if he would play-up there would be no fear of his election; Joseph Lamb said, the sooner they had the dose the easier it would be; Mr. Hollis or Stevens said, there would be no doubt of it.

Were the words last mentioned said either by Mr. Hollis or Stevens, that there would be no doubt of it, spoke immediately after Lamb's saying, the sooner the dose the easier he would have it?—I cannot recollect every word.

Do you remember afterwards being at the White-Horse?—I do.

When was that?—The Saturday night following that.

The White-Horse is Harding's?—Yes.

Who were present then?—I cannot recollect.

Who drew the notes?—Those who were in the house; there was Benjamin Chelsey the elder, Henry Huffe, Jacob Stevens, and another man I did not know, who drew the notes.

What notes do you speak of?—I don't know what the notes were, I never read them.

Did you put your name to the paper?—Yes.

And what favour did you receive?—The favour of 15 guineas.

How did you receive it?—At a hole over the door.

Did any more sign that note besides you?—Yes, three more; William Brookes, John Stevens, and Isaac Davis.

Whom did you vote for?—Hollis and Calthorpe.

How was the money given? Was it counted out to you, or how?—It was twisted up in a bit of paper, and put through this hole into my hand.

Cross-examined by Mr. *Batt*.

There appears to be some confusion in the account you give of what passed after Mr. Hollis came to the Rose and Crown; repeat it.—Mr. Hollis said he was come to canvass the town, and hoped he should find friends in the town: they said, it must be 'One and all.' He or Jobber Stevens said, 'There would be no doubt of it.' They told him if he would play-away, or play up, or something of that kind, there would be no fear of his election: then Joseph Lamb said, that the sooner the dose the easier it would be; and either Mr. Hollis or Jobber Stevens, which I cannot recollect, replied, there was no doubt of that.

Jeremiah Lucas sworn.

Examined by Mr. Serj. *Gross*.

Do you remember Mr. Hollis's coming to Hindon?—No.

When did you see him?—Not till just before the election.

Did you go to the White-horse?—Yes.

When?—Upon Saturday night.

Was any body with you?—A great many people.

Did you receive any thing there?—A ten pound note, and five guineas and a half, and I gave sixpence out of it.

Did you pass for a voter at that time?—I did.

Mr. *Buller*. Your charge in the information is, 'persons having a right to vote.'

Mr. Serj. *Davy*. There is a count of 'divers persons claiming a right to vote.'

You received the fifteen guineas, did you sign a note?—Yes.

Who received any thing with you?—I don't remember the persons; there were three besides me signed the note, but I cannot remember either of them.

Upon whose account did you receive this money?—Upon the behalf of Mr. Hollis.

Mr. *Buller*. Was there a word said about Mr. Hollis?—Yes.

By whom?—A hundred people I believe.

Do you recollect any of them?—No.

Did not you swear before the committee, that the major part of the town told you, that you was to receive the money at the White-horse upon Mr. Smith's account. Mr. Hollis was not there?—No.

Nor was Stevens there?—No.

Richard Ingram sworn.

Examined by Mr. Serj. *Heath*.

Were you at this White-horse?—Yes.

What for?—To receive a favour.

What were you to receive there?—Fifteen guineas.

Upon whose account?—There was no name mentioned.

Whom did you see there?—One James Davis, one Henry Huffe, and Benjamin Chelsey, those I remember; there were several more in the room, but I don't recollect them.

In what manner was it given you?—Through a hole over the door.

Did you hear Jobber Stevens say any thing

about the White-horse?—I was in company with Andrew Farrat; and we stopped at Mr. Stevens's shop; something passed there between Stevens and Andrew Farrat, the particulars I did not take an account of; at parting I heard Jobber Stevens say to Farrat, Bid Lucas be at the White-horse to-morrow night.

Samuel Colyer sworn.

Examined by Mr. *Popham*.

Are you a voter at Hindon?—Yes.

Do you remember Mr. Hollis coming there, and Jobber Stevens?—Yes.

Where did you see them?—At the George.

What did they come there for?—To canvass the borough.

Did they canvass the borough?—Yes.

What was said and done?—They came to ask for their votes.

Do you remember any thing being said?—Yes, the voters cried, 'One and all.'

What answer was given to it?—I do not recollect what Mr. Hollis said.

Were you at the White-horse at any time?—Yes.

What did you go there for?—The same as the rest of my neighbours.

What was that for?—I went there for fifteen guineas.

Did you receive fifteen guineas?—Yes.

How did you receive it?—Through a hole.

Was any body else with you?—Thomas Penny, George Hayward, and Thomas Wyer.

Did you sign any note?—Yes.

Did you all sign it?—Yes.

Did they receive the money too?—They held their hands up the same as I did, to the hole of the door.

What did you receive this money for?—They did not tell me what it was for.

Whom did you vote for?—For Mr. Hollis.

Did you ever see Mr. Hollis at Hindon before this time?—Not before the first time he came.

But he won your heart at once?—Yes.

Thomas Moore sworn.

Examined by Mr. *Moysey*.

Do you remember being at Salisbury upon the 4th of September, or thereabouts in 1774?—Yes.

Did you see Jobber Stevens there?—Yes.

What did you say to him, or he to you?—I asked him if he could help me to the favour as the rest of my neighbours had; for Mr. Hollis, he said he had nothing to do with it.

Did you go to him for that purpose or meet him by chance?—For that purpose: I hope I am not to convict myself, the other part may tend to condemn myself. He said he would go to the Three Lions and meet somebody there, and I should come up afterwards and see him there; that is the greatest part I can remember.

After you came out from the Three Lions, did you see Stevens again?—Yes, in the market-place.

Have you a son that is a voter of Hindon?—He went for a vote.

What did Stevens say about your son's vote?—I don't chuse to convict myself.

[*Edward Meade* was called upon his Subpœna, but did not appear.]

Thomas Penny sworn.

Examined by Mr. Serj. *Davy*.

Were you a voter at the Hindon election?—No, I did not vote, but I was deemed a vote before the election.

Do you know Jobber Stevens?—Yes.

How long have you known him?—Eleven or twelve years, or more.

He is a voter at Hindon?—He has been formerly.

He lives at Salisbury, and is a butcher?—Yes; I remember Jobber Stevens and two gentlemen coming to my father's house; my father asked Jobber Stevens what the gentleman's name was, he said, his name was Hollis; Mr. Hollis said he came recommended by Jobber Stevens, to present himself as a candidate for the ensuing election for Hindon, and the voters said, 'down and down.'

Where was this?—In my father's fore-parlour; the Queen's head: Mr. Hollis said, 'It shall be down, and that soon.'

You deal but in short speeches at your borough. Mr. Hollis said he came recommended by Stevens as a candidate at the ensuing election, the men said, 'It should be down and down,' and Mr. Hollis said, 'It shall be down, and that soon.' What passed next?—Nothing more at that time; the Saturday following I went to the White horse.

What passed there?—I and three more gave a note.

How many more might be in the room?—There was Jobber Stevens's brother, and two more there when I went in: Samuel Colyer, George Hayward, and Thomas Wyer joined with me in a note, that note was for 60 guineas.

How much had you?—Fifteen guineas.

How did you receive that?—Through a hole over the door.

Do you know who that came from?—No, it was handed through a hole over the door in loose money.

Did you sign the note before you had the money, or after?—Before.

Whom did you offer to vote for?—I did not offer to vote for any body.

Whom did you engage your vote for?—I kept that to myself till I came to the Cross.

In whose behalf did you receive the fifteen guineas?—That I cannot say.

You knew you were no vote then?—No, I thought I was a vote.

And you went and received the favour?—Yes.

Whose favour?—I cannot say.

Who bid you go to the White-horse?—It was reported that money was going to pass there, therefore I went to the White-horse.

Whose money?—I did not know that, I have said so before.

So you went there not knowing whose money it was, nor what it was for?—I was not certain of that.

Whom did you understand it was for, whose favour did you understand it to be?—I understood it was in Mr. Hollis's favour.

Cross-examined by Mr. *Batt*.

I believe you were examined before the committee of the House of Commons, and gave a very long account of this matter there?—Yes.

What did you tell the committee was the answer Mr. Hollis made when the voters said 'down and down?—Mr. Hollis said, 'It should be so, and that soon.'

Was that the answer you made to the committee?—That was down upon my examination.

You have read your examination lately?—Yes.

Then you have read it to little purpose: the words you said before the committee were, 'that he should be as good as any other gentleman,' not that 'it should be so:' now, you say, that in answer to the voters saying 'down and down,' he said 'It should be so,' which is the truth, they cannot both be true? If Mr. Hollis only said one, now which is the true account?—The meaning of both goes to one thing.

I desire to know which of the accounts that you have sworn to is true?—That which I have sworn last is true, and that is what I have sworn in London.

Mr. *Batt*. Then that which you said before, cannot be true, of course.

Mr. Serj. *Davy*. Did or did not Mr. Hollis say that he was recommended by Stevens to offer himself as a candidate, and that he would be as good as any other gentleman?—Yes.

Mr. *Batt*. You said you just read over this examination; what was the reason of that?—To be sure not to make any mistake.

You were afraid of not telling the truth I suppose?—No, I came here to tell the truth.

How lately have you read it?—I cannot tell exactly.

Tell me within a day or two?—When I was in London about a fortnight ago.

You said just now that this money was Mr. Hollis's, what reason had you for thinking so?—I could think no other, as he came to canvass the town so soon afterwards.

William Crabb sworn.

Examined by Mr. Serjeant *Grose*.

Do you live at Hindon?—Yes.

Do you remember Mr. Hollis's coming to Hindon?—Yes.

When was it?—In August.

Whom did he come with?—With butcher Stevens.

Where did you first see him at Hindon?—At the Cross.

What did he say there?—That he was come to offer himself a candidate for the borough of Hindon, at the next ensuing election, and hoped he should have the favour of their votes; Stevens said Mr. Hollis was an honourable gentleman, and would behave with honour, then the voters said it must be 'one and all.'

What else did they say?—I cannot recollect what they said besides.

Did Stevens say any thing when they said so at the Cross?—I cannot say he did.

What did the voters say when Stevens proposed Mr. Hollis at the Cross?—They said it must be 'one and all.'

Was there any thing else said?—I don't recollect now.

Did you hear Stevens say any thing more at that time?—I cannot recollect that I did.

Was this Stevens, Jobber Stevens?—Yes.

When was it afterwards, that you saw Mr. Hollis?—The same day, at the Rose and Crown.

What was said then?—We were some of us billetted there; he came in, and said he hoped he should have the favour of our votes and interest: we told him, we had no objection, provided he was as good as another gentleman: Mr. Stevens said, he made no doubt of it.

Was Mr. Hollis present?—Yes.

What was further said by Stevens?—Nothing further: some of the voters asked him when it might be; he said, Your time shall be my time; they made answer, the sooner the better: he said, once within a week he would do something for them.

Court. Did Stevens say all this?—Yes, some of the voters asked him how much it might be; Stevens lifted up his hands, holding up his five fingers, and said, Gentlemen, twice this: we took that to be, that it should be twenty guineas.

Did you go at any time afterwards any where?—To the White Horse, about a week afterwards, according to Stevens's orders.

What passed at the White Horse?—I found there Henry Huffe, Benjamin Cholsey, and Jacob Stevens's brother, and another gentleman that I did not know.

What was done when you got up there?—There was this gentleman a writing of notes; there was a note put to me to sign it.

Did you sign it?—Yes.

Did any body else sign with you?—Yes, Edward White, Richard Ingram, and James Davis: the gentleman asked me to drink a glass of punch, which I did; the note was put into a hole over the door, and I put my hand up to receive the favour.

For whom were you to receive it?—We took it, that it was to vote for Mr. Hollis.

Did any body tell you whom it was to vote for?—No.

What was it you received at the hole of the door?—Fifteen guineas I received in my hand.

Did the rest receive any thing?—They put their hand to the hole; I cannot tell what they received.

Cross-examined by Mr. *Mansfield*.

Who were present at the Rose and Crown when this passed that you have mentioned?---There were eighteen or nineteen of us: there was one Joseph Lamb.

Who else?---I cannot recollect.

Not recollect one?---I cannot say I can, to be certain.

Was Richard Ingram there?---I cannot say.

Jeremiah Lucas?---I cannot recollect.

You can recollect none but Lamb?---No.

Can you recollect any other man that saw this holding up of hands?---I suppose, every body there must see it.

[*Elias Stevens* was called upon his subpœna, but did not appear.]

Mr. Serjeant *Davy*. My lord, we rest our case here on the part of the prosecution.

Mr. *Mansfield* made a speech to the jury in behalf of the defendant, but did not call any witnesses.

Mr. Baron *Hotham* then summed up the evidence to the jury, who by their verdict pronounced the defendant Guilty of the charge alledged in the information.

Mr. Calthorpe and Mr. Beckford were acquitted.

On Monday, May 20, being the last day of Easter term, 16 Geo. 3, Smith and Hollis were brought up to the court of King's-bench, to receive the judgment of the Court; but as the judges were desirous to have longer time to consider of the proper punishment, they were committed till the next term, to the King's-bench prison.

Previous, however, to this commitment, viz. on the 16th of May, the new election for Hindon took place; and Mr. Smith having again declared himself a candidate, he was returned, together with Henry Dawkins, esq.

On Saturday the 8th of June, being the second day of Trinity term, 16 Geo. 3, Mr. Smith and Mr. Hollis were again brought up for judgment.

On the former occasion, Mr. Serjeant Davy, as counsel for Mr. Smith, had informed the Court, that his client had, a few days before, been re-elected by a great majority of voices, to represent the borough of Hindon, and since there was not (as he alleged) the least shadow or pretence, for any charge of bribery against him at that election, he hoped that would operate with the Court in mitigation of the punishment they might think fit to inflict upon him. He said, that at his first election, instead of introducing, for the first time, corruption into the borough, Mr. Smith himself had been led astray, and induced to the offence of which the verdict of a jury had found him guilty, by the established, and almost universal practice, among the voters of Hindon, of exposing their suffrages to sale; and that by the purity with which the last election had, on his part, been conducted, he was, in some measure, entitled to the praise of having reclaimed his electors from this inveterate abuse of their franchises.

Each of the informations contained several counts, and both Smith and Hollis were found guilty on all the counts, in the informations against them. Most of the counts charged them with acts of bribery committed in October, 1774, immediately before the election. For those acts, they were liable still (until October, 1776) to actions on the statute of 2 Geo. 2, cap. 24, and to all the penalties inflicted by that statute.* The court of King's-bench, in the case of the King against Heydon, or Haydon, when the defendant was found guilty on an information for bribery granted by the Court, respited the judgment, till the time within which actions on the statute might be brought was expired,† in order that he might not be twice punished for the same offence; and, nearly about the same time, in the case of the King against Pitt, and against Mead, they, on the same principle, established it as a general rule, not to grant informations for bribery in future, until the end of the two years allowed by the statute, for proceeding by way of action.‡ This rule, however, could only operate upon informations granted, by the discretion of the Court, to private prosecutors, and could not affect those filed, *ex officio*, by the Attorney General.§ The reason of the rule is, indeed, equally applicable to both, and in cases of informations, *ex officio*, the Court might obtain the same end, by respiting judgment, as in the case of the King against Heydon, till the expiration of the two years. But the rule, though general, was never meant to be universal; for in the case of the King against Pitt, and against Mead, lord Mansfield said, "There may possibly be particular cases, founded on particular reasons, where it may be right to grant informations, before the limited time for commencing the prosecution [on the statute of 2 Geo. 2, cap. 24.] is expired." ||

Mr. Justice *Aston* now delivered the judgment of the Court. After stating the qualification with which the general rule had been accompanied in the above-mentioned case, he observed, That there was a very great difference between the cases in Burrow, (where the offence was the bribing of a single voter, and the prosecutions carried on by private persons, who might also have sued on the statute) and the present instance, which was that of a general corruption, and the prosecutor, the Attorney General, acting under the express order of the House of Commons. He entered largely into the nature, enormity, and dangerous tendency of the offence; taking notice that among many evil consequences, one of its most obvious effects was, to give rise to the crime of perjury,

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* *Vide* Douglas, vol. 1, p. 410.

† 3 Burr. 1359. ‡ Ibid. p. 1340.

§ For the difference between these two sorts of informations, *vide* Blackst. Comm. vol. 4, p. 304, 4to ed.

|| 3 Burr. p. 1340.

because a voter who has sold his vote, or has been even promised a reward for it, must, if the bribery-oath is tendered to him, be guilty of perjury, before he can be admitted to poll. He traced the history and gradual progress of election-bribery, and of the different remedies which the House of Commons and the legislature had provided against it; and mentioned, particularly, that a very gross scene of corruption which had taken place at Beverley, in Yorkshire, in the year 1727,* had given rise to the statute of 2 Geo. 2, cap. 24.

The Judgment he delivered nearly in the following words:

"The Court has taken into consideration the imprisonment you have already undergone, and they adjudge that you shall pay, each, a fine of 1,000 marks; and that you be imprisoned six months, and until you pay your respective fines.

"As to you, Richard Smith, the Court cannot help expressing their astonishment at what appeared from the mouth of your own counsel, that you continued so boldly to persist in your attempt, and that you have been again returned for the same place. They therefore have thought proper to add to your punishment, that, at the expiration of the term of your imprisonment, you shall give security for your good behaviour for three years—yourself and two sureties—you to be bound in 1,000*l.* and each of the sureties in 500*l.*"

In consequence of this judgment, both the defendants were conveyed back to the King's-bench prison, where they continued till the 23d of November following. *i. e.* for the space of 168 days, or 6 lunar months.†

On that day, their fines having been paid into the hands of sir James Burrow, the clerk of the crown, some days before, Mr. Hollis was discharged by the marshal. Mr. Smith was brought up to Westminster-hall, and in the treasury-chamber of the court of King's-bench, was bound over agreeably to his sentence for three years. This passed before Mr. Justice Aston and Mr. Justice Willes, before the other judges were come down. Yet, I presume, it is to be considered as having been done in court, since the recognizance was undersigned "By the Court."*

The reader will remark that the same incapacities ensue upon a conviction on a prosecution for bribery by way of information at common law, as when the proceeding is by an action under the statute; the disabling words in the act of 2 Geo. 2, cap. 24, sect. 7, being as follows:

"And every person offending in any of the cases aforesaid, from and after judgment obtained against him in any such action of debt, bill, plaint or information, or summary action, or prosecution, or being any otherwise lawfully convicted thereof, shall for ever be disabled to vote in any election of any member or members to parliament, and also shall for ever be disabled to hold, exercise or enjoy any office or franchise to which he and they then shall, or at any time afterwards may be entitled, as a member of any city, borough, town-corporate, or cinque port, as if such person was naturally dead." *Douglas's Election Cases.*

"1776, 17th May. The Attorney General came into the court of King's-bench, and moved for judgment against general Smith, for bribing the electors of the borough of Hindon: Mr. Justice Willes stated the evidence against him. As soon as he concluded, serjeant Davy and Mr. Mansfield endeavoured to mitigate the sentence, by shewing how much the general had already been punished for his offence, the great expence he was at, and likely to be at. In answer to what was urged in his favour, the Attorney General insisted, that the reasons given in favour of him, only aggravated his guilt. Lord Mansfield then began by expressing his concern that the defendant had brought himself into so disagreeable a situation, pursued the Attorney General's idea, that as to the expence, the general brought it on himself by procuring a return by corruption; that the voters being willing to receive bribes, was no justification of the giver, that such punishment should be inflicted as would compel the candidate to be honest, that the present case was of the most serious nature. An officer of the crown, on behalf of the public, prosecuted to conviction. A man endeavouring to get into the senate by corruption; this crime called for ample punishment by way of example; it was the first instance of the kind heard of, and should be maturely censured, as it would be impossible to preserve the constitution from ruin, if courts of justice did not act with vigour, when such matters came before them. His lordship then ordered the general for the present to stand committed, and to be brought

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* It is impossible to collect any thing of the particular merits of this case of Beverley from the entries relative to it in the Journals. *Vide* Journ. vol. 21, p. 24, col. 1. 1 Feb. 1727-8, p. 188, col. 1, 2. 22 Jan. 1728-9, p. 236, col. 1, 2. 25 Feb. 1728-9, p. 249, col. 2. 9. p. 250, col. 1. 4 March, 1728-9, p. 259, col. 1, 2. 8 March, 1728-9.—Douglas.

† "A month in law is a lunar month, or 28 days, unless otherwise expressed, not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. [Thus in a case in Dyer, 218 b. on the statute of enrolments, the six months were reckoned of 28 days each.]" Blackst. Comm. vol. 2, p. 141, 4to ed.—There is another reason why, in cases of punishment by imprisonment, the computation should be by lunar months; namely, the favour which is always to be shewn to liberty, where the terms are ambiguous and doubtful.—Douglas.

* I was favoured by sir J. Burrow with the account of these circumstances.—Douglas.

up the first day of next term to receive whatever sentence the Court should think proper to pronounce. Mr. Hollis, the other candidate, standing upon the same ground, was dismissed in the same manner, and both sent to the King's-bench prison.

"June 8th. General Richard Smith, and Thomas Brand Hollis, esq. the late members for Hindon, were brought before the court of King's-bench, in order to receive sentence, having before been convicted of bribery at the last general election, when sir Richard Aston prefaced their sentence with a pathetic speech, in which he expatiated on the enormity of the crime, as, by violating the freedom of election, and corrupting the electors, the British constitution, the most perfect in the world, could only be undone, that the crime of which they had been guilty was aggravated by the tendency it had to lead the ignorant and unwary to the commission of that horrid and foul sin of perjury, the only barrier between God and man. From these and other reasons equally forcible, he inferred the necessity of an exemplary punishment, and adjudged them to pay a fine of 1,000 marks each (666*l.* 13*s.* 4*d.*) to the king, and to suffer six months imprisonment, and one of them (general Smith) at the expiration thereof, to enter into a recognizance of 1,000*l.* himself, and two securities in 500*l.* each, for his good behaviour for three years.

"The day following, one of the voters at the same election was brought before the same Court, to receive sentence for wilful and corrupt perjury, in his evidence before the House of Commons, when he received sentence to stand on and in the pillory, with a paper on his forehead signifying his crime, "Wilful and Corrupt Perjury," twice in the town of Hindon on market-days, between eleven and two, the first time to-morrow se'nnight, and the second the Thursday following. And accordingly on Wednesday the 19th following, he was brought from the King's-bench prison to Fisherton gaol, Wiltshire, and on Thursday was carried to Hindon, where he was placed in the pillory for the first time. He was met on the road by a number of his friends, with two flags, and blue ribbons in their hats. The populace treated him very favourably, their attention being taken off, in a great measure, by a person mounted on a stool, who sung and sold an election ballad, much to their entertainment. He was brought back to Fisherton gaol in the evening, and is to undergo the remainder of his sentence the Thursday following."—Annual Register.

See more concerning these transactions, and the borough of Hindon, in Douglas's Election Cases, vol. 1, p. 173, vol. 4, p. 371. 18 Parl. Hist. 575, *et seq.*

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560. The Trial of an Action brought by Stephen Sayre,* esq. against the Right Hon. William Henry Earl of Rochford, one of his Majesty's most Hon. Privy Council, and theretofore one of his Majesty's Principal Secretaries of State, for False Imprisonment: Before the Right Hon. Lord Chief Justice De Grey, in the Court of Common Pleas in Westminster-hall: 16 George III. A. D. 1776. [Published from Mr. Gurney's Short-Hand Notes.]†

Thursday, June 26.

Counsel for the Plaintiff.

Mr. Serjeant Glynn, Mr. Serjeant Adair, Mr. Davenport, Mr. Alleyne, Mr. Arthur Lee.

Counsel for the Defendant.

Mr. Attorney General, Mr. Solicitor General, Mr. Serjeant Davy, Mr. Wallace, Mr. Serjeant Walker, Mr. Dunning.

Special Jury.

Valentine Grimsted,	Edward Hawkins,
Edward Bond,	John Willis,
Thomas Allen,	Thomas Jordan,
Charles Matthews,	Redburn Tomkins,
William Downes,	John Biggs,
John Cope,	William Clarke, esqrs.

The Declaration was opened by Mr. *Lee*, as follows:

Gentlemen, This is an action brought by Stephen Sayre, esq.; against the right hon. Henry Earl of Rochford.

The Declaration states, That upon the 23d of October, in the year 1775, the defendant did, by various illegal violences, enter the plaintiff's house, seize his papers and his person, and commit him to close prison for several days, contrary to law; which the plaintiff lays to his damage in 30,000*l.*

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* I suppose that he was the person mentioned by Mr. Douglas in his Reports of Election Cases, vol. 3, case 26. Seaford Case.

† As the original publication contains not the speeches of the Counsel, or the Lord Chief Justice's charge to the Jury, I have inserted in notes the report given of them in the Morning Chronicle newspaper of June 28th, 1776. In the Annual Register for the year, History of Europe, p. 59, is a brief account of the arrest of Sayre.

To this the defendant pleaded,

First, the general issue of Not Guilty:

And then several other pleas in justification: and his justification is, That he was at that time one of the lords of his majesty's privy council, and one of his majesty's principal secretaries of state; and that, upon an information upon oath, by one Richardson, against the plaintiff, for treasonable practices, he did issue his warrant to arrest the plaintiff for high treason, and to seize his papers; and did issue another warrant to commit him close prisoner to his majesty's Tower: this he pleads in justification.

The plaintiff has replied, That this was done in his own wrong: upon that issue is joined which you are to try: we shall bring our evidence and prove our case; and upon that we trust, that the justice of your verdict will give us ample reparation for the injuries we have sustained.

After Mr. Lee had opened the declaration,

Mr. Serjeant *Glynn* went at large into the facts and circumstances of the case,* and then proceeded to examine the witnesses, as follows:

Joseph Wood sworn.

Examined by Mr. Serjeant *Adair*.

What are you?—A shoemaker by trade.

What else?—A constable.

Do you remember being at Mr. Sayre's house?—Yes, I was called upon on Monday morning by Mr. Bond, sir John Fielding's clerk, and I went along with him to the king's messengers, and from there we went to 'squire Sayre's house.

What messengers?—I don't know their names, two of the king's messengers.

For what purpose did you go to Mr. Sayre's house?—They had got a warrant, they said.

Did you see that warrant?—I did not read it, they had it in their hand.

What did you do when you came there?—They knocked at the door, the maid-servant came and opened it: they said they wanted to speak with 'squire Sayre about some particular business: she went up and told the 'squire, I believe; she came down again, and let us into the parlour on the right-hand, and then the 'squire came down; they shewed him a paper, the warrant I suppose it was, and said they must look into his apartments for some papers.

They must search for papers?—Yes.

Did they read the warrant?—Yes, they read the warrant to him.

What did they do in consequence?—As soon as the 'squire had settled a-bit, and got ready, he shewed them all the desks where they were.

Did they take any thing?—I believe they took two or three away, I cannot say which.

Did they search among his papers?—Yes; I stood by, and the 'squire was by.

Where did they go, and in what manner did they behave?—They behaved very genteel and quiet.

What did they do with his papers?—They read a great many over, and those that they did not want, I suppose, they left.

They examined them?—Yes.

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* In the Morning Chronicle of June 28th, 1776, the opening speech of Mr. Serjeant Glynn is reported thus:

"The Recorder of London, as leading counsel for the plaintiff, opened the cause, and stated the grounds of the action to the jury, beginning with an account of the mode of putting the first warrant in force on the 23d of October, by sending three of the messengers of the secretary of state to Mr. Sayre's house, where they pretended they wanted to speak to him respecting a forged note of 200*l.* and by that means got possession of his person and conveyed him to lord Rochford's office, after having rummaged his cabinet and seized his papers; reciting the examination of Mr. Sayre before lord Rochford and sir John Fielding, with the refusal of the defendant to accept bail, although he had changed his ground and committed Mr. Sayre for treasonable practices, notwithstanding that the warrant of apprehension charged him with high treason, and finally mentioning the committing him to safe and close custody, which was rigidly observed, (excepting the compliance paid to a restrictive order for the free access of Mrs. Sayre) although the offence on the face of the commitment was merely a misdemeanour, and therefore bailable.

"The Recorder dwelt on each particular above-mentioned with great force and ability, deducing from the whole such inferences as were most likely to alarm the jury and bring the circumstance home to each man's breast. He painted in the liveliest colours the injustice of issuing a warrant to seize a man's person and papers on an information not less improbable than ridiculous: he urged the inquisitorial stile of the private examination of a man so apprehended, and the manifest malice and severity of refusing bail, and committing him close prisoner to the Tower, after the magistrate before whom he was examined, had found reason to alter his opinion of the fact with which he was charged, and thought proper to change the description of his offence, and to insert in the commitment words of such vague and indeterminate import, 'as the words 'treasonable practices.' Having enlarged on the general illegality and evil tendency of such conduct in any man, and more particularly in a secretary of state, he retouched his picture and increased its effect by shewing how particularly mischievous it was to Mr. Sayre; who, when the event took place, was a banker of great credit, and was now, in consequence, a ruined man. He hoped therefore the jury, from their natural feelings and wish to do justice, would see the case in its true light, and then he doubted not they would think the plaintiff materially injured; and make him a just compensation by awarding him ample damages."

They took what they pleased, and left what they did not like?—They took two or three, I think, away.

What did they do afterwards?—The 'squire dressed himself, and went with them to my lord Rochford's office.

What time in the morning did they go there?—I think they got there about seven o'clock in the morning, or between seven and eight, I am not positive, but it was about that time.

How long did you stay at Mr. Sayre's house?—I reckon we might stay there three quarters of an hour.

Did any body else come there while you were employed about this business?—Nobody else came there.

Where did you carry Mr. Sayre?—He went to my lord Rochford's office.

Did you go with him?—I did not go in the coach, I followed the coach, and saw it there.

You did not see any thing that passed afterwards?—No, I was not in the office.

When Mr. Sayre came down to them, and they read the warrant, tell particularly in what manner they proceeded, and what they did?—They said they had got a warrant for high-treason: the 'squire did not seem to be at all dismayed: he said they should look, he was not afraid of any thing; he did not seem to be the least discomposed; he said they were very welcome to look, he did not know that he had done any thing amiss.

Was Mr. Sayre in the room all the time they were there?—Yes.

Did he offer at any time to go out of that room?—No.

Did he ask to go any where else?—He asked to go to dress himself, and they did not allow that; he had his clothes brought into the room where he was.

They would not then permit him to go into another room to dress?—No.

Did they keep the door open or shut?—It was shut: they ordered me to lock the door when I went in, but I saw the 'squire was not dismayed, and I did not lock it.

Did they make use of any excuse to get into Mr. Sayre's house?—Yes, that they had some particular business, and must see the 'squire.

Did they say what the business was?—They mentioned something that they wanted to see him about a note.

Edward Mann sworn.

Examined by Mr. *Davenport.*

You are a secretary of state's or a king's messenger, are not you?—A king's messenger.

Pray have you got the warrant?—No, I have not.

Had not you the warrant?—Yes, I had.

What became of it?—I gave it to Mr. Sneath.

Who is he?—The first clerk in the secretary of state's office.

When did you give it him?—Last Monday.

Did you go, upon the 23d of October, with Wood the constable to Mr. Sayre's house?—I did.

Under what pretence?—With a secretary of state's warrant.

Did you tell the person who let you in that you had a secretary of state's warrant?—I did not.

What did you tell the person who let you in that you came for?—I cannot tell the very words: I believe I said to this effect, that I had some business of consequence to communicate to Mr. Sayre, and I should wish to see him.

Do you remember saying you came about a draft that there was reason to believe was forged?—I believe I did mention something of it.

Was the forged draft the warrant, or what other thing did you allude to?—Mr. Sayre was then not stirring.

So this forged draft was stirring before him?—Speaking of it was stirring before him.

How came you to say that you came about a forged draft, when you were a king's messenger armed with a warrant?—Because I wished to see Mr. Sayre.

And therefore you made a pretence of a forged draft, instead of telling him you came with a warrant?—I did mention that, and with a view of his coming down stairs.

That warrant I think you say you delivered to Mr. Sneath?—Yes.

Is he the secretary to lord Rochford, or was he then?—He was first clerk then to lord Rochford.

When were you served with a subpœna to attend this trial?—Upon Monday last.

Before or after you delivered the warrant to Mr. Sneath?—After.

You were served with a subpœna to bring the warrant with you?—I read the subpœna, and finding it mentioned that I was to bring the warrant or any other papers which I had, I went to Mr. Sneath to ask him for it: he told me he had not done with it.

When did you go to him?—On Monday.

How long after you delivered it?—Within an hour after I received the subpœna.

How long had you delivered it before you received the subpœna?—I believe it might be three or four hours.

Did you go to him upon Tuesday?—No, I did not.

Did you go to him upon Wednesday?—I went to him upon Wednesday, and told him the same.

He had not done with it then?—He told me that it was mislaid, and he could not find it.

Then it is lost?—I don't know.

What do you believe about it?—I believe it is mislaid, I only guess by Mr. Sneath's words.

Will you be so good as to tell me whose hand-writing it was, and by whom signed?—Signed by lord Rochford.

What was it an authority to do?—I believe it runs in the usual form that warrants do: I have one at home I had 15 years ago, and it runs in a similar form to that.

Was it a warrant to take him for high treason?—To the best of my remembrance it was.

Signed by lord Rochford; and to apprehend Mr. Sayre for high treason?—Mr. Stephen Sayre.

I believe afterwards you saw Mr. Sayre; did he come down to you or you go up to him?—'Squire Sayre came down to us.

What did you then order to be done to him; did you order him to be locked up?—I told Mr. Sayre that I was come on business which was very disagreeable to me, and I was afraid it would be so to him; that we had a secretary of state's warrant to take him into custody, and after that to seize his papers.

When he came down to you, did you permit him to go about to dress himself, or any thing? For that, I refer you to Mr. Sayre.

For that, he cannot be a witness, and therefore I refer to you.—After this Mr. Sayre asked to have permission to shave himself; I told him that and any thing else that he desired.

Then you permitted him to go up stairs for his clothes?—He did not desire to go up stairs for his clothes, he rang the bell and ordered his clothes to be brought to him.

Then he did not desire to go into any room?—He did desire to go up stairs.

That was not permitted, I take it?—It was permitted.

And to go into another room?—Yes.

To dress himself there?—To speak to Mrs. Sayre, who was then at breakfast.

Who went into the room, you or Staley?—I went along with him; but if I am not mistaken it was by Mr. Sayre's desire; but in that I will not be positive.

Afterwards you brought him before my lord Rochford?—We did.

Did you bring with you any papers of his?—We did.

Did you search and look into a number of papers before you took away those that you thought material?—I do not properly know what is searching. I told Mr. Sayre we were to take his papers, in consequence of which he himself opened his drawers.

Did you take any?—No, we took none, Mr. Sayre took them and gave them to us.

You took all that he gave you?—No, he held several papers in his hand, and said, this is such a paper, and this such, and we took his word.

So then you looked at none but what you brought away?—We looked at some, and returned them.

You took his word for some, looked into others, and brought away what you thought proper?—Some were brought away; I did not look into any papers.

I thought you said just now, you read some of them?—I did not say I read some, some were read and returned.

Who read them?—Sir Stanyer Porten and Mr. Willis.

Who was sir Stanyer Porten?—He was then first secretary to lord Rochford.

Then the papers were under his inspection?—Mr. Sayre handed them; Mr. Willis took some, and sir Stanyer Porten others, and returned them.

Those that were to be brought away, they gave to you or Staley?—I took them.

Then you brought them to lord Rochford?—To lord Rochford's office.

How long were you there?—I believe we might be there about an hour and a quarter. I will not be exact, I did not make minutes.

What became of Mr. Sayre then?—He was shewn into a room where lord Rochford receives foreign ministers.

What became of him after this hour and quarter?—Mr. Sayre ordered his own carriage, he got into it, and Mr. Staley and me went to lord Rochford's office.

How long did he remain at the office?—I believe, an hour and a quarter, or an hour and 20 minutes.

What became of you then?—Then we had another warrant given to us.

What became of that?—That I gave to the deputy constable of the Tower, and left it with him.

Did you carry Mr. Sayre to the Tower?—We sent for a hackney coach; and Mr. Staley and me went with Mr. Sayre to the Tower.

By whose orders?—In consequence of the warrant.

What was the message to the lieutenant of the Tower when you delivered him?—We had no message.

Only the delivery of the warrant?—The delivery of the warrant and Mr. Sayre.

There ended your duty?—I took a receipt.

You took a receipt for the body, and there left him?—Yes, and there left him.

John Tally sworn.

Examined by Mr. *Alleyne.*

I believe at the time of this arrest, you were one of Mr. Sayre's clerks?—I was.

Do you remember the circumstance of the messengers coming to Mr. Sayre's?—I do.

Do you remember what passed between you and them at that time?—I took minutes of it at the time, if you will give me leave to read it.

Mr. *Attorney General.* When did you take those minutes?—Soon after.

How soon?—Two days after; but I can remember it without my notes, if you choose it. [The witness proceeds without referring to his minutes.] On Monday the 23d of October, between eight and nine, I was at breakfast in the office: our porter came and told me, three gentlemen wanted Mr. Sayre: I went into the parlour; Mr. Sayre was not up: I asked them if they wanted Mr. Sayre; they told me they did, upon very particular business: I told them the servant had informed me he had called him, and if it was very urgent business he would call him a second time: they said it was; it was about a forgery upon the house: I asked, what kind of forgery: they immediately made answer, that it was a bank-note of 200*l.*, and they supposed it was fabricated

in Holland: I did not ask them to let me see it, but immediately sent a second time for Mr. Sayre: I went into the office, waiting for the other clerk to come; as soon as he came I went into the parlour, and asked Mr. Sayre if he wanted me: he said, No: I thought it exceeding odd that he did not mention the forgery: I came back, and mentioned it to the other clerk, and told him that the people were looking over the papers, and I thought it something very extraordinary that Mr. Sayre did not mention the forgery: a gentleman came in, and Mr. Sayre had just an opportunity of saying that he was in custody of the king's messengers.

Did you stay in the room, and see every thing that passed?—I did not stay a minute in the room.

You saw the papers rummaged?—The papers were spread upon a table, and they were examining them.

Do you know whether it was permitted Mr. Sayre to come into the shop?—He did not come into the shop: whether there was any permission I cannot say.

Had you any conversation with Mr. Sayre, and where, before he left the house?—I had not: I went to acquaint a friend or two of the situation Mr. Sayre was in, and did not return till Mr. Sayre was in the Tower.

At this time Mr. Sayre was a banker?—Yes.

Mr. *Alleyne.* I fancy such an attack as this would necessarily have a very bad consequence.

Mr. *Attorney General.* Do you go for special damages?

Mr. *Alleyne.* No, general damages.

L. C. J. *De Grey.* It is proved, that he is a banker: any body may form an opinion what an effect a thing of this sort would have.

Tally. Mr. Sayre had settled matters that day and the day before; he was to have gone out of town for ten days or a fortnight, on Monday evening, or Tuesday morning, to Bath.

Before this business happened, did you observe any thing particular about the house?—Some time before, I cannot be certain how long, but it was previous to this event, there was a guard of soldiers at sundry times about the house: our watchman came and told me, he thought it exceedingly odd: there was a vacant space of ground; it is now built upon, near it, by lord Paulett, where the soldiers were.

Mr. Serj. *Davy.* This is not evidence.

Tally. The watchman came and told me there were some soldiers: I asked him at what time they came, and how they came there? it was about eleven o'clock.

L. C. J. *De Grey.* You have not declared upon any thing of this sort; you declare for the trespass and imprisonment; if you mean to say that this arrest and trespass, as it is stated, was not done in consequence of this warrant, we ought to say, it is an illegal warrant; for that there had been a premeditated design to surround his house, and arrest him in an illegal manner before: if you mean to say that, you will shew how it comes within the case.

Mr. *Alleyne.* This must be in reply to the justification; I will not anticipate it.

L. C. J. *De Grey.* To be sure, you should not.

Mr. *Attorney General.* The difficulty is, knowing it to be false: I don't care to seem to oppose it.

L. C. J. *De Grey.* Let it be false or not, we should not go into matter that is extraneous to the cause. Do you want to go into more witnesses to prove these facts? These facts, I presume, will not be denied.

Mr. Serj. *Glynn.* We shall call no more witnesses to any of these facts.

L. C. J. *De Grey.* The jury must have a full insight now into the manner in which this warrant was executed.

Mr. Serj. *Glynn.* We shall ask no more about the first warrant.*

John Reynolds, esq. sworn.

Examined by Mr. *Lee.*

Were you at the secretary of state's office during the examination of Mr. Sayre, upon the 23d of October last?—Upon the 23d of October, my lord, I was attending my duty, as under sheriff of this county, at Tyburn; and while I was there, I received a message by one of Mr. Sayre's servants, that he desired to see me instantly. In consequence of that message, I left the melancholy business in which I was then employed, and went to the banking-house of Mr. Sayre: the clerks told me he was then carried to my lord Rochford's office by messengers, upon a charge of high treason. I got into a hackney-coach, and went down to the Secretary of State's office. I sent my name in to my lord Rochford, that I understood Mr. Sayre was there in custody, upon a charge of a criminal nature, and I desired, as his solicitor, to have access to him. I received no answer to this message, from the person, but that it was very well. I told the person who brought me that answer, that I must have another sort of answer; that I must have access to Mr. Sayre; I would not be shuffled in that way, but insisted upon being admitted. The person came to me again, and said, if I had any thing to communicate to Mr. Sayre, I might do it in writing: my answer to that was, I came there in the character of his solicitor, and I insisted upon having access to him; that if my lord Rochford did not admit me, I must apply to Mr. Serj. Glynn, his counsel, and bring him there; and see whether his lordship would refuse him admission, or not. Upon that peremptory message, I was admitted into an outer room. The first person I saw was sir John Fielding: he accosted me, and said, Mr. Reynolds, did Mr. Sayre send for you? I said, Yes, Sir: said he, That is not

* I suspect that there are some errors in this report of what occurred during the examination of John Tally.

true: I replied, I am very sorry for that, sir John Fielding. Lord Rochford was present: I said, I should not take that language from sir John Fielding in another place. Lord Rochford interfered, whom then I did not personally know, and I expressed some warmth about the difficulty of a gentleman, in the character of a solicitor, or as a private friend, having access to a person who was there in custody, upon a charge of a criminal nature. I then desired that they would ask Mr. Sayre the question, whether he sent for me or not? Mr. Sayre was in another room: application was made to Mr. Sayre, and, as I was informed by my lord Rochford, Mr. Sayre said, I did send for Mr. Reynolds; upon which my lord Rochford admitted me into the presence of Mr. Sayre. I found Mr. Sayre under an examination, as I understood, and a clerk writing at a table: I then charged him not to answer any questions; not to sign any papers; that the very moment he did one or the other, or seemed disposed to do one or the other, I would leave the room. Lord Rochford said, Is that the advice you give your client, Mr. Reynolds? Yes, my lord, it is the advice I give him; I am answerable for that advice, and I shall give him no other. Then, said he, Sir, I think you give him very wrong advice. Mr. Sayre then desired, that the minutes of his examination, so far as it had gone, might be read: they were read: the information of Mr. Richardson was also read. Upon hearing the information read, I laughed exceedingly; I said, the charge was too ridiculous to be attended to seriously a moment. Either my lord Rochford or sir John Fielding, I cannot determine which, said, Why, Sir? It is upon oath. I answered, looking at Richardson, who was there present, I know that gentleman's character too well to give credit to any thing that he swears, or words to that effect; upon which Mr. Richardson called for the protection of the magistrates: he said, he was not to be there insulted. I then said, that if under the authority of sir John Fielding and his lordship, I was not permitted to say it there, I would say it again in another place. I then said to my lord Rochford, after this altercation had passed, if, after consulting the great law officers of the crown, they should be of opinion with me, that this is not a charge of high treason, and a bailable offence, I then am ready to give good and sufficient bail for Mr. Sayre; but if they should be of another opinion, I have no favour to ask: I was then ordered with Mr. Sayre and the messengers into another room. That is all I know with respect to what passed that day at the Secretary of State's office.

Did you apply at the Tower for admission to Mr. Sayre as his solicitor?—I applied to major Rainsford between seven and eight o'clock that evening for access to Mr. Sayre; the answer given to me by major Rainsford was, that Mr. Sayre was a close prisoner; that, under that commitment, no person could have access to him without a special order from the secretary of state. I applied again the next day, and I applied several times afterwards, but never could get access to Mr. Sayre; and I never saw him till I found him before the Lord Chief Justice of the court of King's-bench, by a writ of Habeas Corpus.*

L. C. J. *De Grey.* These several applications were to the Tower, not to the secretary of state's office?—Yes, not to the secretary of state's office. I was present when Mr. Alleyne and Mr. Lee, as counsel for Mr. Sayre, applied for access, stating to the lieutenant-governor of the Tower the reasons for that application, that they were counsel retained for him, and wished to see him to consult about the measures for his enlargement. The major gave those two gentlemen the same sort of answer that he had given me, as I before stated.

You mentioned that you withdrew after offering bail, and then a warrant was sent out for the committment: how long was it between the time of your withdrawing and the warrant being sent out?—After I went into the other

* "On the 28th of October, by virtue of a Habeas Corpus granted by lord Mansfield, Mr. Sayre was conveyed, by the proper officers, from the Tower to his lordship's house in Bloomsbury-square. Messrs. Adair, Dayrell, Lucas, and Alleyne, attended on the part of Mr. Sayre, and Mr. White, partner with the solicitor of the Treasury, on the part of the crown. After the two first mentioned gentlemen had spoken for some little time on the subject of Mr. Sayre's being committed to close confinement, by virtue of the warrant of commitment, which only conveyed a general charge, and Mr. White had declared that he had no instructions to oppose the bail, his lordship called for the warrant of commitment, and immediately on perusing it, pronounced that he had not the least doubt of Mr. Sayre's being entitled to bail; as he observed, that that gentleman was only charged with treasonable practices, and that he, lord Mansfield, should not have refused the bail, if Mr. Sayre had come without any counsel. Bail was accordingly directly offered and accepted; viz. Mr. Sayre himself in 500*l.* and John Reynolds, and Coote Purdon, esqrs. in 250*l.* each.

"After the business was over, Mr. Sayre thanked his lordship for the great politeness and candour he had shewn on the occasion; and hoped his lordship would always act in the like impartial manner according to the constitution. 'I hope so too,' replied his lordship; 'let us both act according to the constitution, 'and we shall avoid all difficulties and dangers.'

"The lord mayor and several other friends of Mr. Sayre, attended upon this occasion.

"On December 13th following at the Old Bailey, upon motion on behalf of Mr. Sayre, the recognizance entered into before lord Mansfield, on October 28th, was discharged." Annual Register for 1775, Appendix to Chronicle, p. 242, where is a brief account of the previous proceedings against Sayre.

room I had three or four minutes conversation with Mr. Sayre, in the presence of the messengers; then I withdrew and went to his banking-house, and sent an express for his partner, for fear of the consequences of the commitment. I had not been in Mr. Sayre's house two minutes before a letter came from Mr. Sayre, acquainting Mrs. Sayre, which was opened in my presence, that he was now committed a close prisoner to the Tower.

L. C. J. *De Grey*. Do you know what became of the papers which I understand were carried to lord Rochford's office?—They were sent to me afterwards, I think it was after the access of Mrs. Sayre, by her hands, from the Tower.

L. C. J. *De Grey*. Then they were returned to Mrs. Sayre?—I understand they were.

Major *Rainsford* sworn.

Examined by Mr. *Allcyne*.

Do you remember receiving Mr. Sayre into your custody?—Yes.

Do you recollect at what time?—Upon the 23d of October.

Have you the warrant?—I have. [Produces the warrant.]

By virtue of this warrant you received Mr. Sayre into close custody?—I did.

Did you refuse any person's seeing him?—Yes. I did.*

Did you conceive yourself bound so to refuse, because it was directed you in the warrant to keep him in close custody?—I do. By the practice of the Tower, when a person is ordered to be kept in close custody, no person is to have access to him but by an order of the secretary of state; and, in consequence of that, I did refuse several persons access to him.

Do you know my lord Rochford's handwriting?

Mr. Serj. *Davy*. That is not meant to be disputed.

L. C. J. *De Grey*. Did you receive any particular directions from the secretary of state?—No.

No particular message?—Nothing but the warrant.

The Warrant read.

"October 23, 1775.

"William Henry, earl of Rochford, one of the lords of his Majesty's most hon. privy council, and principal secretary of state, &c. &c.

"These are in his majesty's name to authorise and require you to receive into your custody the body of Stephen Sayre, esq. herewith sent you, being charged† upon oath before me, one of his majesty's principal secretaries of state, with treasonable practices, and to keep him in safe and close custody until he shall be delivered by due course of law; and for so doing this shall be your warrant. Given at St. James's on the 23d of October, 1775, in the 15th year of his majesty's reign.

"To earl Cornwallis, constable of his majesty's Tower of London; or to the lieutenant of the Tower, or his deputy."

L. C. J. *De Grey*. Are all your warrants with prisoners committed into your custody, to receive them into close custody?—No; in the case of lord Ferrers and lord Byron, for murder, who were committed by the House of Lords, these warrants were conceived in other terms; but the warrants from the secretary of state, which are for state prisoners, are always to close custody.

Have you got the warrant for the admission of Mrs. Sayre?—I have. [Produces it.]

Was any body else permitted to see him?—Nobody.

The Order for the Admission of Mrs. Sayre read.

"October 23, 1775.

"William Henry, earl of Rochford, one of the lords of his majesty's most honourable privy council, and principal secretary of state, &c. &c. &c.

"These are in his majesty's name to authorise and require you to permit and suffer Mrs. Sayre to have access, from time to time, to Stephen Sayre, esq. her husband, a prisoner in your custody; and for so doing this shall be your warrant. Given at St. James's the 23d of October. Rochford."

"To earl Cornwallis, constable of his majesty's Tower of London; or to the lieutenant of the Tower, or his deputy."

Mr. Serj. *Adair*. We are now going to prove that applications were made at the Secretary of State's office by some gentlemen for admission to Mr. Sayre, which were refused.

John Ellis, esq. sworn.

Examined by Mr. Serj. *Adair*.

Did you make any application, or were you present when any application was made at the Secretary of State's office respecting Mr. Sayre?—Upon the 23d of October I received a note from Mrs. Sayre, to acquaint me that her husband was committed; and about an hour afterwards she sent a gentleman to me, that I supposed was either a clerk or one of the partners in the bank, requesting that I would go down to the Secretary's office and try what I could do for the service of her husband who was under those disagreeable circumstances, and to take such steps as I thought proper upon the occasion: upon this I went and applied to some of my friends, and consulted them to know what was proper to be done. I applied to lord Effingham, and we went together to Mr. Burke, and we agreed that it was

* See Vol. 19, p. 983.

† In a Note to the 42d Letter of Junius, dated January 30, 1771, (see Woodfall's edition, vol. 2, pp. 191, 192,) is some criticism on the official French of this lord Rochford. The language of this warrant is awkward. Concerning the doctrine that a relative is to be referred to the last antecedent, see vol. 10, p. 147; vol. 19, p. 1110.

proper to go all together to the Secretary's office, and there to make application.——If the Court will permit me, I made a little minute of what passed at the Secretary's office, within about three hours after I returned home.

L. C. J. *De Grey.* You may refresh your memory by looking at it.

Mr. *Ellis* reads. October the 23d, about ten in the morning, Mrs. Sayre wrote me a note, wherein she mentioned that her husband was apprehended by a warrant from the Secretary of State. About one, or after, she sent me a message by a gentleman whom I suppose to be one of the partners in his bank, to desire I would go to lord Rochford's office to enquire into the situation of her husband, and take such steps as were necessary for his benefit. After having consulted with some friends, I went to lord Rochford's office, accompanied by lord Effingham and Mr. Burke, and applied to the Under Secretary concerning the warrant by which Mr. Sayre was apprehended. The Under Secretary answered, That he was committed to the Tower for treasonable practices. I desired then to know what was the confinement he was under: his answer was, That the warrant directed he should be under safe and close custody. I then desired to know if any of his friends or his wife might have access to him: his answer was, That they must apply to the Tower to solve this question. I then demanded whether Mrs. Sayre might have access to her husband: he replied, She must apply to the Tower, and if she had not admission, might then apply to the Secretary of State. I could not help observing upon this, that lord Rochford might as well say directly whether he would permit her to have access to her husband or not; that I was desired by Mrs. Sayre to come down to the office; that I acted from motives of humanity, and that I would not quit the office till I received from lord Rochford an explicit answer whether he would permit her to have access to her husband, or not. Upon this, the Under Secretary went in to lord Rochford, and returned this answer; That Mrs. Sayre must make application at the Tower, and if that was not satisfactory they might apply to the Secretary. I repeated my observation, that my lord Rochford might as well at once give an explicit answer; and it would be but genteel, if he meant she should have access, to let me carry an order for that purpose to her immediately. Though I repeatedly urged the above observation, the Under Secretary would make no other answer than at first, to wit, She might apply to the Tower, where, if she was refused, she might apply to the Secretary's office.

Did you go to the Tower, in consequence of that, with Mrs. Sayre or any other person?—I waited upon Mrs. Sayre in the evening: she told me, no access was permitted to her husband, except to herself.

I think you mentioned that you applied to know whether Mrs. Sayre and Mr. Sayre's friends might have permission to see him,—Yes.

Was permission granted to any body else but Mrs. Sayre, that you know?—Not to my knowledge; for I should have waited upon Mr. Sayre; for I received a note from him to beg I would go to the Tower, and get access; but in my way I called upon Mr. Reynolds at his office, and he told me, nobody was permitted to go to the Tower but Mrs. Sayre.

Mr. *Attorney General.* You must not mention what Mr. Reynolds told you.

L. C. J. *De Grey.* Mr. Reynolds, who is the best witness to that, tells you, nobody was permitted to have access to Mr. Sayre in the Tower but Mrs. Sayre.

[The evidence for the plaintiff being closed,* Mr. Attorney General made a speech to the

* "Alderman Lee was called, but not being present was not sworn.

"As soon as the evidence on the part of the plaintiff was gone through, Mr. Attorney General rose in behalf of the defendant, replying to what had been advanced by the Recorder, and animadverting on the evidence adduced. In the course of his speech, this lawyer, with amazing skill, reversed the picture which had been drawn by his learned opponent, shewing that lord Rochford had done no more than was strictly conformable to the duty of an ordinary magistrate, and that it would have been scandalously negligent for a person who filled the high and important station of a Secretary of State to have done less. He urged the alarming nature of the charge alleged, declaring that neither its absurdity nor its improbability was a sufficient reason for any magistrate to have passed it over without taking legal notice of it; he then proved from the evidence which the Court had just heard, that lord Rochford's conduct had not only been strictly legal, but that the whole of the business had been transacted with all possible politeness and civility to the plaintiff. He answered the objections of the Recorder one by one, and endeavoured to shew, that the material grounds of complaint alleged in the declaration, viz. the issuing a warrant to seize papers, the committing only for treasonable practices (although the warrant to apprehend contained a charge of high treason) and the refusing to admit bail, and the committing to close custody, were ill-founded, and would not bear the inferences deduced from them. In answer to the first he instanced the absolute necessity of the practice in cases of suspicion of treason, and urged the frequency of it in common cases of felony, where magistrates without scruple, search the persons and lodgings of highwaymen, footpads, &c. many of whom have been convicted and suffered, in consequence of evidence so obtained; without any idea prevailing that they had been illegally treated; he wished therefore to know on what principle of law the practice was objected to, quoting lord Coke in support of it.—In reply to the second, he declared it was the newest kind of objection that ever was made in a court —the changing the crime alleged from a capi-

jury in behalf of the defendant, and then proceeded to examine his witnesses as follows:]

FOR THE DEFENDANT.

Francis Richardson, esq. sworn.

Examined by Mr. *Solicitor General*.

Are you an adjutant in the guards?—Yes, in the first battalion, in the first regiment.

Were you, in the month of October last, stationed in the Tower?—I was.

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tal offence to a misdemeanour, was surely a mark rather of the magistrate's lenity than his rigour.—With regard to the refusing bail, it had not been proved that any bail was legally tendered. The law required in all bailable offences, that the names and descriptions of the bail should be made known to the magistrates; it had not been pretended that a hint even was offered, who the persons were that were to be the bail; and finally in regard to the commitment to safe and close custody, he knew no other legal custody; the words were the usual and formal words of warrants, from the day that warrants were first translated into English; they were a literal and close translation of the old Latin words 'in salvâ et arctâ custodiâ.'

"Mr. Attorney General took great pains to exculpate Mr. Richardson from censure, shewing that he would have been guilty of the most contemptible and infamous conduct, had he borne the king's commission, and yet concealed his knowledge of a plan to insult and endanger his person, (a plan which, however apparently absurd, was nevertheless practicable!) and explaining how far a man was bound by any information given him in confidence, asserting, that when the information went beyond a certain legal point, it was no less impudent and daring in the person giving it to expect confidential secrecy, than it was unwarrantable and dangerous for the party to whom it was imparted to conceal it. Upon this ground he justified Mr. Richardson; whom he described as a man deserving the thanks of the public, for having so well discharged his duty, in a case of a very nice and important nature.

"In observing upon the evidence he animadverted with much severity on Mr. Reynolds, who, he said, had behaved to lord Rochford with great impertinence, and had very eloquently informed the Court how rudely he had dealt with a poor secretary of state and a poor adjutant of the guards, to whom he had offered his law advice *gratis*, which they in a most insulting manner had neglected to follow.

"After a very long and powerful speech, enforcing the fullness of his client's justification, and urging repeatedly that there was clearly no malice in what lord Rochford had done, but that the whole of his conduct arose from the necessary discharge of his official duty; he concluded with expressing his hopes that the jury would confine their thoughts to the matters specifically stated and laid down, and not have recourse to their imaginations; that acting thus conformably to law, justice and equity, he doubted not, as honest and conscientious men, they would lay their hands on their breasts and give a verdict for the defendant." Morn. Chron.

Please to look at that paper. Is that the information that you made upon oath before my lord Rochford?—Yes, here is my handwriting.

You were sworn to it?—I was then.

[It is read.]

"The voluntary INFORMATION of FRANCIS RICHARDSON, Adjutant to the first battalion of the first regiment of foot-guards, sworn before me, one of his Majesty's principal Secretaries of State, this day, the 20th of October, 1775; who says,

"That he the said Francis Richardson did, on Thursday the 19th of this month, on or about the hour of 12 o'clock at noon, meet Stephen Sayre, esq.; banker in Oxford-road, at the Pensylvania coffee-house, in Birchin-lane, when he told the said informant that he intended to have wrote to him, and that he wished to have ten minutes' conversation with him; whereupon they both went up stairs into a private room in the said house, and after the said informant had shut the door, at the desire of the said Stephen Sayre, he the said Stephen Sayre said, he hoped, as they had been long friends and countrymen, that the informant would not betray the confidence he was going to put in him; and upon the informant's assuring him he would not, the said Stephen Sayre enquired what power the informant had in the Tower?---Whether he could keep the gates open?---Whether he could not fix what number of centinels he thought proper?---Whether all orders did not go through him, as adjutant?---Who had the care and keys of the magazine and arsenal?---What situation the men were in, in respect to ammunition?---If by presents or promises, the informant had it in his power to make the soldiers stand neuter, in case there should be occasion?---The said Stephen Sayre then said, if there was not a change in government, both countries would be ruined; and that there was a scheme laid in which the informant might be instrumental in saving this country and America from ruin, if he had but resolution and good will. The informant replied, whenever he was called upon, he hoped he should not prove deficient in either. The informant then desired the said Stephen Sayre to explain himself, which he did, by saying, the people were determined to take the government into their own hands, and the time was near at hand: that they had a set of fine fellows, who were only waiting the opportunity: and that as to tearing to pieces lord Mansfield, lord North, lord Bute, &c. it would be of no material consequence; they must strike at the fountain-head: to which the informant made answer, You don't mean the king! The abovementioned Stephen Sayre re-

plied, Yes: that the king was at the bottom of all; for he believed lord North was heartily sick of the business: he then went on, and said, The design was, to seize the king going to the House of Lords on the 26th instant, and to convey his majesty to the Tower. The informant then asked, whether they intended to destroy the king? The abovesaid Stephen Sayre answered, No, but to send him to his German dominions; and that major Labillier, or a major of a name like that, had been employed, for some time past, to distribute money to the soldiers of the foot guards, and had already distributed 1,500*l.* for the purpose of alienating their affections from government, and to prepare them for a revolt: and that the abovenamed Stephen Sayre said, he wished the informant would instil into the first battalion of foot-guards a notion, that, if a change of government should take place, their pay should be raised, in proportion to the dearness of provisions; and that he would send the informant, in a day or two, 10 or 20*l.* for the purpose of making himself popular with the soldiers; and that if the informant could not bring them over to fall in with the said Stephen Sayre's scheme, he would at least prevail on them to stand neuter: that the informant was to be in the way on the morning of the 26th instant, and on a signal given, which would be communicated to him in due time, that the king was brought to the Tower, the informant was to let him in, and the populace with him, then to see the gates shut, and to put them in possession of the magazines and arsenals, and to fix trusty centinels at the governor's door, and when they had got the king in their possession, they were to issue proclamations under the king's sign manual; to call a new council; to annul the authority of all officers, civil and military, of which the said Stephen Sayre's frends should disapprove; that the lord mayor was at the same time to order the sheriffs to raise the posse comitatus to keep the peace near the Tower; and that proper constables would likewise be ordered. The aforesaid Stephen Sayre enquired particularly into the situation of the magazine at St. James's guard, and the state of that in Hyde Park, and finally concluded by saying, The attempt would entirely depend on their opinion of the temper of the people of that day. FRANCIS RICHARDSON."

"Sworn to, and signed by me,* the day and year above written. ROCHFORD."

Did any body go with you to lord Rochford, or did you go by yourself?—I went with general Craig.

Had you communicated to general Craig any thing of this matter?—Yes, the greater part of it: general Craig declined being privy to the name of the person of whom I received this.

Did he desire you to go to lord Rochford?—Yes: he desired me to go along with him.

General Craig is your commanding officer?—My immediate commanding officer.

Cross-examined by Mr. Serjeant *Adair.*

How long have you been acquainted with Mr. Sayre?—Between six and seven years.

There has been a considerable degree of freedom between you?—In the common acceptation of the word there was the appearance of intimacy; we never visited at our respective houses; there was an appearance of familiarity, confidence and freedom.

Have you never visited Mr. Sayre during that time?—I never visited him at his house that I recollect: I remember about six years ago that I met him at the house of a Mr. De Burgh's, but never visited him at his own house, as I know.

Was there any correspondence kept up by letter or otherwise between you and Mr. Sayre during that time?—Not that I recollect.

You mean then to say you were intimate with Mr. Sayre during these six or seven years, because you have met with him in the street and conversed with him, and once met with him at a Mr. De Burgh's?—We met as countrymen; I was always very happy to see Mr. Sayre, and he me.

Mr. Serj. *Davy.* What countrymen are ye—We were both born in America.

Mr. Serj. *Adair.* Then you conceive the common acceptation of the word 'intimate' is applied to people who for six or seven years together never visit each other or keep up any correspondence, but who speak when they meet in the street?—We were not intimate. I must appeal to your lordship whether gentlemen are to use such treatment as this!

L. C. J. *De Grey.* Upon being asked, he explains what his idea is, there is no imputation lies upon the witness; according to the common idea of words I should have thought they did not import an intimacy, but he explains what he means.

However, that was the state of your acquaintance and intimacy with Mr. Sayre that you have given an account of?—Yes.

Do you apprehend it likely that a person so acquainted and with such a degree of intimacy, whatever it was that you would describe, would place a confidence in you in the manner you have mentioned?—It is likely, for two reasons: in the first place I have always expressed an approbation of the Americans and their cause; I hope, Sir, you approve of that: the other is, that no other officer in the Tower could have served him in that manner but myself.

Then you were a likely person to have served him in that manner, you conceive?—Apparently I was.

What time of day did this conversation pass at the coffee-house?—At twelve o'clock.

Did you meet accidentally or by appointment?—Accidentally.

* This appears to afford another instance of lord Rochford's official incorrectness of language.

Who began the conversation?—Mr. Sayre.

In the coffee-house?—Yes, he was writing a letter when I came up to him.

Were any persons present or within hearing when Mr. Sayre began that conversation?—I don't recollect any body in particular.

Did you continue to converse any time in the coffee-house?—Mr. Sayre was writing a letter; as soon as he had finished it he said he intended to have wrote to me, and wanted to speak to me,

At whose instance was it that you withdrew into another room?—Mr. Sayre's request.

I think you say he locked the door upon the occasion?—Locked or shut the door.

In the conversation with Mr. Sayre you have mentioned that a major Labellier, or some person of a name like that, Mr. Sayre told you had distributed a sum of money among the guards. Did that pass?—Yes.

Did you know any thing of that person that was named?—I never heard of such a name before.

Did you, in consequence of the conversation that had passed between you and Mr. Sayre at any time before your information at lord Rochford's, make any enquiry concerning that person?—I did not.

Did you make any enquiry among the soldiers of the guards whether any such thing had passed as was supposed to have passed in that conversation?—No, I went immediately to see the general.

This passed on the 20th of October?—I believe on the 19th.

When did you give the information to lord Rochford?—I went immediately to look for the general; I believe it might be about three o'clock that day.

Did you go to lord Rochford the same day?—The same day.

I think the information is not dated on that day: was the information given that day or the day following?—The day following.

At what time, as near as you can recollect?—I believe about ten or eleven in the forenoon.

You were at that time upon duty at the Tower?—Not while I was at lord Rochford's.

But it was your station?—Yes.

Did you at any time between the conversation with Mr. Sayre, and the time of your information given to lord Rochford, return to your duty at the Tower?—Yes, I lay in the Tower that night.

You are, I think, an officer in the first regiment of guards?—Yes.

It was that regiment, I think, which was mentioned in the conversation between you and Mr. Sayre?—He spoke of all in general: he spoke of the first regiment then; of that which was immediately under my care as adjutant.

Money, he said, had been distributed among the soldiers of the foot-guards?—There are seven battalions; I am adjutant to the first battalion of the first regiment.

Did you make any enquiry into that matter?—No; because I was desired by my lord Rochford not to make any enquiry about the matter, for fear of discovering the matter: I suppose you mean to confine me to that particular day, I was desired to mention it to no person whatever.

L. C. J. *De Grey.* Fifteen hundred pounds is not said to be given to the first battalion in the Tower; but among the foot-guards?—Yes.

When this particular was mentioned to you of money being actually distributed among the guards, you did not think it necessary, before you gave an information upon that subject, to make any enquiry at all into the truth of that fact?—No, because I thought it would come out of course.

Nor is the person mentioned in that information?—No, I thought it not necessary.

In fact you did not do it?—No.

Did Mr. Sayre send you the 10 or 20*l.* you spoke of?—No, he promised to meet me: I staid till three o'clock at my own apartments: that was the Saturday, I believe, following; but he did not come: that money was to be distributed among particular persons, the serjeants of the guards: I was going to look for Mr. Sayre; I met Mr. Sayre in a coach with Mr. Reynolds.

L. C. J. *De Grey.* Before he went to the Tower?—Yes.

Did you stop the coach?—I did.

Did you desire to speak to Mr. Sayre?—I did.

For what purpose?—To get the money: I thought it my duty to get the money: I was desired to see Mr. Sayre upon the subject; to encourage him in the attempt; to get out what I could from him: I looked upon it to be my duty; and I would do it again: immediately upon coming to the coach, Mr. Sayre offered to stop; and he said he was going to———

L. C. J. *De Grey.* Before this, had you settled any matters with Mr. Sayre about receiving the money?—At first he said he would come with it to me: afterwards he said it might create some suspicion, and he would send it by some trusty person in a letter.

Then there was no appointment of a meeting for that purpose?—No.

Did Mr. Sayre express a readiness of speaking to you then?—He offered to stop the coach and take me in.

Did he ask you to come into the coach?—I cannot recollect; but I believe he did: somebody asked me to come in; I said I would walk: it was just by the court Mr. Reynolds lived in; Salisbury-court, I believe it is; and Mr. Sayre said he was going to stop in that court. I followed the coach for the purpose of speaking to him.

Did you go to Mr. Reynolds's house?—Yes, Mr. Reynolds was there; and a little man in black got out of the coach: they led me into a little room on the left hand.

Did any thing particular pass then?—Yes,

I spoke as I had been desired: I told Mr. Sayre I had considered the matter very attentively, and I thought it was feasible.

Who was present there?—Nobody but Mr. Sayre and I.

At whose desire did you withdraw into a private room?—Mr. Reynolds's: they opened the door; Mr. Sayre went into the room, and I followed him: there was a servant-maid cleaning the hearth: she went out and left us together.

Without any desire expressed by you to have any private conversation?—Yes.

How long did you continue with Mr. Sayre at that time?—I believe a quarter of an hour.

Did he give you any money then?—He pulled out his purse, and said he had but half a guinea and a key; but, said he, I will meet you at the New England coffee-house at one o'clock, and will give it you then; you will give me your note of hand, and it will look like money:—but there was one thing that I had forgot.—When we were in the room, Mr. Sayre asked me whom I had seen after I parted from him? I said, general Craig: he looked me steadily in the countenance, and said, Did you see nobody else? I said, No.

Did Mr. Sayre meet you pursuant to that appointment?—He did not.

Did any thing farther pass between you and Mr. Sayre?—I do not recollect any thing; I went there at one, and I waited there till near three: I met a gentleman who was very near the place, that I mentioned the circumstance to before I informed general Craig, captain Nugent.*

Did it never occur to you, or was it never suggested by any body, that it would be proper for you to enquire into the truth of that fact with respect to the money that was said to be distributed among the guards?—I never thought it necessary, I thought this affair was not confined to Mr. Sayre: Mr. Sayre mentioned some great persons as parties concerned in it: I could not suppose 1,500*l.* could be distributed and it not be known.

Though you were not very intimate with Mr. Sayre, you knew him for six or seven years; did you ever meet with any thing in your acquaintance with him during that time that led you to conceive that he was out of his senses?—No, I thought him a man of moderate parts.

As other men are?—Yes.

General *Craig* sworn:

Examined by Mr. Serj. *Davy*.

I believe you belong to the first battalion of the first regiment of foot guards?—I have the honour to be lieutenant-colonel of the first regiment.

Mr. Richardson is adjutant?—Yes, there are three.

You are of course his superior officer?—Yes.

Do you remember his coming to you and informing you of any conversation he had had with Mr. Sayre?—Yes.

Of what nature was that conversation?—He came to me in the orderly-room of the first regiment of foot guards. I was busy there, but he was very importunate to speak to me; saying, he had something of very great consequence that he must immediately communicate to me. I went with him out of the orderly-room into a little back court that is there, that we might be alone: when I came there, he said he had had a very extraordinary conversation held with him that morning, of matters of the greatest consequence to the nation; that there had been money distributed among the soldiers of the guards, to the amount, I think he said, of 1,500*l.* in order to suborn them from their duty and allegiance: that there were intentions of seizing the King's person as he went to the House of Lords on the opening the session of parliament, with many other particulars; but this was the chief of it. He said farther, that there was no particular design against his Majesty's life, but that he was to be conducted, some time after being seized and carried to the Tower, to his German dominions; with many other particulars, as I said before. All this, you may imagine, struck and astonished me. I repeatedly questioned Mr. Richardson as to the certainty of these facts; he persisted in them: I then asked him whether he had communicated this conversation that he had told me of, that he had just had in the city, to any one else: he told me he had, to captain Nugent. Captain Nugent was then on the Tilt-yard guard: he said, that while he was waiting for me, which had been about an hour, or half an hour, or something of that sort, he had met with captain Nugent, and, upon telling him part of that conversation which he had held in the city, he immediately exclaimed, 'May be they had a mind to tamper with me, 'too;' or words to that purport.

L. C. J. *De Grey*. We cannot receive general Craig's account of what captain Nugent said, or of what adjutant Richardson said captain Nugent said.

Did Mr. Richardson tell you where it was that he had seen Mr. Sayre, and held this extraordinary conversation?—He told me it was in the city; I do not remember that he mentioned the place. I desired not to know the name: he came to me officially as his commanding officer: I desired him not to tell me the name, wishing not to know particulars.

What advice did you give him upon the whole, or did you take him any where?—I thought it then my duty, as it was a matter of such importance, and he was so confident and determined in the facts he had related to me, to carry him before the secretary of state; in consequence of which I did carry him to my

* I believe that shortly after this transaction, captain Nugent was dismissed from the guards; and that in the year 1782, during the administration of lord Shelburne, he was created a baronet of Ireland.

lord Rochford's office: he was admitted to my lord Rochford's presence; I then quitted the room, and was not present at his examination.

Cross-examined by Mr. *Alleyne.*

Were you at lord Rochford's when Mr. Sayre was committed?---I might be in the outer office, but I knew nothing of it.

Do you know the time when Mr. Sayre withdrew?---I cannot speak positive when it was.

Mr. *Wallace.* Mr. Reynolds informs your lordship, that he came into the room when Mr. Sayre was at lord Rochford's office, and told Mr. Sayre that if he answered any questions, or signed any paper, he would instantly leave the room. I wish to shew your lordship what Mr. Sayre's examination was, before he was stopped by Mr. Reynolds.

[The Examination produced.]

Charles Brietzcké sworn:

You belong to the secretary of state's office?---Yes.

Is that your hand-writing?---Yes; it is what Mr. Sayre said before lord Rochford: this is the true purport of what he said: lord Rochford put every question before I wrote it down, to see if it was proper, and understood. The questions were put, and his answers; and before I wrote them down, Mr. Sayre admitted, I believe, that they were the sense of his answers.

[The Examination read.]

"The Examination of Stephen Sayre, esq. taken before me, William Henry, Earl of Rochford, this 23d day of October, 1775.

"This examinant saith, That, so far as relates to the seeing Mr. Richardson at the Pensylvania coffee-house, upon the 19th instant, as he believes, is very true: and that they went up stairs, is also true; their conversation turned chiefly upon the contest now depending in America: the conversation began by Mr. Richardson's apologising for being an officer in the guards, instead of being now in the service of America. What made this apology the more necessary, he having met him in the streets some months before, when he declared to him, if he did not succeed in coming into the guards again, he meant to proceed instantly to America, and to go into the service of that country: that he does not choose to trust his memory with Mr. Reynolds being present at this conversation; but that there was a person present; Mr. Richardson proceeded in saying, That he should be better qualified for that service, having just been appointed an adjutant in the guards. The conversation then took a turn upon the mischiefs which must arise, in consequence of the contest now with America: that he, the examinant, acknowledges that he declared to him, that he thought nothing would save both countries but a total change of both men and measures: that he was afraid there was not spirit enough left in this country, to bring such a measure about; but that, as to any plan or intention of seizing the king's person, he is totally and entirely ignorant thereof.

"Taken before me, the day and year above written, Rochford."

Cross-examined by Mr. *Alleyne.*

You were in company with my lord Rochford and Mr. Sayre, all the while they were together, were you not?—During the time the examination was taken down by me in writing.

Were you there when Mr. Reynolds came?—I was in the room when Mr. Reynolds intruded himself into that room.

How long after did you continue there?—Till the examination was closed.

Were you in the room when Mr. Sayre and Mr. Reynolds were directed to withdraw into another room?—They went into another room; but I cannot take upon me to say they were directed: I was in the room before the examination was taken, and I remained till my lord Rochford signed it.

Then you were in the room, in plain English, when Mr. Sayre and Mr. Reynolds withdrew?—Yes.

How long after that withdrawment was it before the warrant for the commitment was signed?—It might be half an hour, or more, or less; I cannot take upon me to say.

What was done after Mr. Sayre and Mr. Reynolds withdrew; did not lord Rochford immediately give orders for having the warrant made out for committing him?—I heard orders given for to make out the warrant.

Immediately, or within a few minutes?—I understood that orders were given: I am not the clerk that made out the warrant.

You heard Mr. Reynolds talk something about bail, did not you?—I cannot charge my memory, I wish I could, to that matter.

It is unfortunate that your memory can recollect all on one side and nothing on the other!—I shall give answers to every question in my power, but I will not speak to any thing I do not know.

Did you hear any thing of bail being offered?—I cannot say that I did; and, to the best of my knowledge and belief, there was not any thing said about bail, that my lord Rochford said, in my hearing.

I did not ask you what lord Rochford said.—Or any body else.

L. C. J. *De Grey.* Was sir John Fielding there at that time?—He was.

Mr. Serj. *Davy.* My lord, it is admitted, that matter is pleaded, that there is such an Habeas Corpus and Recognizance.

Mr. Serj. *Adair.* That Recognizance was afterwards discharged for want of prosecution.

The evidence for the defendant being closed, Mr. Serjeant Glynn made a reply in behalf of the plaintiff; after which his lordship summed up the evidence to the jury, who withdrew for

about an hour, when they returned into court with a verdict for the plaintiff,* with 1,000*l.* damages, subject to the opinion of the Court of Common Pleas upon the following Questions:

* "The Recorder replied to what had been urged by the Attorney General, and with great spirit insisted upon the hard treatment his client had met with, and the right he had to expect large damages. Allowing even that a secretary of state was warranted to act as a justice of the peace, he denied that lord Rochford had acted with that impartiality, that regard for the liberty of the subject, that view to an equal distribution of justice, which an ordinary justice was bound to observe. The mode of apprehending Mr. Sayre, the issuing a warrant to seize his papers, added to the illegality of commiting him to close custody for a misdemeanour only, after sufficient bail had been offered, were incontestible proofs of his position. It was evident, he said, that lord Rochford never credited the absurd information: if he did, why did he alter the offence alleged by committing only for treasonable practices? And why had not the prosecution been pursued? It was most clear from the dropping all further proceedings, that lord Rochford did not now believe, and he appealed to the court if there was one man present who gave the information the least credit. An ordinary justice, in such a case, would at least have examined into the foundation of the charge, ere he proceeded to inforce the rigour of the law. He would not, on the single evidence of a most improbable story, have gone so far as to commit to close custody. He would have endeavoured to procure some information, especially where it could so very easily have been come at as in the present case. Had his lordship sent to the lord mayor he would have thrown some light on the matter; so might the soldiery: but as an incontestible proof of the falsehood of the charge, even now at this distance of time, the information was altogether unsupported. It had been urged by the Attorney General that Mr. Sayre had been treated with all possible politeness: it was not to be supposed that lord Rochford would treat any man unpolitely, but it was extremely evident that Mr. Sayre had been treated with the full exertion of official rigour from the beginning to the end of the business. The issuing general warrants to seize papers had been more than once debated and settled: it had been argued in the case of Arthur Beardmore, and in the case of Mr. Wilkes. The Recorder professed himself against all seizures of papers, and he was persuaded that Mr. Reynolds had acted with great propriety at lord Rochford's, however harshly other men might treat his behaviour. He had given lord Rochford very proper advice: the crown lawyers were the persons who were best able to have directed his lordship in his proceedings: they had doubtless since been consulted, and had very wisely advised the ministry to drop the affair. The Recorder spoke for a considerable time, and with great warmth inforced his client's case.

"The Chief Justice prefaced his recapitulation of the evidence with observing that the present was a cause of the utmost importance, as it involved in it those two very material points, the safety of goverument, and the safety and security of the subject. The person of the king, he remarked, was so intimately connected with the interest of the people, that the law regarded it with an eye of jealousy, and had made it high treason only to imagine his death or dethronement. He then commenced a learned inquiry into the doctrine of treasons, shewing what constituted high treason, overt-acts of high treason, and misprision of treason; strengthening his own arguments with quotations from judge Foster and the ablest law-writers on the subject; and after declaring how the law stood in these respects, compared it with the fact in issue, explaining to the jury how far it applied to the case before them. The charge made against Mr. Sayre by Mr. Richardson, sir William observed, if true, wanted only one circumstance to corroborate it and make it high treason. If any one of the matters referred to in the alleged conversation had been proved by a second witness, the attorney general might have prosecuted to conviction: as the case stood, therefore, it remained for the jury to consider, whether the conduct of lord Rochford had been that incumbent on a magistrate on such an occasion. He did not himself see the necessity of a secretary of state's inquiring with scrupulous nicety into the truth of a charge of high treason, before he proceeded to secure the suspected traitor. Suspicion was a sufficient cover for a magistrate's acting in cases of felony: in cases of treason, therefore, he conceived the same rule would hold. With regard to the improbability of the charge, it ought to be remembered how exceedingly improbable and apparently absurd all attempts to kill or dethrone princes or alter governments ever had been. In the case of Henry the 4th of France, the people universally discredited the report of an attempt to murder their monarch; the consequence was, they lost their king by it, he being killed in the public streets of the city of Paris at noonday, surrounded by his retinue and court. How improbable also were the attempts reported to have been designed on William the 3d and Charles the 2nd of England! It seemed, therefore, to be a main point for the jury's consideration, whether lord Rochford had acted as a magistrate ought to do in such a case as that before them, and also whether Mr. Reynolds's declaration at lord Rochford's amounted to a legal tender of bail. After instancing the material parts of the evidence, sir William left the whole to the consideration of the jury, who half an hour after three went out of court and staid about two hours; on their return they found a verdict for the plaintiff with 1,000*l.* damages." Morn. Chron.

§

1. Whether the offer and refusal of bail was admissible evidence under the issues joined upon the special pleas? And if admissible,

2. Whether the evidence given was a sufficient proof of an offer and refusal of bail, to make the subsequent imprisonment illegal?

The following is Mr. Justice Blackstone's Report of the proceedings in C. B.:

Mich. Term, 18 G. 3.

In trespass and false imprisonment, the plaintiff declared,

1st. On a breach and entry of his house on the 23d of October, 1775, and making a disturbance there for twelve hours, breaking open his cabinets and escritoires, and taking away his goods and papers, and for an assault on his person, and imprisoning him ten days, without any lawful or reasonable cause. 2nd. On a general count for an assault and false imprisonment; and laid his damages at 30,000*l.*

The defendant pleaded, 1st. Not Guilty, on which issue was joined.

2nd. He justified, as to entering the house and taking the goods, and imprisoning the plaintiff for part of the time laid in the first count, as being a privy counsellor and secretary of state, and having received an information upon oath, on the 20th October, 1775, from one captain Francis Richardson, who on the 19th was an adjutant in the guards, then on duty in the Tower of London, and who deposed, as stated at length in the plea, but substantially, "That the plaintiff had tampered with him to betray his trust as an officer on guard at the Tower, and to influence the minds of the soldiery, by a promise of double pay, to assist in a revolt and change of government, which he declared the people were determined to take into their own hands; and that there was a design to seize the king when going to the House of Lords on the 26th of October, and convey him to the Tower, and from thence send him to his German dominions, and that 1,500*l.* had been already distributed among the guards, to alienate their affections. He also promised to send the informant money, to make himself popular among the soldiers; and desired when the king was seized he would so order matters as to let him and the populace into the Tower, and put him in possession of the magazines, &c. That their intent was to compel the king to issue proclamations to call a new privy council, and to displace such officers civil and military as their party should disapprove: and that the lord mayor (Wilkes) was to order the sheriffs (Hayley and Newnham) to raise the *posse comitatus*, and keep the peace near the Tower; and also to order proper constables." Upon which the defendant issued his warrant to apprehend the plaintiff for high treason, and seize his papers; and delivered the same, on the 23d of October, to two of the king's messengers; who taking with them a constable entered the plaintiff's house, and seized him and his papers, and brought him before the defendant, who, upon examination, committed the plaintiff to close custody in the Tower for treasonable practices; but returned him his papers. That the plaintiff was, on the 28th of October, 1775, upon a Habeas Corpus, admitted to bail by lord Mansfield, chief justice of the King's-bench, and set at liberty, 'Que 'sunt eadem,' &c.

3d. The defendant further pleaded a like plea as to the second, with respect to entering the house, taking away the defendant's papers, and imprisoning him.

4th. There was also a fourth plea of the same purport to the second count of the declaration.

The plaintiff replies to all the special pleas, 'De injuriâ suâ propriâ absque tali causâ,' &c. and thereupon issues were joined.

This case was argued last Easter term, by Adair for the plaintiff, and Walker for the defendant; and when the Court was ready to give judgment thereon in Trinity term, it was, at the pressing instance of the plaintiff's counsel, adjourned for another argument to this term: when it was again argued by Glynn for the plaintiff, and Davy for the defendant.

For the plaintiff, it was urged, that under the replication of 'De injuriâ suâ propriâ,' &c. it is sufficient to shew any fact that is not consistent with the justification. And though a new trespass cannot be given in evidence under that issue, it may be shewn that the original trespass was unjustifiable. That though the original caption might be justified by the matter contained in the plea, yet the subsequent detainer might be shewn to be unjustifiable by the tender and refusal of bail. A lawful act may be turned into a trespass by the subsequent misbehaviour of the party; as by abusing a distress; Salk. 221. Gargrave and Smith. Riding an impounded horse. Yelv. 96. See also the Six Carpenters' case, 8 Co. 146, and Withers and Hendley, Cro. Jac. 379, where it is held, that an unlawful detainer after a legal taking is a fresh and illegal caption. They said, the second question was too clear to make a doubt. The tender could only be conditional, as it was not known for what crime the plaintiff would be committed: and immediately after the tender, he is committed to close custody, which prevented him from then offering bail.

And per Gould, justice. It is held in Long Quinto, 13, that in bailable cases it is the duty of the magistrates in the first place to demand sureties.

For the defendant it was argued, that the evidence of tender and refusal of bail was not admissible, because, 1st. It is not within the issue, which is only on the truth of the plea, and that the plea does not mention this fact. A general replication (like the present) only denies the plea. A special replication confesses it, but alleges new matter; this therefore, being new matter, ought to have been replied. In King and Phippard, Carth. 280, in action of assault and battery. A plea 'son assault

'demesne.' Replication that the defendant entered the plaintiff's house and misbehaved, whereupon he gently put him out. Held that the replication was good without a traverse, *absque hoc*, for it ought to be a special replication, because this new matter could not be given in evidence on the general replication, 'De injuriâ suâ propriâ, &c.' Whatever confesses and avoids, as the tender of bail does in this case, must be suggested on the record, that the adverse party may be able to meet it in evidence. It is collateral matter, and out of the issue of the general traverse, which only goes to the facts of the plea. Therefore all subsequent misbehaviours, as abuses of distresses, &c. are in the regular course of pleading, constantly replied, and cannot be given in evidence. Besides,

2. This evidence does not support the action, which is for a positive fact. This is only proof of a negative, a mere non-feasance. See the Six Carpenters' case. Resolution the second. Ld. Raym. 1399.

As to the second question. Tender of bail must be like the tender of money. The bail must be produced in order to see that they are current. A promise, or offer of bail not present is not sufficient, nor is the subsequent commitment a refusal, if no bail were ready. The tender must be absolute, not conditional; Salmon and Percival, Cro. Car. 196. Sir W. Jones, 226. Smith and Hall, 2 Mod. 31. On an action of false imprisonment the defendant justified under a Latitat, the plaintiff replied (which shews the true course of pleading) a tender and refusal of bail. Held, that as the arrest was legal, case and not trespass lay for this refusal.

De Grey, chief justice. As the case is so clear on the first question, there is no necessity to give any opinion on the second.

It is a certain rule that no new matter, foreign to the issue joined, is admissible as evidence. The present replication 'De injuriâ 'suâ propriâ,' &c. is a general traverse of the whole of the plea. Whatever therefore goes to disprove the facts of the plea is proper evidence. What disproves none of them, is improper. This refusal of bail, if true, disproves nothing that is advanced in the plea, and therefore ought not to have been admitted.

Gould, justice, of the same opinion. There may be a partial traverse 'absque tali causâ,' and a general one. This is a general traverse, under which no new matter can be given in evidence. The case in Carthew, 280, is a strong authority for the defendant.

Blackstone, justice, of the same opinion. Nothing ought to be admitted in evidence, but what is material to the issue joined, either to prove or disprove it. Nothing is in issue upon a special plea, but what is directly traversed: and the general replication, 'De injuriâ suâ 'propriâ absque tali causâ,' traverses all the matters, and nothing but the matters contained in the plea. The plaintiff declares on a fact which at first view is a trespass. The defendant in his plea acknowledges that fact, but states such new circumstances as (if true) amount to a justification. If the plaintiff can suggest additional new matter, which shews that the defendant's assertions (though true) will not justify the trespass committed, he ought to reply that new matter in a special replication, that the defendant may demur or take issue upon it. But in the present case he has chosen to reply generally, the imprisonment I complain of is still an injury, because all that you have said in justification is absolutely untrue. The words 'De injuriâ suâ propriâ,' of his own wrong, are merely introductory; the traverse is contained in the words 'absque 'tali causâ,' without the cause alleged by the defendant. Whatever therefore goes to disprove that cause is admissible evidence, but nothing else.

Nares, justice, of the same opinion. It was held by all the judges on a reference from this Court in the case of Selman and Courtney, about the 13 or 14 Geo. 2, that where a defence confesses and avoids, it cannot be given in evidence on the general issue. See also 3 Hen. 7, pl. 8. Cro. Jac. 147.

Judgment for the defendant.

See the Case of Wilkes, on a Habeas Corpus, vol. 19, p. 982. Also that of Leach against the King's Messengers, for False Imprisonment, vol. 19, p. 1002, and the Case of Seizure of Papers, p. 1030.

In the Letter from Candor to the Public Advertiser, pp. 15, 16, it is asserted, that "Mr. Pratt never was consulted at all, and but once even spoken to, about any secretary's warrant; and then as Mr. Pitt avowed in a certain august assembly, 'his friend the Attorney told him the warrant would be illegal, and if he issued it he must take the consequence, nevertheless preferring the general safety in time of war and public danger to every personal consideration, he run the risk (as he would that of his head had that been the forfeit upon the like motive) and did an extraordinary act upon a suspicious foreigner just come from France.'"

561. The Trial of JAMES HILL otherwise JAMES HINDE, otherwise JAMES ACTZEN or AITKEN,* (known also by the name of John the Painter) for feloniously, wilfully, and maliciously setting Fire to the Rope House in his Majesty's Dock-Yard, at Portsmouth: had at the Assizes holden at Winchester, Before the Hon. Sir William Henry Ashhurst, knt. one of the Justices of his Majesty's Court of King's Bench, and the Hon. Sir Beaumont Hotham, knt. one of the Barons of his Majesty's Court of Exchequer, March 6: 17 GEORGE III. A. D. 1777. [Taken in Short-Hand by Joseph Gurney; and published by Permission of the Judges.]

THE GRAND JURY.

Viscount Palmerston	P. Taylor, esq.
Rt. hon. Hans Stanley	C. Saxton, esq.
Sir R. Worsley, bart.	John Pollen, esq.
Sir H. P. St. John, knt.	T. Gatehouse, esq.
Sir W. Benett, knt.	T. Sidney, esq.
Sir C. Ogle, knt.	J. Amyatt, esq.
H. Penton, esq.	Tho. South, esq.
J. Iremonger, esq.	H. Harmood, esq.
T. S. Jolliffe, esq.	W. Harris, esq.
J. Worsley, esq.	Richard Bargus, esq.
C. Spooner, esq.	Philip Dehany, esq.
T. Ridge, esq.	

INDICTMENT.

Southampton,

THE jurors for our lord the king, upon their oath, present that James Hill, otherwise James Hinde, otherwise James Actzen, late of Portsea, in the county of Southampton, labourer, on the 7th day of December, in the 17th year of the reign of our sovereign lord George the 3d, now king of Great Britain, &c. with force and arms at Portsea aforesaid, in the county aforesaid, twenty tons weight of hemp of the value of 100*l.*; ten cable-ropes, each thereof being in length one hundred fathoms, and in circumference three inches, and of the value of 80*l.*; and six tons weight of cordage, of the value of 200*l.*; the said hemp, cable-ropes, and cordage, then and there, being naval stores of our said lord the king, and then placed and deposited in a certain building in the dock-yard of our said lord the king there situate, called the Rope-house, feloniously, wilfully, and maliciously, did set on fire and burn, and cause and procure to be set on fire and burnt, against the form of the statute in such case lately made and provided, and against the peace of our said lord the king, his crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said James Hill, otherwise James Hinde, otherwise James Actzen, on the said 7th day of December, in the year aforesaid, with force and arms at Portsea aforesaid, in the county aforesaid, a certain building erected in the dock-yard of our said lord the king there situate, called the Rope-house, feloniously, wilfully and maliciously, did set on fire, and cause and procure to be set on fire, against the form of the statute in such case lately made and provided, and against the peace of our said lord the king, his crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said James Hill, otherwise James Hinde, otherwise James Actzen, on the said 7th day of December, in the year aforesaid, with force and arms at Portsea aforesaid, in the county aforesaid, a certain building of our said lord the king there situate, in which great quantities of naval stores, that is to say, twenty tons weight of hemp, ten cable-ropes, and six tons weight of cordage, of our said lord the king, were then placed and deposited, feloniously, wilfully, and maliciously, did set on fire, and cause and procure to be set on fire, against the form of the statute in such case lately made and provided, and against the peace of our said lord the king, his crown and dignity.

The Prisoner was arraigned upon the above Indictment, to which he pleaded Not Guilty, when the following persons were sworn:

THE PETIT JURY.

Henry Lucas, of the Soke.
Richard Long of the same.
Robert Mondy, of Thruxton.
John Cole, of Upelatford.
William Cole, of Longstock.
Richard Vokes, of Kingsworthy.
Rechab Thorne, of Itchin Stoke.
Samuel Maunder, of Hyde-street,
George Newsham, of Wickham,
John Kent, of Fareham.
John Berry, of the same.
Charles Cobb, of Gosport,

* Some account of this man is given in the Annual Register for 1777, Hist. of Europe, p. 28.

Counsel for the Crown.—Mr. Serj. Davy, Mr. Mansfield, Mr. Missing, Mr. Buller, Mr. Fielding.

Mr. *Fielding.* May it please your lordship, and you gentlemen of the jury, this is an indictment against the prisoner at the bar for a crime of so atrocious and uncommon a nature, as to render it impossible to affix any epithet to the crime descriptive of its enormity. This is, gentlemen, the first instance of its existence, and I hope in God it will be the last. The indictment, you have perceived already, turns upon three counts: the prisoner at the bar is first charged for setting fire to a quantity of hemp and ropes particularly specified; the second count is for setting fire to a certain building erected in the dock-yard, called the Rope-house; the third count is for firing his majesty's naval stores. Gentlemen, the matter will be more fully opened to you by the learned and experienced gentleman who leads this business, and I doubt not but your verdict will be satisfactory to your country.

Mr. Serj. *Davy.* May it please your lordship, and you gentlemen of the jury, I am of counsel in this case for the king in the prosecution of the prisoner at the bar, who is described by the name of James Hill, otherwise James Hinde, otherwise James Actzen, for setting fire to the Rope-house at Portsmouth Dock, belonging to the crown, the place where cordage is made to supply the king's navy, and which crime is constituted a capital felony by an act of parliament* made in the 12th year of his present majesty, till when it had not entered the imagination of man that such a crime could be committed at all. It will be unnecessary for me to expatiate upon the nature of the offence; that has nothing to do with the prisoner at the bar, any more than as he was an agent in the commission of it; and it will be necessary for me, therefore, to mention to you only those particulars that we have to lay before you in evidence, by which to affix the crime upon the prisoner, and to submit to you upon the consideration of those facts, whether he is or is not guilty of the charge in the indictment.

Upon the 7th of December in the afternoon (I believe about 4 o'clock) a dreadful fire broke out in the Rope-house at Portsmouth Dock, which I think was entirely consumed; it is an edifice of very great extent and magnitude indeed, (perhaps you may have seen it) and is consequently of great value, and it is exceeding lucky for the public that it did not happen at that time to contain so much cordage as at some times it had; that was not the only thing intended to be consumed that day, but fortunately that alone was consumed. Gentlemen, it is necessary to mention to you that the fire broke out at the easternmost part of the building; as soon as this misfortune had happened, all imaginable enquiry was made, in order to find out the cause of it, but all to no purpose, no fire or candle had been there, none ever is used there, particularly in the eastward part of the building; nobody could tell by what means it happened, and all enquiry was fruitless, and it would have passed as an accident, the causes of it unknown to this day, had it not been for a very extraordinary discovery, which was made upon the 15th of January, five or six weeks afterwards, which led to an enquiry, and which enquiry produced the most ample and clear discovery that ever was laid before a court of justice.

Upon the 15th of January, in the Hemp-house, which is another very large building, and which contains hemp of an infinite value belonging to the crown, there was discovered by Mr. Russell, and two others, in turning over some of the hemp for some purpose, something which shone a little and appeared bright; it appeared upon taking it up, that it was a sort of canister, which one at first sight imagined to be a tea canister; it was a machine which nobody could tell what to make of; upon looking a little further on the same spot, there was found a sort of box, containing combustibles of various kinds; there was oil of turpentine, there was hemp, there was tar; the moment that was seen, it struck them; and there could be no doubt in any mind upon that subject, that whoever placed that machine there, had an intention to set the place on fire; it was alarming, the men were struck with astonishment and wonder, looking at each other and at the instrument in their hands, and upon recollection determined to do the only thing fit to be done, to go to the Commissioner of the Dock and inform him of it, that the proper evidence of this matter might be laid before government, and fit enquiry made into it; then it was, for the first time, clear and apparent to every one, that the fire, which had happened on the 7th of December in the Rope-house, had not been by accident, but design. Now, gentlemen, let us endeavour to recollect every circumstance of that unhappy day—while it was thought to have been accident, nobody gave themselves the trouble to enquire or to recollect who they had seen, who was there, or who was not there; but from the instant that they resolved that this must have been the work of some devil, or that this was some human contrivance, that this was an act done on purpose, then it was fit to advert back to the subject, and to turn in their minds all the circumstances of that day; among others it occurred (for it was the talk of all the thousands in the Dock in five minutes, I suppose) that a man had been seen upon the day of the fire, lurking very much about the Hemp-house and about the Rope-house; then it occurred, that a man had been locked into the Rope-house, and with some difficulty had got out again; then it occurred, that the person upon whom suspicion then fell, from several vague indefinite cir-

* Stat. 12 G. 3. c. 24. See East's Pleas of the Crown, chap. 22, s. 38. For the law of Arson, see the preceding chapter of that work.

cumstances, was one whose sirname was not known, but who was called John, and who was by business a painter, who had worked for a Mr. Goulding, a painter at Titchfield, at a gentleman's house in the neighbourhood, and that was the origin of the name given to him of John the Painter.

John the Painter then being the man upon whom suspicions strongly fell from several circumstances, none of which concluded directly and positively against him, but all of which led to extreme strong suspicions; and the circumstances that caused these suspicions, were put together in the form of an information, and laid before a magistrate, in order, if possible, to have this John the Painter apprehended and further enquiry to be made. Upon this, there was an advertisement published in the papers, with a reward of 50*l.* for the apprehending John the Painter, describing him as well as they were able, and his person and his dress were very sufficiently described by the people who had seen him before.

A very worthy honourable gentleman, whom I have in my eye, and who is a very great friend to the public, and in the strict and true sense of the word, a patriot, having seen this advertisement, very actively stirred himself in the business, and was very much the cause of the apprehending of this John the Painter. John the Painter was accordingly taken up, I believe, in this county, at Odiham; and you will be pleased to mark, that there was then found upon him, a loaded pistol, a pistol tinder-box, some matches, and a bottle of oil of turpentine; he was examined, but he had too much sense, he was too much guarded to make any considerable discovery upon the examination that he underwent before a magistrate, and had it not been for a circumstance, which I am now going to mention to you, it would be an extremely difficult matter to affix the crime upon this person at the bar, however satisfied one might have been in one's own private judgment of his guilt.

It happened that there was one of the same business, a painter, who had been as the prisoner likewise had been, a painter in America; for this gentleman (the prisoner) has worked in America; he is an American, not by birth, for by birth he is a Scotchman, but he is an American, there he was settled, from thence he had lately come, and thither he meant to return. One of that business, and who likewise had worked as a painter in America, it was imagined might possibly know this John the Painter, and therefore he was sent for to sir John Fielding's in Bow-street, upon the 7th of February, in order to be shewn the prisoner, and to inform the magistrate whether he did or did not know him; that man being asked the question answered, that he did not know him, and to the best of his recollection had never seen him in all his life time; there was an end therefore, of that business; as that man had worked in the same place, for I think the prisoner had worked at Philadelphia too, it was very likely that he might have known him, but he happened not to know him at all; that person being dismissed from the room, where this examination, though I can hardly call it an examination, where this little matter had passed, and retiring to the other room where the prisoner was, the prisoner having been informed that this person, whose name is Baldwin, was an American and a painter, naturally enough beckoned to him and desired him to sit down by him. Baldwin sitting down by him, a conversation began between these people, touching their trade, and touching America and Philadelphia, that part of America in which they had lived, the distance of the place, a few names, and some general conversation; the place and occasion would not admit of a long conversation. The prisoner at the bar desired Baldwin to do him the favour of a visit at New Prison, Clerkenwell, where he was going, desired he would be so good as to call upon him, he should be glad to see him. Now, gentlemen, here let me tell you, for fear I should forget it, that all this was the mere fruit and offspring of accident; this Baldwin was not set upon him, was not desired to obtain any confession from him, nor desired to make any acquaintance with him; but an intimacy passed between these people for several days afterwards, before any body concerned for the prosecution knew any thing of it. It is fit the world should know that. In consequence of this short conversation that passed at sir John Fielding's, Baldwin went as desired by the prisoner, to visit him at Clerkenwell New Prison; when he was there, a conversation passed between them of no very great importance, it was only general, concerning persons and places, some of which both of them knew, some of which only one of them knew. The next day, Baldwin paid him another visit, for the prisoner liked his company, and it was a very lucky circumstance; it was indeed the providence of God that this man placed that fortunate (for fortunate I may call it for the public) confidence in this Baldwin, by which he afterwards made the ample discoveries that you will hear by and by. The prisoner told him after various visits, for he visited the prisoner at his own request almost every day, for, I believe, near three weeks from that time, and it was not for many days, not until a full discovery was made, that Baldwin communicated the matter to any body, and when he did, he communicated it to an honourable person not at all connected with government; he told him, among other things (I will descend to the particulars by and by, for a very striking reason which you will go with me in observing when I descend to them, he told him) that he had lately come from France, that he had been employed there by a gentleman, whom he was surprised that Baldwin did not know, as he was a man of so much note, and whose name had been so frequently in the news-papers, which was a Mr. Silas Deane; that Mr. Silas Deane was a very honourable gentleman, employed by the congress in Ame-

rica, as well as another very hon. gentleman, a Dr. Franklin; that Mr. Silas Deane had employed him in the noble business in which he had been engaged; that his employment was to set fire to the several dock-yards, to destroy the navy of Great Britain; that he had undertaken that work, and that he was to have a pecuniary reward for it; that Mr. Silas Deane was his employer; that this was a noble act, this was a patriotic measure, this was what all patriots would exceedingly applaud, this was the right way to expose government, this was the way to render Great Britain for ever subject, by bending its neck to the yoke of America, this was the way by which we were to prosper; this great work was to be effected by his hand under the employment of Silas Deane, and that he did not at all doubt but that Dr. Franklin was likewise engaged in the same good work; he told him, he had taken Canterbury in the way from Dover; and now I am going to descend to some particulars, which I shall by and by have an occasion to repeat, in order to shew you that it is impossible (I will not change the word) that it is impossible but that Baldwin's account should be perfectly true; he told him, that in his return from Paris to England, he had landed at Dover, and so came through Canterbury; and at Canterbury he had engaged a man to make a tin-machine, which you will see by and by somewhat resembling a tin-canister, the purpose of which was, to act the part, if I may so say, of a lantern; that is, that a candle might be enclosed in it, and yet the candle perfectly be hid, so that no eye should see the light; that the man he employed to make this tin-canister for him, was an awkward fellow, and set about it in a way that convinced him he was dull, and did not comprehend his meaning; but that his servant, a lad, had a much brighter genius than his master, and very well understood his directions; that he set about the work, and he made the canister for him. Gentlemen, you will remember these particulars; he told him, that he had ordered two more at another shop, but had not time to stay for them; and so left them behind him, but this canister he took with him; he told him that when he came to Portsmouth, he took a lodging; I had forgot the wooden-box; he told him that he had likewise got made for him a wooden box; I told you that the use of the canister was to contain a candle, hiding it; the use of the box was to contain the combustibles which were to be lighted by the match, in order to set the place on fire; the preparation and the ingredients of this you will have an account of. He told him he had taken a lodging at Portsmouth, at a Mrs. Boxell's, where he had made some preparations for the work of setting the place on fire; I should have told you in the conversation with regard to Canterbury, he told Baldwin likewise of a quarrel which he had had there with a dragoon, which had led to a sight of this canister under the flap of his coat; he said at Mrs. Boxell's he had made preparations in order to set the store-houses on fire; and he told him there the manner of his making this composition; that it was by grinding charcoal with water very fine upon a colour stone, such as painters use in grinding their paint, not with a pestle and mortar; that it was ground to an exceeding fine powder; that it was then to be mixed with gunpowder: he then mentioned to him how it was to be diluted with water, and what proportions of the powder and the charcoal, and to what consistency it was to be mixed; and so this ended with the particulars of how this composition was made: the prisoner told him that in the afternoon of the 6th, the day before the fire, being in the Rope-house, he got a parcel of hemp and strewed the hemp about where he intended the match to be; that he laid a bottle of turpentine on its side, with hemp placed in the neck of the bottle instead of a cork; that he laid the match upon a piece of paper in which was some gunpowder, and over the gunpowder some hemp strewed very light; he told him that as soon as the match reached the gunpowder, it would fire the hemp, and he mentioned also his throwing a quart of turpentine about the hemp; all these particulars he told this man of the manner of setting it on fire; I should have told you that he said this Mrs. Boxell was impertinent, and turned him out of his lodgings; he told him a circumstance of his being shut in at the Rope-house; that he was so long in the place about this work that the time of shutting it up had arrived, and when he attempted to go out at the door at which he got in, he could not get out; that after having walked up and down without his shoes to avoid being heard, and endeavouring to get out quietly, finding all that impracticable, that he knocked, and cried out hollo! upon which a person came to the door and asked who is there? that the person directed him to go straight forward, and possibly he would find a door open; however, he did happen to get out: he mentioned also the circumstance of his calling to a person on the outside, under apprehensions of his being shut in; he likewise told his acquaintance Mr. Baldwin, that he had been before on the same day in the Hemp-house; it was the Rope-house you observe that was set on fire; that in the Hemp-house he had laid the tin canister which he had got made: you will be pleased to observe he did not effect the fire in the Rope-house by means of the tin canister; I have told you already how he effected that, but the tin canister he got made at Canterbury was laid in the Hemp-house, which was not set on fire, for by the providence of God, the matches which had been lighted had luckily gone out; that there he had likewise laid a square box, in which square box there was room to put a candle; that he had put into the box tar and turpentine, and hemp and other combustibles; these things he said he placed in the Hemp-house; that making all this preparation, and doing this in the Hemp-house, had taken up a great deal of time; that he was so much heated, though in

the mouth of December, that he had pulled off his coat, which he could not find for some time; that when he found it, there was a good deal of hemp sticking to it, which he picked off as well as he could; he said the next day he went into the Hemp-house, in order to set it on fire; the candle was placed in the wooden box, and within this tin machine; and he mentioned to him this circumstance likewise, that he had bought some matches for the purpose of lighting it of a woman at Portsmouth, which he supposed were damp because he could not make them catch fire, in order to light the candle; so you see the saving of the Hemp-house from destruction that day, was, because the matches were not so well made, or being well made, had been so long made that the wood was not dry enough, and would not catch fire, so as to enable him to light the candle; for if the candle had been lighted, the Hemp-house must infallibly have been burnt; then, he says, that not being able to set that on fire, he got some matches of a better sort, and then returned to the Rope-house; that there he placed himself in such a way, as that no body could see it; when he struck a light, that he lighted the match, and every thing being prepared he went away, leaving that to be burnt, very much vexed that he was not able to set the Hemp-house also on fire; that he set out as fast as he could from Portsmouth; that just after his leaving the town he overtook a woman in a cart; that he got her leave to get into her cart, for the sake of expediting his journey; that he gave her 6*d*. in order to make haste with him; that he then hastened to London as fast as he could. Another circumstance, likewise, he mentioned; that, besides the lodging which he took of Mrs. Boxell, he took another of a woman on Portsmouth Common; the pious man mentioned something to be done to the poor woman of whom he took the lodgings; they had a very fortunate escape too, for his intention was to set those lodgings on fire, in order to engage the engines, that they might not assist to extinguish the fire in the dock-yard; but by good luck that did not succeed neither; burning a house was nothing to him; he told Baldwin a circumstance of his leaving a bundle at the lodging on the common; he said, that he had come away from Portsmouth in so great a hurry, that he had not time to go there for it, and that bundle, he said, contained three books, the titles of which he mentioned; there was an English translation of Justin, another of Ovid's Metamorphoses, and there was a Treatise of the Art of War and of making Fire Works, or something of that sort, and likewise a pair of breeches, a pair of buckles, and a French passport; all these things, he said, were in his bundle, which he had left with the woman, at his lodgings at Portsmouth Common; now all these particulars he told to Baldwin. I mentioned to you just now, gentlemen, that it would come out in the course of this cause, that it was impossible for Baldwin to have invented this story; but that it must be, that the prisoner had told it to Baldwin: now I will tell you why I said so; Baldwin having made a discovery of these conversations, that he had held with this man, to the effect I have mentioned, then it was that an enquiry was made into these particulars; for that led to all the discoveries, of which you shall now have an account, and which will be proved to you in evidence. In the first place, I will mention to you, not in the order of time in which the discoveries came out, but in the order of time in which I have mentioned the transactions themselves to have happened: having told the story to this Baldwin of what had passed at Canterbury and the other places, messengers were sent to all these places to find out the people referred to, and to see whether these several accounts were true or no; upon enquiry, they found out the persons who made these tin canisters, not only the persons that made the tin canisters by his directions, which he had left upon their hands, not having time to stay for them; but we found out the very person who made the tin canister that was left in the Hemp-house, in order to set it on fire; you will see the very boy who made this, and he confirms exactly the account as related by Baldwin; that his master having first been employed to do this work, and not rightly understanding the instructions he received, that the boy understanding them, made the canister, and the boy will swear, that the very canister now to be produced at your bar, and which was found in the Hemp-house, he made for the prisoner. The story of his quarrel with a dragoon at Canterbury, will be confirmed by the dragoon who quarreled with him; the stripping off, or taking up the lappet of his coat, and the seeing the canister under it at that time. The making of the wooden box will be proved; the witness swearing to the identity of the person, by whose order it was made. Mrs. Boxell will be produced to you; she will tell you, that this very prisoner at the bar, came to her house to take a lodging, the day, I think, before the fire happened; that, afterwards, observing a strange sulphurous smell in the lodging, she went about, inside and outside of the house, and could not guess from whence it came: that the next morning there was the like smell; she then traced it to the very room that the prisoner had taken to lodge in; she found him at work, in preparing combustibles, and there was a stench of gunpowder, or nitre, or whatever it was, which I mentioned to you just now from the account he gave to Baldwin, how he had prepared this; we will produce to you the person, upon whose colour-stone the prisoner ground the very charcoal, and who saw the prisoner grinding the charcoal. Gentlemen, we will prove the circumstance, I mentioned to you, of the Rope-house being shut, and the prisoner being shut in; we will prove by the recollection of the people in the rope-yard, that there was a man exactly in the circumstances that he describes himself to Baldwin to have been in, making a noise; asking

the witness how he could get out, and his giving him the best directions he could, leaving him there speaking to the watchman, the watchman saying, he must stay there all night, the hour of call being over: but perfectly recollecting the circumstances in the way in which he himself described them. Gentlemen, we will likewise produce,—it is marvellous that we are able to do it; but it is owing to the great vigilance and care of the noble person who was at the head of this enquiry, and who has spared no pains, in order to investigate every circumstance as far as possible; though one should not have supposed, that any human enquiry could have reached such circumstances as these;—but we will produce to you the very woman that he bought the matches of; she saw him yesterday, and she will tell you, that that man at the bar, and she noted him particularly, because he was not such sort of a man as usually come upon these errands; he came to her shop the day before the fire to buy a bundle of matches; that he asked her whether they would light quick, rejecting one bundle and choosing another; she remembers his taking out a handful of silver, and having but one halfpenny, she remembers that particularity; the man being dressed so particular, and unlike persons that call upon such errands, struck her observation, and she will swear to the identity of the person. There is yet behind, one more circumstance, that places it beyond the possibility of suspicion; the bundle that I told you of, could not be found; for Mrs. Boxell, where he actually did lodge, nor any body there, could hear of any other lodging that he had taken; she remembered that she had seen such a bundle, that the prisoner had with him the first day; but what was become of the bundle, and where he had left it, or whether he took it away with him, God Almighty knew! nobody could give an account. At last, after great search and enquiry, the bundle was found in the possession of another woman, whose lodgings he had taken, and who had no suspicion about what the man was; she wondered that he had not returned, and kept the bundle unopened, expecting him to call every day for it. Upon opening the bundle, there were the very things he had described; an English Justin, Ovid's Metamorphoses, a Treatise on the Art of War and of making Fire Works, and there was this person's passport from the French government; all these things were found just exactly as he had described them to Mr. Baldwin; and you will have likewise an account, that in that bundle are a pair of buckles, belonging to the prisoner, whom a witness will be produced to you to prove that he has seen, as far as he can remember, that pair of buckles in the shoes of the prisoner. Gentlemen, there is yet one more circumstance; you will have the woman that took him up in her cart, and she will swear to the very man, to the bringing him two miles in her cart, and while they were just at parting the blaze of the fire at the Rope-house burst out. Now, when you have all these circumstances proved to you in evidence, will not you say that I was well warranted in insisting that it was impossible for Mr. Baldwin to have invented this story? for these discoveries were made in consequence of Baldwin's relation; not that Baldwin's relation was after the discoveries, for it was the relation of Baldwin from the mouth of the prisoner that led to a discovery of all the particulars which I have now mentioned to you; the tenth part of these circumstances, which I have opened, would serve, I should think, to decide the fate of any man standing in the prisoner's situation; but it is the wish of the public, it is the wish of government, that all the world should know the infamy of this transaction, and that they should know to whom they are indebted for the sorrows they have felt, and how much they owe to the providence of God, that America has not been able totally to destroy this country, and to make it bow its neck, not only to the yoke of America, but to the most petty sovereign in Europe; for let the English navy be destroyed, and here was a hand ready to effect it; let but the English navy be destroyed, and there is an end of all we hold dear and valuable; the importance of the subject, the magnitude, the extraordinary nature of the thing calls for a more particular investigation, than any other subject of what kind soever could demand; and therefore I need, I hope, make no apology for having descended so particularly into these minute, if any of them can be called minute, particulars of this story; we shall prove all these circumstances to the full, and surely there can be no doubt what shall be done with the man. I shall be glad to hear what he has to say for himself, and I shall be glad if he is able to lay this guilt at any body's door besides those to whom he has laid it. I wish Mr. Silas Deane were here; a time may come, perhaps, when he and Dr. Franklin may be here.

Prisoner. He is the honestest man in the world.

James Russell sworn.

You are, I believe, employed in Portsmouth dock?—I am.

In what capacity?—I am clerk to the clerk of the Rope-yard.

Do you remember the day when the Rope-house was set on fire?—Yes, it was on Saturday the 7th day of December; the fire was first perceived at half after four in the afternoon.

Was the Rope-house consumed by that fire?—Yes, entirely.

What was in the Rope-house that was burnt?—Some hemp-toppings which were in the middle loft of the Hemp-house.

Was there any thing else that was burnt?—Some cordage on the ground floor.

It is the place where cordage and hemp usually are kept?—Yes.

And there was some there at that time which was burnt?—It was.

Did you at any time find any thing particular in the Hemp-house at Portsmouth?—Yes, on the 15th of January I found a tin case in the Hemp-house. [The witness is shewn a tin case or canister.] This appears to be the tin case that I took up in the Hemp-house; there is a piece of wood hollowed out, which is inside it, and a thin piece of wood nailed at the top of it; there are matches, and tar, and oil, and other combustibles. I have no doubt but this is the tin case; this box goes into it; they were separate when I found them.

What did you find else besides these two things?—A bottle, which appeared by the smell to have held spirits of turpentine, or something of that quality; and there were some common wooden matches, such as are generally sold at chandler's shops, which I found lying in the Hemp-house just by this tin canister.

Whereabout in the Hemp-house?—In the centre of the mow of hemp there were some bundles of refused hemp. There is certain hemp which is refused, which is not according to the contract, which is put by and is returned to the merchant; this was behind those bundles of hemp which were then in the very center of the mow behind several other bundles.

Were these things easy to be discovered, or were they concealed?—They had the appearance of concealment.

Could they be discovered without removing those bundles of hemp, behind which they were put?—Not conveniently. There was a passage that went up at the end of the bundles of this hemp, and a person probably might have discovered it. At the ends of the bundle of hemp, there is a little passage; a person might have gone up to the upper end of it and have discovered this, if he had had any apprehensions of such a thing.

Was there any loose hemp near it?—Yes, what we call 'dunnage;' that is the refuse of the hemp which we generally lay at the bottom of the hemp to preserve it from any moisture that may arise from the foundation; those combustibles were laid upon that; there was also some brown paper; when we found all these parts of the machine they were put together, and then made the appearance of a dark lantern; there was some brown paper laid near it, which appeared to have been tarred; when this thing was all united we put it upon the paper that was tarred, and the paper seemed as if it had been round this tin case; it seemed as if it had been thrown over the bundle, and by striking against the mow of hemp, the parts had separated; that was the idea that I formed of the matter.

Then you communicated it to the proper officer at the Dock-yard?—I did.

Were these things found in such a place, that if a fire had arisen in consequence of them, the Hemp-house and the hemp in it must probably have been consumed?—Undoubtedly.

That Hemp-house, I suppose, from its name, is the place where the hemp belonging to the dock is kept?—Yes, the ground floor upon which this tin case was found was full of hemp, and this was the situation of the machine; it could not have been thrown in at a venture. The construction that I put upon it was, that it must have been thrown over the bundles of refused hemp, for they were as high as my head, and therefore it is possible, and I apprehend that was the case, that it was thrown against the mow from which it rebounded and separated.

Court. Prisoner, I would once for all, without repeating it to you after every witness is called, inform you, that you are at liberty to ask any witness what questions you think fit, after the examination is gone through by the crown. You know best your own defence.

William Tench sworn.

Did you ever see the prisoner?—I have.

Where?—At my master's house just without Westgate, Canterbury.

Did you make any tin thing for him?—Yes, I did.

Look at that, and tell us whether that is the thing that you made for him?—Yes, this is the machine.

When was it you made it for him?—About a month or six weeks before Christmas.

When was the first time since that, that any enquiry was made of you about making this canister?—On the Monday before last.

Examined by the *Prisoner.*

You say you made this canister for me, a month or six weeks ago?—No; a month or six weeks before Christmas.

How do you know the canister?—I know it by the seam.

I saw a canister a few days ago with the same seam as that; how can you know one seam from another?—Because this is so very bad soddered; I took particular notice of it when you came to me about it.

Can you swear to the sodder?—Yes.

How do you know me; by my face, or dress, or voice, or what?—I know you are the very man that came to me about it. I know you by your person, by your hair, and by your clothes that you have on now.

What particular garment?—You had on the same coat you have now.

This coat? (his great coat.)—No; not your great coat, the other, or near upon such a colour.

On what particular day did you make this tin canister?—I really cannot tell.

Was it so much as six weeks before Christmas?—That is as nigh as I can tell.

Was it more or less, do you think?—I really cannot tell.

Pris. I think he ought to recollect whether it is more or less than six weeks before Christmas.

Elizabeth Boxell sworn.

Have you ever seen the prisoner at the bar before?—I have.

When did you see him?—The day before the yard was on fire, at my house.

Where is your house?—At No. 10, Barrack-street, Portsmouth; he came to me for a lodging.

Did he lodge at your house?—One night.

What night was that?—The night before the fire happened.

Did you observe any thing particular relating to him, or the room he lodged in?—I observed a very sulphurous smell on the Friday, and on the Saturday.

That was when he first came to your house?—Yes, on the morning of the Saturday, my house was in a very great smell and smoke; I went up stairs and pushed open the door, and I could not see my hand before me, because of the smoke; there was a sulphurous smell in the room and the grate; I asked him what he was about, whether he was going to set my house on fire? He asked me what I was afraid of? I said I was afraid he was going to set my house on fire, for fire was a thing I much dreaded; he asked me if I had ever suffered by fire? I said No, God forbid I ever should, for fire was very dreadful to me; I was much afraid of fire.

Did you observe what occasioned the smoke in the room?—As I was making the bed, I turned round and saw he had been burning something on the hob by the fire-place.

Did you observe any thing else in the room?—He had a lighted candle on Saturday morning; he had had a little bit of candle carried up stairs in a candlestick for him, but the candle that I took from him in the room, was not the same candle that I carried up stairs for him, for it was about half an eight candle; he had something in a chair which he was doing something with, but I could not tell what it was. I carried the candle down stairs, and went up again immediately, as fast as possible; I opened the window a little before I went down: when I came up again he had shut it; I said I would not have my window shut by him or any other man, that if I chose to have it open it should be open.

Did you observe any thing else, at any other time when you were in the room?—On the Friday, when he came out of the room, I went up; I saw his bundle; I went to carry it to one of the neighbours to wash; when I opened it, I saw part of an old shirt, a pair of leather breeches, a top of a tin case; I viewed the tin case a quarter of an hour to be sure.

Look at that tin case?—I viewed it from this part [pointing out a particular part of the machine] I think this is the same canister, it is as much like it as one thing can possibly be like another; I really believe it to be the same.

You say you had some dispute with him about filling your room with smoke. Did you tell him he should go away from your house?—I ordered him out of my house; he said it was hard he could not be permitted to put his things up; I told him no, he should quit the room; he then said that the candle I carried down in the candlestick was his, and that he wanted it; I told him he might take it as he went down stairs; this was on Saturday morning between nine and ten, then he left my house, and he never returned again.

Court. What became of the bundle?—*A.* He carried the bundle in his left hand, and I saw him into High-street, for I got into the middle of the road and watched him; I never saw him afterwards.

Do you know whether the canister was in the bundle when he took it?—I cannot say; I saw the canister on Friday, I did not see it on Saturday.

James Gambier, esq. sworn.

Mr. *Gambier.* I have here the bundle that has been spoken of by the witness: I received it from my first clerk John Jeffereys; it has been in my possession ever since; it is exactly in the same state now as when I received it; I received it on the 21st of February in the morning, about nine o'clock.

Elis. Boxell. I believe that to be the bundle; it is tied up in an handkerchief of the same pattern.

John Jeffereys sworn.

Do you know that bundle?—That is the handkerchief, I believe; indeed I have no doubt of it; commissioner Gambier gave orders on the evening of Thursday the 20th of February for search to be made in North-street and the neighbourhood, for such a bundle.

Where did you go to make that search?—I ordered a junior clerk, and a messenger of the office to make that search in North-street and its neighbourhood; they came back in about an hour's time, and told me they had searched that street except a few houses, in one of which particularly the person was not at home; I went next morning, and found this bundle at Mrs. Cole's in North-street; I delivered it to Mr. Gambier.

Ann Cole sworn.

Look at the prisoner, do you know him?—I do.

When did you see him?—On the day of the fire.

Where did you see him?—At my house in North-street, on Portsmouth common.

What was the occasion of his coming to your house?—To take a lodging; he took one.

Did he leave any thing when he went away?—He left a bundle.

Is that the bundle?—It looks like it.

What became of that bundle?—I delivered it to Mr. Jeffereys and Mr. Calden.

Had you kept the bundle from the time the prisoner left it with you, till you gave it to these gentlemen?—I had.

How long did the prisoner stay in your house?—A quarter of an hour, not more.

What time of the day was that?—In the forenoon; I can't exactly tell the hour; it was

between nine and twelve; he staid about a quarter of an hour, then he went out.

Did he return again?—No.

Did you open that bundle?—It was not tied close, and I saw it a little way open.

What did you see in the bundle?—I saw some books and other things; I did not untie it, I delivered it to these gentlemen when they came for it.

You took nothing out, nor put any thing in?—No.

Prisoner. My lord, I beg Mrs. Boxell may stop.

William Abram sworn.

What are you?—A blacksmith.

Where do you live?—At Portsmouth.

Did you ever see the prisoner before?—Yes, he lodged in the same room with me.

At whose house?—At Mrs. Boxell's in Barrack-street.

Had you any particular conversation with the prisoner?—At first he asked me whether there was any pressing; I told him yes, they pressed very hot; that the constables had press warrants, to take up all the people that could not give an account of themselves; says he, suppose they were to take up such a man as me, I can give no account of myself, only by the writings I have in my pocket; he asked me if I thought if he was to get into the justice's hands, there was no way of escaping; I said No, there were gates and walls all round; and if he was not taken in Portsmouth town, he would be taken at the bridge; he said, was there no way of getting over those walls? I said No, there is water on the other side; he then said again, is there no getting over those walls? I said No.

Examined by the *Prisoner*.

Was any other thing said?—Yes, he said he knew one Brooks who was in Newgate; and he was certain sure he would be hanged.

At what time was that?—I cannot justly say.

Where was it said?—At Mrs. Boxell's.

In what part of the house?—The lower room; Mrs. Boxell heard the words as well as me.

Counsel for the Crown. Look at these buckles which were in the parcel?—There are a great many buckles alike, they are such sort of buckles that the prisoner had, they are the same pattern.

John Baldwin sworn.

Prisoner. I can't embrace you now, Mr. Baldwin, as I did last Monday sen'night.

Look at the prisoner at the bar, when did you first see him?—The 7th February.

Where did you then see him?—At sir John Fielding's; lord Temple sent his servant to me on the 6th of February, to inform me, that I should be sent for by sir John Fielding, in order to give evidence against a person whom they looked upon to be a painter that had come from America, my lord knowing that I had been in America.

Were you sent for under an imagination that you might know the prisoner at the bar, having been in America and a painter there?—Yes, I have been in America, at New-York, at Philadelphia, and Amboy.

Are you a painter by business?—I am.

Upon the recommendation of lord Temple then you went to sir John Fielding's?—I did; I was asked whether I knew the prisoner; I told sir John that I had never known him to the best of my memory and remembrance; nor never seen him till I saw him in the other room.

The prisoner heard you say that?—He did; he made me a bow as he stood at the bar, as soon as I had given my evidence to sir John; I saw him afterwards in another room.

What passed in that other room?—I went to sign my name to the deposition I had made; as I was going away the prisoner beckoned to me with his head; I went and sat down by him; he asked me what part of America I had been in, and who I knew there; I mentioned Philadelphia; he asked me if I knew any printers* there; I said I did many; who did I know there? I mentioned several; he said I see that you know the place very well; you are not like evidences that have been brought against me; there was one person said he knew me, but I had changed the colour of my hair; did they imagine that I was a cameleon? there was another person said I was transported from Gloucester gaol; but, said he, you are a gentleman, and I wish it was in my power to make you a satisfaction; he told me he would be very glad to see me at a place called New Prison; I said I would come there whenever he pleased, if I could get admission; he said I don't know what time I shall be discharged from here, but if you will come between three and four, I dare say you will see me; I went to New Prison about four o'clock, I saw the prisoner there, he and I walked together; we adjourned to a corner by ourselves between the two gates; he disclosed a great deal about America, mentioning gentlemen's names in America that he knew; and he begged I would call upon him the next day when it suited me; I went and acquainted my lord Temple of what information I had got from the prisoner; my lord Temple said he thought it was very material, and thought it proper that lord George Germain should be acquainted with it; he wrote a line, I carried the letter and was introduced to lord George Germain; his lordship said he was of the same opinion as lord Temple; and that it should be taken care that I should have admission to see the prisoner, in order to bring him to a confession if possible; I waited upon the prisoner the next day, and we had discourse again about America as before; he found by my discourse that I was an American by principle; he asked me what countryman I was; I said a Welchman; he said he thought at first seeing me he saw in my face that I was a person interested in the cause

* So in orig. edit. Qu. *painters*.

of America; I told him I married at Amboy, that we removed to Philadelphia and there lived, where I had a son; that that son I had now in London.

Counsel. However you need not mention every particular; you entered into general conversation, being both of the same trade and of the same country.

Prisoner. I desire the witness will speak every particular, as I am interested in it.

Counsel for the Crown. Be it so by all means, go on then.

Baldwin. I mentioned to him about my family, that I had my son with me now in London; he was desirous to see him; I told him my wife was very much indisposed, which he said he was sorry for; I waited upon him from day to day, till the 15th February; on that day he told me all the particulars; he asked me if I knew one Mr. Deane? I told him no; he said, not Mr. Deane who is employed by the Congress at Paris?

Prisoner. I remark to the witness that there is a righteous Judge, who also giveth righteous judgment; beware of what you say concerning that Mr. Deane, perjure not yourself, you are in the sight of God, and all this company is.

Baldwin. The prisoner said, what, not Silas Deane? I told him No; he said he is a fine clever fellow, and I believe Benjamin Franklin is employed in the same errand; he said that he had taken a view of most of the dock-yards and fortifications throughout England, and particularly the number of guns that each ship in the navy had, and likewise the guns in the fortifications, the weight of their metal, and the number of men; and he had been at Paris two or three times, to inform Mr. Silas Deane of the particulars of what he found in examining the Dock-yards.

Prisoner. Consider in the sight of God what you say concerning Silas Deane.

Counsel for the Crown. You need not be afraid, Silas Deane is not here, he will be hanged in due time.

Prisoner. I hope not, he is a very honest man.

Baldwin. He said that Silas Deane was greatly pleased with what he had done; he acquainted Silas Deane in what manner he was to set the rope-houses and the shipping on fire in England; that Silas Deane was amazed that he should undertake by himself to execute a matter of that kind, but he told Silas Deane, that he would do more execution than he could imagine, or any person upon the earth; that then Silas Deane asked him what money he wanted to carry his scheme into execution; he told him not much; he expected to be rewarded according to his merit; that then Silas Deane gave him bills to the amount of 300*l.* and letters to a great merchant or a great man in the city of London. He was very anxious to know whether lord Cornwallis had been defeated between Brunswick and Trenton, in the Jerseys. He said that he knew general Washington personally; he believed that general Washington's abilities were greater than those of general Howe, and that general Washington would watch general Howe's motions, and would harrass him; he was assured that the provincials would conquer this winter; that the grand campaign was to be in the summer; that general Washington only wanted a few experienced officers, which he believed would be supplied from France; and Silas Deane was appointed for that purpose at Paris, to supply them with ammunition and stores; but as for cannon balls, he said, they could procure a sufficiency to serve all Europe, in America at a place near Annapolis in Maryland; that he himself had seen likewise pitch, tar and turpentine. This was what passed in the course of a great number of visits. I waited upon him from the 7th of Nov. to the 24th. I never missed but one day, and was with him twice on most days.

Prisoner. Remember that this witness says he was with me twice most days.

Baldwin. The prisoner said he arrived at Dover, from Paris, and went to Canterbury; that he went into a shop and spoke for a machine to be made.

Prisoner. At what particular place did I call in my way from Canterbury? I must have called at some particular place.

Baldwin. He said he went into a shop, and ordered a tin machine to be made, which was by some people called a canister; he said the master was a stupid fellow, and did not understand his directions, but that the boy seemed to be more ingenious and understood it, but he was obliged to stand by the boy while he was making of it to instruct him, and he gave him something to get some drink for his pains; that then he went into a public-house with the canister under the breast of his coat; that a dragoon saw something under his coat, and opened his coat to see what was under it, and said, which of them are you for? The prisoner asked, what do you mean? He said, whether you are a barber or a taylor? The prisoner said, that was no business to him, and called him an impudent fellow, and told him that he did not mind him, nor none of his master's men; he said there was another soldier in the room, who was a civil man, and he drank with him; that he went from thence to Portsmouth, where he took a lodging at one Mrs. Boxell's.

Q. All this is the account that he gave you?

Baldwin. Yes; in all the conversations, as near as I recollect, word for word. He said at Mrs. Boxell's he tried his preparations, which were matches that he had made, by doubling a sheet of whitish paper into ten or twelve folds; that then the paper was unfolded, in order to be done over with a composition made of charcoal and gunpowder; he said, if the paper was not doubled before the composition was laid on it would cause it to crack; that the charcoal must be ground very fine, upon a colour-stone, in the same manner as painters grind their colours; but the gunpowder did not require much grinding, he said; that that

might be mashed with a knife, in the same manner as painters mix vermillion: but, he said, they must be very particular in mixing these two bodies together; that the charcoal is ground in water, and then mixed to the consistence of new milk, and then with a small brush the paper must be painted over on both sides with this composition; he said, that he had managed the matter so well, that one match would last 24 hours. He said, he lodged at Mrs. Boxell's one night, and that Mrs. Boxell was a very impudent woman, for she had opened his bundle during his absence; he told me, that this tin machine was a very curious construction of his own invention, and that he had a wooden box made which had a hole in the centre, in order to put a candle in, and in that box was tar, turpentine, and hemp; that the tin canister fitted this wooden box so well, that when the candle was put into it no person could perceive any light. He said, that on the 6th of December he went into Portsmouth-yard, and got into the Hemp-house; that there was a deal of hemp there, and it was matted so together that he could hardly get it apart; he pulled his coat off, and then, after lightening the hemp, he placed this canister over the box, with a small candle in it; that he sprinkled some turpentine about the hemp that was round it; that he was some time before he found his coat afterwards, and, when he found it, there was a deal of hemp sticking about it, which he endeavoured to take off; that he then went out of the Hemp-house, and got into the Rope-house, and in the Rope-house he placed a quart-bottle of spirits of turpentine upon its side, stopped with hemp instead of a cork, and close to the hemp he laid a piece of paper, and in this paper was some dry gunpowder.

Prisoner. Did I go straight out of the Hemp-house into the Rope-house?

Court. You had better wait till he has gone through his evidence, and then you may ask what questions you please.

Baldwin. To this gunpowder there was one of these matches, and over the powder he laid some hemp strewed very light, likewise a quart of turpentine strewed all about; that as soon as the fire of the match touched the powder it should set it all immediately on a blaze. He said, that by cutting this match which he had made, into short pieces, it would answer any time that he pleased, in order to make his escape; that the next day, which was the 7th of December, he went from Mrs. Boxell's, and took two other lodgings, one was at a public-house, and the other at a private house on the Common, he said in the North-street; that he took particular notice before he took these lodgings which houses had most wood about them, for he had his combustibles ready for the purpose of setting his two lodgings on fire on the same day as he set fire to the Rope-house, in order to keep the engines from playing upon the buildings in the Dock-yard; he said, that he told the woman at the lodging which he took on the Common, that he was going to Petersfield, and begged her to take care of his bundle; he said, after that he went into the Dock-yard in order to set fire to both the Hemp-house and the Rope-house; that he first went into the Hemp-house, and struck a light, but the matches which he had were very damp, and he could not get the sulphur to take fire; that he wasted a whole box full of tinder in order to light the candle, and even blowed at the tinder till he had almost burnt his lips; that he went away from the Hemp-house, and procured some better matches; that then he got into the Rope-house, and set fire to the match which led to the powder.

Q. Did he say any thing about buying of the matches?

Baldwin. He said he had bought an halfpenny worth of matches the day before of a woman. —My lord, there is one matter I forgot: he said, the day that he put his preparations into the Hemp-house and Rope-house, he was so long in the Hemp-house that he was locked into the Rope-house; that when he came to the door which he went in at, he could not get out; he said there were several doors belonging to this building, that he tried many of them, and went the whole length of the building, which was upwards of three hundred and sixty yards. He then went up stairs, pulled off his shoes, and went the whole length there, and could find no possible means to get out, upon which he returned, and got to the same door that he came in at; there he heard some person's voice, upon which he knocked at the door, and said, holloa! They asked, who was there, and what business he had there? He said, it was curiosity that had led him there, that he did not imagine they had locked up the house so soon; he said, the person told him to go strait forwards, and turn to such a door, and he would be able to get out, which he did; he said, when he came out he was very vexed with himself that he could not set the Hemp-house on fire, and was also vexed because he could not go to his lodging at Portsmouth Common, where he had left a parcel, which parcel contained, among other things, a pistol, Ovid's Metamorphoses, the Arts and Dangers of War, or something of that sort, and a Justin; but what vexed him most was a passport that he had left which was signed by the French king, and in that passport was his real name, but it was in French, and he did not imagine that the people at the lodgings could read or understand it, but, he said, he was greatly amazed that they had not found the bundle; he said, he imagined they intended to make a property of him, or otherwise he thought it would be best to take no notice of it, but let it lie; after setting fire to the Rope-house he made the best of his way towards London; he said, that he was so sorry that he could not get the matches to light in the Hemp-house, that he had a good mind to go and shoot at the windows of the woman's house where he had bought them; he said, that he had burnt the bills and the letter which he had from Silas Deane, on

account of the behaviour of Mrs. Boxell, and to prevent any suspicion of the gentlemen that they were for; he said, that soon after he left the Dock-yard he jumped into a cart and begged of the woman to drive quick: that he rode in this cart two miles, and then gave the woman six-pence for driving quick, for he had near four miles to go before he passed the sentries; that a few minutes after he had passed the sentries he looked back, and saw the flames; he said the very element seemed to be in a blaze; that he walked all night on his way for London; that upon the road between the last sentry and Kingston two dogs barked at him very much; he said, he shot at them, and believed he either killed or wounded one; that he arrived at Kingston the next morning, which was Sunday, between ten and eleven o'clock; that he staid there till pretty near dusk, and then came in the stage to London, and waited upon this great man in the city of London; he said, he told the gentleman that he had had letters and bills about him that he had received from Silas Deane at Paris, which he was obliged to burn; that the gentleman seemed to be very shy of him, and told him, he had received no account from Paris; he said, he told the gentleman he might think what he pleased, but he was an enemy to Great Britain, and a friend to America; and that he had set fire to the Rope-house at Portsmouth, which he would see in the papers of Monday; he said the gentleman ordered him to a certain coffee-house.

Court. I suppose, by your repeating the word gentleman so often, he did not mention his name?

Baldwin. No, I could not get his name from him; I wish I had. He said the gentleman waited upon him at the coffee-house, where they had some little discourse, but the gentleman seemed still to be shy of him; he said, there was another gentleman in the coffee house, who took very particular notice of him, which he observed, and therefore did not chuse to stop long; he said, he was so angry that this gentleman would not believe his word, that he took his leave of him, and went directly to Hammersmith; that when he got to Hammersmith he wrote a letter to this gentleman, and told him, he was very sorry that he would not believe what he had told him, but he was satisfied he would receive letters in a few days; that he was going to Bristol, where he should hear of more of his handy works. He said, in his way from thence to Bristol he called at Oxford.

Court. He is going now to speak about Bristol; if you don't watch him very attentively it is natural he should fall into an account of Bristol, which we have nothing to do with.

Counsel for the Crown. We are not examining about Bristol with a view to impute to him the setting Bristol on fire, but to shew he was actuated by the same motives towards this country, with regard to America, which operated at Portsmouth, which will be material, as it will confirm the design he had in his mind. We shall prove his grinding charcoal upon a painter's stone there, and other circumstances.

Court. Any conversation that he relates of the prisoner's, of what happened at Bristol that will confirm this evidence here, is material.

Baldwin. He said his next scheme was to set a building at Woolwich on fire; he said he arrived at Bristol a few days before Christmas; that he got leave from a painter to grind some charcoal upon his colour-stone.

Q. Did he mention to you his reasons for going to Bristol? I don't mean of what he intended to do there; but whether he mentioned any reason why in particular he should go to Bristol, any more than to Worcester, or any other place?

Baldwin. He said that he heard there were three or four ships that were there: that one or two of them were mounted with twelve carriage guns and eight swivels, and that they were going to the West-Indies, and he wanted to see these vessels.

Court. All these questions must necessarily tend to the fire at Bristol.

Baldwin. He said, a painter gave him liberty to grind this charcoal.

Court. When was this? before the fire at Portsmouth, or after it?

Baldwin. After the fire at Portsmouth.

Counsel for the Crown. We shall call that witness to confirm and prove many of these things after the fire; that he called upon the man to grind charcoal. Now I shall call that man to prove that the prisoner did grind charcoal at that house. I do not mean for the preparation for this particular fire, but only as a circumstance confirmatory that he did hold the conversation that the witness relates, and did make such preparations.

Court. As far as that goes I see no objection to that.

Counsel for the Crown. Let it be supposed that the charcoal was for an innocent purpose; but it is a fact that the witness will prove confirmatory of his having said that he did such a thing.

Baldwin. He said he ground it upon a colour-stone belonging to a painter at Bristol, that he was above two hours grinding it, and the painter took particular notice of that.

Q. He told you he went to Bristol?—He did tell me he went to Bristol; he said he looked upon that to be one of the greatest circumstances against him, the man seeing him make this preparation, grinding this charcoal.

You gave an account of this matter, and in consequence of that enquiries were made of the several people?—I suppose so.

When did you give an account of this conversation?—Day after day to my lord Temple, and from thence to my lord George Germain; it was on the 15th of February that the particulars came out. I was from the 7th to the 15th before I could get out any particulars. I

communicated an account of the particulars day by day.

Prisoner. I should wish to hear the evidence read over.

Mr. Baron *Hotham.* I certainly will read it over to you, if you desire it.

Prisoner. I wish it to be read, in order to refresh my memory.

Mr. Baron *Hotham.* If you want to ask any question, you will stop me at the place where you wish to interpose your question.

Mr. Baron Hotham then read over his notes (which were exceeding accurate) of the evidence which Baldwin had given. His lordship concluded thus. 'I have taken the evidence 'as faithfully and as exactly as I could; if 'there is any difference, I shall be obliged to 'any gentleman in court who will be pleased to 'set me right.'

Prisoner. It is exceeding well taken down, my lord. Now is it proper, in the sight of God and in the sight of man, that a man, contrary to the laws of God and man, should come with deceit in his heart as an emissary from other people to insinuate to me, or any person what they can in that deceitful manner? If they are deceitful enough to deceive one in such a distressful situation, they must certainly have deceit enough in their heart to speak lies of them.

Court. That is matter of observation, which will come in with propriety in the course of your defence; it is better for you to apply yourself now to asking any questions that you may think proper.

Prisoner. I would rather ask him some questions after all the witnesses are examined.

Counsel for the Crown. Well, he shall stay in court.

Edward Evans sworn.

Were you at Canterbury at any time?—Yes, from the month of October till the latter end of February.

Did you ever see the prisoner at Canterbury?—I think I have: the man is altered a great deal since I saw him, but, to the best of my judgment, he is the man, that was either the latter end of October or the beginning of November,* in November to the best of my knowledge, we had some words.

Did you see any thing about him?—My comrade was present; he said he saw something under his coat.

How was he dressed?—In a brown duffil surtout coat, rather shabby.

Did you observe what was inside the surtout?—I did not.

James Wilson sworn.

Do you remember seeing the prisoner at Canterbury?—I really think he is the person; but I had never seen him before nor since he had a dispute with my comrade Evans. To the best of my opinion he was dressed much as he is now; I observed something bright under his coat that glistened like tin.

Did you see much of it?—I did not make much observation upon it.

Was there any quarrel or words between either of you?—There had been a fighting or a scuffle between him and my comrade.

Prisoner. (To the Counsel.) Sir, I have one thing to remark; are you his majesty's counsel?

Counsel. I am. What then?

Prisoner. I only wanted to know if you were his Britannic majesty's counsel, and if you had done with the examination.

John Fisher sworn.

Where do you live?—At Mr. Lawrence Tuck's at Canterbury.

Do you know the prisoner?—I think I have seen him before.

When?—About six or seven weeks, I believe before Christmas.

Where did you see him then?—At my master's shop; he came and ordered two tin canisters of me. My master is a tin-man.

What were his directions?—To make two canisters of a long square. I have got one here. [Producing it.]

Was that canister made by the prisoner's directions?—Yes.

How came he not to take it away?—I cannot tell; there were two of them left in my hands.

Did he call afterwards for them?—He called once and they were not completed, after that he called no more. [The machine or canister was exactly upon the same construction with that found in the Hemp-house.]

William Baldy sworn.

Look at the prisoner. Did you ever see that man in the Dock-yard at Portmouth?—I have.

In what part of it?—I saw him about a hundred yards from the east end of the Rope-house upon the lower floor where the cordage is made.

Upon what day did you see him there?—On Saturday the 7th of December, which was the day of the fire.

At what time of the day did you see him?—Between 11 and 12, it might be nearer 12 than 11; I saw him come down on the south side of the house, and cross from that to the north side towards where I was sitting by myself.

Did he speak to you?—Yes, he picked up a small smooth stone which he held up in his finger in this manner, [describing it.] Pray, Sir, says he, Do you make use of this in making cables? The oddness of the question made me look fully at him; I thought he appeared very ignorant. I said, we do not make use of this; this is, I suppose, a stone that is come out of the clay that those barrels are filled with; there were then about threescore and ten barrels of clay there; he staid five or six minutes, and then he left me.

When did you see him again?—In about

* So in orig.

ten minutes, or it might be a quarter of an hour after.

Where did you see him then?—I saw him the second time at the east end of the same floor; he had been up stairs, I saw him come down; there was one William Weston in company with me; the prisoner addressed him with how do you do, how do you do? holding out his hands to him; they fell into a conversation, which I thought was a matter that did not concern me; supposing by his addressing him in that manner that they knew each other, I went off.

Are you or are you not certain that he is the man whom you saw in the Rope-house, the day of the fire?—I am certain.

Court. What is your business in the Dock-yard?

Baldy. I am a rope-maker.

William Weston sworn.

Look at the prisoner. Have you ever seen that man before?—To the best of my knowledge I have.

Where?—In the Rope-house the day that the fire was; that is the man that I saw there, to the best of my knowledge.

You had some conversation, I believe, with him?—Very little.

Had you seen him there before, or did you know him before?—I saw him walking there, about seven weeks before the fire; he said he had been round the Dock then, and that he had never been in the Dock in his life before.

Did you see what part of the house he came from, on the 7th of December?—I cannot say I did.

Did you see him come down stairs?—No.

What is your employment in the yard?—I am a shipwright's apprentice.

Edward Carey sworn.

Were you at Portsmouth at the time of the fire?—I was.

Were you there the day before the fire?—I was.

Do you remember whether any person was shut up in the yard?—Yes, the night before the fire, a person was shut up in the Rope-house.

Did you see him?—No; I heard a man making a rumbling noise at the door; I went up to the door, and asked him what he wanted; he said, he was locked in and could not get out, and he should be glad if we could let him out; I told him we could not let him out, he must abide there all night; we left him in the house.

Prisoner. Was it the night of, or the night before the fire?

Carey. The night before the fire.

Ann Hopkins sworn.

Look at the man behind you (the prisoner) did you ever see him before?—Yes.

When?—I saw him last Saturday.

When did you first see him?—The day that the Dock was on fire.

At what time?—At four o'clock, or half after, I cannot be exact as to the time, I had been at the market; I was coming home in a little cart; between the Flying Bull and Cosham, he stopped my cart.

Did he overtake or meet you?—I cannot tell, it was a close tilted cart, I did not see him till he came close to me; he stopped my cart, and asked me how far I was going? I said but a little way; he said he would give me any thing to give him a lift, for he was going to Petersfield and should be benighted; he jumped up into the cart, and said, Do, ma'am, drive as fast as you can; as I was going out of Cosham, I called at a shop.

Was he, or not, heated when he came up to you?—He was very much out of breath, when he came up to me; I called at a shop at Cosham to buy a pair of pattens; when I was taking out the money to pay the woman, the prisoner took six-pence out of his pocket and gave her, and I gave her another.

Why did he do that?—It was to make haste; I told him before I called, that I must stop at a shop; he desired me not to stop there; then, he said, you won't wait long; and, he said, he would give any thing for a returned chaise, for he must get to Peterstield that night if he was alive; I drove on till I came in sight of my own house, I stopped to let my horse drink, and he jumped out of the cart and ran away as fast as he could.

Had the fire burst out at the time he left the cart?—No.

How soon was it afterwards?—I cannot pretend to say; he ran the main London road, and I saw no more of him.

Elizabeth Gentell sworn.

Where do you live?—I live at Portsmouth Common.

Look at the prisoner, you saw him yesterday, I believe?—I did.

When was the first time that you saw him?—The day before the fire at the Rope-house; I saw him at my own house in Havant-street, Portsmouth-common; he came to my house, and asked for a half-penny worth of matches; I took down two bunches and put them upon the counter; he asked me if they would take fire quick; and he desired me to change one of the bunches, which I did; he pulled some silver out of his pocket, and gave me a halfpenny.

Are you sure that the prisoner is the same person?—I am.

Prisoner. How can you be so certain from so small a time as you have now taken to look at me; how should you know my physiognomy?

Gentell [looks at him again] I am sure he is the man.

John Illenden sworn.

Did you ever see the prisoner at Canterbury?—As far as there is human possibility of knowing a man, I have seen him there.

What are you?—A surgeon and apothecary; I was lately an apprentice.

On what business or occasion did you see him there?---Upon his coming to buy two ounces of spirits of turpentine, and a quarter of a pound of salt-petre, what we call nitre.

About what time was that?---As far as I can recollect, it was either three or four days before or after the 20th of November.

Mary Bishop sworn.

Did you ever see the prisoner before?---Yes.

Where?---At my house in Canterbury.

Do you recollect at what time you saw him there?---It was between Michaelmas and Christmas; but I cannot recollect the particular time.

Had he any conversation with you when he was at your house at Canterbury?---He told me he had been interrupted by a dragoon at the White-horse; he told me he came from America on account of the disturbances.

Do you recollect whether he applied to you to direct him where he might get any thing made?---He asked me afterwards where he might get a wooden thing made?

Prisoner. Is that a proper question to put?

Counsel. If I was to put an improper question the judge would stop me.

Court. No improper question will be put; and you ought to see by this time that the candour of the counsel for the crown will prevent them putting an improper question.

Did you see any thing that was made for him?---I saw a wooden thing which the apprentice of Mr. Overshaw, to whom I directed him, brought into my house for him; the prisoner put it under his coat, wishing not to have it seen.

Did you see that wooden thing?---I saw the wrong end of it; the shape of it was a long square.

Was it at all like this? [shewing the witness the wooden part of the machine found in the Hemp-house.]---Yes.

What is become of the apprentice who made and brought this machine?---He is since dead.

You say it was like this wooden machine?---As nigh as I can guess it was like this; it was of the same shape.

Court. How long was it after he asked you where he could get such a thing made, that you saw it brought to him by the apprentice?---*A.* Some time in the afternoon, I think, of the same day.

John Dalby sworn.

I believe you apprehended the prisoner?---I did.

What did you find upon him when you apprehended him?---I found upon him a Bath metal seal; a pair of steel buttons; a snuff-box with tinder: a small powder-horn with gunpowder; a large nail piercer; a striking tinder-box primed; a screw barrel pocket pistol loaded with shot; two bundles of matches dipt in brimstone; a phial bottle half full with spirits o turpentine; and a small pair of scissars.

Thomas Mason sworn.

Where do you live?---In the parish of St. Philip and Jacob in the county of Gloucester, near to Bristol.

Look at the prisoner, did you ever see him before?---He was in my house the morrow after Christmas-day.

What business had he there?---He came to my house about eleven o'clock; he asked me to let him grind a lump of charcoal upon my colour-stone.

What business are you?---I am a tyler and plaisterer, and a house painter; I told him yes sure, and welcome; I shewed him my colour-stone.

What did the prisoner tell you he was?---I talked with him a good while afterwards; when I was in my room, I saw him pull out a hanger from under his coat when he began grinding, and lay it down, and lay his great-coat upon it; I said, why you are one of the press-gang? No, Sir, said he, I be not.

What did he tell you?---I asked him when he was sitting in my house, what he did think of the American affairs; he said he wished that affair had never happened; that he had lost a plantation there, and he hoped when that affair was over he should have it returned to him.

Prisoner. Is it proper that this man's evidence should be invalidated or not, from his own downright contradictions?

Court. I did not observe any contradiction; the witness does not seem to be very quick of apprehension, and did not immediately understand the question put to him; it is nothing but relating a discourse which does not appear to be material.

Counsel for the Crown to *James Gambier*, esq. Have you, Sir, translated the passport?

Mr. *Gambier.* This is the translation as well as I understand the English of it.

Prisoner. I object to the passport being read.

Court. State your objection.

Prisoner. That they who shall be called to witness for or against me, may not hear the contents of it.

Counsel for the Crown. We shall call no more witnesses.

The translation of the Passport was read as follows:

Exhibited at the Office of Marine at Calais. } By the KING.

To all governors and our lieutenant generals of our provinces and armies, governors particular, and commanders of our towns, places, and troops; and to all other our officers justiciary, and subjects to whom it shall belong, — Health.

We will and command you very expressly to let pass safely and freely, Mr. James Actzen, going to England; without giving him or suffering him to have any hindrance; but on the

contrary, every aid and assistance that he shall want or have occasion for. This present passport to be valid for one month only, for such is our pleasure.—Given at Fontainbleau the 13th of November, 1776. Louis.

By the king,

Gratis De Vergennes.

Counsel for the Crown. Now it will be material for the officer to tell your lordship what those books are.

Officer. The books are Ovid's Metamorphoses, a Treatise of the Arms and Engines of War, of Fire Works, &c. and the other is the History of Justin.

Counsel for the Crown. My lord, this is all our evidence.

Court. Prisoner, the evidence against you is now closed; this is therefore the time for you to make your defence.

Prisoner's Defence.

I understand, my lord, that that French passport was not found out till a few days ago, and since my first apprehension, a great part of the kingdom has been sought, and persons have been brought from many different places to give evidence who I was, or what I am, or so far as they knew about me, and every particular thing that has been witnessed respecting the late fire in the Dock-yard, from these evidences given, and the communication of them to all the people in the kingdom, by newspapers, and other ways. I think it is possible, and may have been possible for Mr. Baldwin, or for any other person that is any way at all intelligible, to bring every evidence against me that that person has done, by the said knowledge from public papers and conversation; nevertheless, whether it is a false accusation, that is upon me, or whether it is a betraying of trust, through the treachery of the heart, God Almighty, the great judge of all, only knows; if it is the former, I pray God Almighty may forgive him! if it is the latter, I pray the same! but in that case I should like to know, whether it is proper, that a person possessed of such a disposition as that, should come from emissaries unknown to me, and do all that lies in him to insinuate any thing out of me, unknown to me, and daily to come and go, and give information to the said lord George Germain? I should like that your lordship would take it into your consideration, as in the sight of God, whether such a person has a right in the sight of God, and according to the laws of man, and of this kingdom, to give evidence against a man, that his evidence ought to be regarded? He that may have been able to betray me, and speak things in the dark of me; he is able also, I think, to give the lie to any man, through motives of gain, or any other motives whatsoever; your lordship can consider that in your own mind, much better than I can speak it, as I am not endowed with oratory.

Court. Do you rest your defence on that observation, or do you intend to call any witnesses?

Prisoner. With respect to any other witnesses that may be called against me, if there is any positive fact can be proved against me, I will then prove the negative, or otherwise the court will proceed according to the laws of the country. I have one thing more to say; I would put a few questions to this man, Mr. Baldwin.

John Baldwin examined by the *Prisoner.*

I think you gave evidence, that I should have said to you, that on Friday the 6th of December last, I went into the Hemp-house, belonging to his Britannic majesty's yard, in Portsmouth?—I did.

And that I went in there with some combustibles, and lighted some hemp?—Yes; in order to set fire to the combustibles.

Do you speak of lighting a flame, or laying the thing lighter?—You said it was matted, that it was to make it lie light.

It is not my business to deny going to Canterbury, or confess it; do you say, that I said, I went to Canterbury and had the tin machine made?—Yes.

You also say, that I said, that I went into a house on Portsmouth Common, and left the passport?—Yes; among other things.

Prisoner. There are some other evidences say, that I was at Canterbury, one says, about six weeks before Christmas, another says, about six or seven, another between Michaelmas and Christmas, another, before or after the 20th of November; of the other three, two speak of it as sooner: respecting the French passport that has been found at Portsmouth, it seems to me inconsistent how it can be my passport, and at the same time, I to be at Canterbury, or any where in England at the time mentioned; the date of the passport is the 13th of November; if I can bring these two articles to bear, it seems very unintelligible to me, for it is sworn, that I said, that is my passport, and again it is sworn, that I was in England at that time; that is equal to the good gentleman, that said I had power to alter the colour of my own hair; if there is any thing brought against me that is positive, I am ready with the greatest pleasure, by the help of Almighty God, to receive the punishment of the laws of the country, be what it will: there are other things surprize me more than that: I have nothing more to say, my lord.

Counsel for the Crown. We have done with our evidence.

Court. Will you call any witnesses?

Prisoner. For what end? till something is proved positive against me, I intend no defence in the world. I am ready to live or die according to justice.

Mr. Baron *Hotham.* Gentlemen of the Jury; The prisoner at the bar stands indicted for setting on fire, and procuring to be set on fire, the Rope-house in the Dock-yard at Ports

mouth; and before I sum up the evidence to you, I will make one general observation; that though it is impossible for any language to aggravate this offence, yet it is not for you now to feel the magnitude of that crime; you are to divest yourselves intirely of all the horrible consequences of the perpetration of it, and apply your consciences to this single fact; Is this prisoner guilty or innocent of this offence? What the consequences of it are, or might have been, I wish you not to think of; because it is in human nature to feel prejudices, that one wishes at such a moment as this, juries should forget. I am sure, therefore, you will now think of nothing but the plain simple fact itself; and whether it is, or is not, supported by the evidence you have heard.

Gentlemen, the first witness is James Russell, who says he is clerk to the clerk of the Rope-yard, and that upon Saturday the 7th of December last, at half-past four o'clock, he first perceived the fire by which the Rope-house was consumed. There were hemp-toppings in the middle loft, and cordage on the ground floor: and that was the usual repository for both; much of it, he says, was burnt.—This witness was called to prove the fact of the fire itself; which, though too notorious to doubt about, was necessary to be proved in evidence. He says, on the 15th of January he found a tin case in the Hemp-house, on the ground floor; and upon its being produced, he says, it appears to be the same—he has no doubt at all about it. He told you that there was a box in it, but at the time it was found, there were besides, matches, tar, and oil, in the wooden box; but the tin box and the wooden box were then separate. He says, he found also a bottle, which had had spirits of turpentine in it; he found all these things in the Hemp-house, just by the box: its situation was in the center of a mow of hemp; and it had the appearance of concealment, though, he says, a person by going up to the upper end of it, if he had had a suspicion or apprehension of it, might possibly have discovered that such a thing was there. He says, there was a great deal of loose hemp near it, and there was some dunnage, which I understand to be cuttings, or refuse of hemp, which seemed to lie under the box and the canister. There was also some brown paper lying near it, and from the appearance it had, it seemed to him to have been all thrown in together over the bundle of hemp upon the mow; and by falling against the mow, they had separated. Now, gentlemen, it is material for you to understand, that all these several things were found in this place, because in the course of the evidence you will find, most, if not all of them, particularly accounted for;—he says, that there was hemp in the place; that both it and the Hemp-house must have been consumed if the fire had happened, for you will recollect, though fire was attempted to be set, as well to the Hemp-house as the Rope-house, the providence of God did interpose, and prevent that from taking effect.

William Tench, the next witness, says, that he saw the prisoner at his master's house just without West Gate in Canterbury; and he thinks it was about a month or six weeks before Christmas.—The observation which the prisoner has made in his defence is very true; namely, that all the witnesses from Canterbury give rather a different account about the time; they are none of them very particularly precise; they all speak rather at large about it. But it does not seem to me to weaken that evidence, because five or six different people do not all concur in their recollection of the very day when the person was at Canterbury; and when they speak cautiously, it is not to be wondered at, that they differ a little, a few days or a week in their account. This witness says, that it was a month or six weeks before Christmas, and that he himself made the tin machine for the prisoner; the first time he was applied to upon this business was on the Monday before last, and that was particularly asked him, in order I suppose to show you a material circumstance, that this was after the prisoner had confessed the whole himself to Baldwin. But when I use the word 'confession,' it is proper now at the outset to make one general observation to you upon the evidence of Baldwin. I do not look upon this as being strictly a confession of the prisoner: but it was evidence which the man himself chose to disclose to Baldwin without any solicitation whatsoever, and without any promise or engagement of secrecy. It seems to have come from the prisoner himself spontaneously; and as far as we have the evidence before us, Baldwin does not seem, in any of these conversations, to have sought a discovery from the prisoner; but it has all come from the prisoner, and not from Baldwin, and therefore what the prisoner has said in his defence by way of objecting to Baldwin's evidence, does not, in my apprehension, weigh much in the consideration of this question.

Tench then proceeds to say, upon being cross-examined by the prisoner himself, that he knows the canister very particularly by the seam in it, and that he knows the seam by its being very bad solder; that he took particular notice of the badness of the solder when the prisoner came, and that he can swear to that solder any where: that he knows the prisoner by his person, he thinks also by his hair, but he is positive that he had the same sort of coat on as he has now.—He says he does not pretend to recollect the particular day that he made the canister.

Elizabeth Boxell says, that she saw the prisoner the day before the Rope-house was on fire at her own house, in Barrack-street, Portsmouth: that he took a lodging of her, and lodged there one night, which was the night before the fire. And, gentlemen, her evidence, abstracted from bringing it home to the prisoner that he was at Portsmouth at the very time, is extremely material, if you give her credit; inasmuch as she speaks to particular work and operations, upon which she found

him employed; for, she says that that very night, when he was at her house, she observed a very ugly sulphurous smell in his room; and she smelt it again on the Saturday morning: she was so uneasy at it, that she went up stairs, she pushed open the door, and found the room full of smoke; she asked him, with great anxiety, what he was about? She saw that he had been burning something by the side of the fire, and on the hearth itself: she said she took a candle from him, but observed it was not the same candle she had carried up. She says, he was doing something too on the chair. She then went down stairs, but returned again immediately; and, in that interval, she having opened the window, and he having shut it, she told him he should not shut the window, and insisted upon its being kept open.—I say, gentlemen, this is material; because as this case is to depend entirely upon a chain of circumstances, you must lay all of them attentively together, and circumstances may form such a body of evidence, as shall be abundantly stronger than where two or three witnesses swear to a positive fact. If you should think this case stands upon such circumstances, you will draw your own conclusion; if you think the circumstances are not strong enough to bring the charge home to the prisoner, you will then discharge your consciences by saying so: but upon every little circumstance you must hang. This, therefore, is material to recollect. The prisoner is employed visibly in some preparation of combustible matter over night, and next morning; the fire happens that very day. That, therefore, you will take as one circumstance. She then mentions another, which turns out to be also material, which is, that on the Friday, looking into the prisoner's bundle, she found in it part of an old shirt and a pair of leather breeches upon a tin case: now, you have had it in evidence, that a tin case was found in the Hemp-house; she says, she viewed this tin case a quarter of an hour, and therefore is very particular in swearing that it is as much like the case, which has been produced to you, as any thing can be: she says, she was so much alarmed at his proceedings, that she ordered him out of her house, and indeed she says, that she would not quit the room. He said he wanted his candle; she bid him take it as he went down; that, by and by, may turn out also to be a circumstance fit to be remembered. She says he took away the bundle, but she does not know whether the canister was in it at that time; she had seen it on the Friday, and this was on the Saturday. Then Mr. Commissioner Gambier produces the bundle which he received from his clerk, John Jeffereys, on the 21st of February; it is shewn to Mrs. Boxell, who says, she does believe that to be the same bundle.

John Jeffereys, who delivered the bundle to Mr. Gambier, says, that he has no doubt about the handkerchief, which incloses the contents, being the same; he says, that on the evening of the 20th of February, he had orders to search all about, and particularly in North-street, and he found the bundle in North-street at a Mrs. Cole's.

Mrs. Cole being called, says, that she knows the prisoner; that he came to her house on the day of the fire, and took a lodging there; that he left a bundle; and looking at the bundle now produced, she says it has all the appearance of being the same bundle. Mr. Jeffereys, and another person, she says, had it from her; that she never opened it whilst she had it; that the bundle was not tied quite close, and she saw a little way into it. She says the prisoner came to her house in the forenoon; that he staid a quarter of an hour, and went out about 11 or 12 o'clock.

William Abram, a blacksmith at Portsmouth, says he lodged in the same room with the prisoner at Mrs. Boxell's; the prisoner asked the witness if there was any pressing? He said, yes, there was a very hot press. The prisoner said, suppose they were to take up such a man as me, I could give no other account of myself but from writings in my pocket. Then he asked, if a man was to get into the justice's hand, could there be any way of escaping? The witness said no. Why not escape? said the prisoner, Why there are very high walls—Why is there no way of getting over the walls?—he said no. The witness says, that then the prisoner said there was one Brooks in Newgate, that he knew would be hanged. He says, the prisoner had yellow buckles on, but he cannot swear to the buckles that are shewn him (which are part of the contents of the bundle), being those buckles, though they are the same pattern. Now, upon this evidence, I would make this observation; that Abram proves the identity of the prisoner; he proves too his lodging at Mrs. Boxell's house, so that he confirms her evidence, and to his lodging there at that particular time; and then the bent of the prisoner's conversation with him, (for you are to take the whole evidence together) you may, perhaps, think, implies that he then had something in contemplation, which might induce him to wish to make his escape.

The next witness is John Baldwin; this you see is the material witness, upon whose account very much will depend. I did read over his evidence before to the prisoner, as he wished to hear it; but I will repeat it now to you. John Baldwin says, he first saw the prisoner on the 7th of February, at sir John Fielding's, having been sent there by my lord Temple, because he thought he might know the prisoner, as he was a painter, and had lived in America, and the prisoner was described as having been there; he says, that he himself had been at Amboy, at New York, and at Philadelphia; he says, he told sir John Fielding that he had never seen the prisoner; that the prisoner heard him say so, and made him a bow: he afterwards saw the prisoner in another room, and the prisoner beckoned to him, and he sat down by him; and then he entered into a little discourse, and asked him who he knew

there? he mentioned several people, particularly some painters; and he told him, "you are not like the other evidences, who have sworn falsely, but you are a gentleman, and I wish it was in my power to make you a satisfaction," and said he should be glad to see him in New Prison: he says, at near four o'clock he went there, he went into a corner between the two gates, and there he discoursed a good deal with him about America, and desired him to come again the next day. Lord Temple sent him, in consequence of this, to lord George Germain; and they both thought it material that he should go to the prison. Accordingly he went again the next day, and had a good deal of discourse with the prisoner; the prisoner told him he found he was an American by principle, but what countryman was he? He said he was a Welshman; "Why," said he, "I find you are interested for America, however." Then, he says, he told the prisoner that he was married at Amboy, and they talked about the witness's family. He waited upon him, he says, from day to day, till the 15th, and in the course of all that time, nothing but general discourse passed upon the subject of America; but upon the 15th he made material discoveries; he then began, and he told him all the particulars. I do not mean that he told him all upon the 15th of February; but I collected from his evidence, that the substance of what he has told you, all passed subsequent to the 14th of February; and among other things, he asked him, "Do you know one Mr. Deane?" he said no. "What, not Mr. Deane, employed at Paris by the Congress?"—No. "What, not Silas Deane!"—No—"He is a fine fellow; I believe Benjamin Franklin is employed about the same errand." And then he told him that he had taken a view of most of the dock yards and fortifications about England, and particularly the number of guns in each ship of the navy, and the weight of their metal, and the number of men; and he said he had been at Paris two or three times, to inform Silas Deane of the particulars of what he found in the dock-yards; that Silas Deane was greatly pleased with what he had done, and he acquainted Silas Deane in what manner the dock-yards were to be set on fire; and Mr. Deane was amazed he could undertake to execute it in such a manner alone; but he told him he would do more execution than he could imagine, or any person upon the face of the earth. Deane asked him what money he wanted to carry his scheme into execution? he said not much; that he expected to be rewarded according to his merit. Silas Deane, however, he said, gave him bills to the amount of 300*l.* and letters to a great man, a considerable merchant in the city of London. In his discourse with the witness, he expressed his anxiety to know whether my lord Cornwallis had been defeated in America; he said he knew Washington personally, and believed him to be abler than general Howe. That he would watch and harass general Howe, and he was sure the Americans would conquer this winter; but the grand campaign was to be in the summer. He said he only wanted a few experienced officers, which he believed would be supplied from France. That Silas Deane was appointed at Paris for that purpose, and to buy stores and ammunition; but as to cannon ball, they had enough in America, particularly somewhere in Maryland, to supply all Europe; and likewise pitch, tar, and turpentine. He says, from the 7th of February to the 24th, he was with him every day, and mostly twice a day: the prisoner told him among other things, that he arrived at Dover from Paris, and went to Canterbury.—Now here you see appears the materiality of the Canterbury evidence. That he went into a shop at Canterbury, and bespoke a machine to be made which they called a canister; the master to whom he applied he said was a stupid fellow, and did not understand him; but the boy was more ingenious; though he was obliged to stay by him to instruct him. Now that boy you see has been called, and confirms this part of Baldwin's evidence, by swearing positively to the prisoner being the man who came to his master's shop, who bespoke the canister—for whom he made the canister, and who took away the canister. That the prisoner told him he gave the boy something to drink, and then he went into a public-house with the canister under the breast of his coat; that there was a dragoon in the house with whom he had some words, and that the dragoon opened his coat to see what he had in it.—The dragoon, you will recollect, is called, and he confirms this story, not directly, but in such a way, as leaves you very little room to doubt about it; he does not, you will recollect, swear positively to seeing the actual canister itself, but he saw something under the breast of the prisoner's coat shining and glittering like tin: and he mentions the circumstance of the prisoner's having had a quarrel with his comrade, which the other dragoon also confirms him in, though both of them swear cautiously to the identity of the prisoner. The witness says the prisoner told him that from thence he went to Portsmouth, where he took a lodging at Mrs. Boxell's; and there he tried his preparations. Now, gentlemen, I think I am warranted in saying, that Mrs. Boxell's evidence was very material, inasmuch as he himself, in his discourse with the witness, has confirmed her testimony in the strongest degree: for he tells him here what she told you before, that he was employed in her house in preparing and in trying these combustibles. He goes on and says, that there were matches made of a sheet of whited-brown paper being folded up in ten or twelve folds; and he told him that this was the method in which he made them in order to be done over with a composition of charcoal and gun-powder; that is a small circumstance as it passes; but you will recollect it presently, as being perhaps material: the charcoal he said must be finely pounded upon a colour-stone, such as painters use, in order to

make it effectual: he said the paper must be doubled before it was done, in order to prevent its cracking. Now there was a witness called afterwards, relative to what passed at Bristol, who is a painter. You will recollect I was desirous that he should steer clear of dropping any thing about the calamity that we have all heard of at Bristol; because we are not now in charity or justice at liberty to suppose, that this prisoner had any the remotest connection with what happened at Bristol. But the evidence was material in this way, to prove him at Bristol, merely for the purpose of confirming that part of Baldwin's evidence, where he said the prisoner told him he went afterwards to Bristol, and to prove him to have been with Mason, the painter. It shews, too, that he knew how to make this preparation, and that in fact he did himself apply to the painter to grind charcoal upon a stone, for some purpose or another; what that purpose was is no consideration of ours, nor was that the view with which the evidence was called; but however he knew that was the method of grinding charcoal, and therefore it confirms Baldwin, in some measure, in this part of his relation. The witness says he told him that the gunpowder does not require much grinding; that might be mashed with a knife, as painters mix vermilion: but they must be very particular in mixing these two bodies together; the charcoal is ground in water, then mixed up to the consistency of new milk, and then with a small brush, the paper, that is to make the match, is painted over with it: and it is so managed, that the match will last 24 hours. You will imagine, I dare say, without my telling you, that it is material for any person, who intends to carry into execution such a purpose as this, that it should not be executed too soon; it is of importance that it should be some time about, in order to facilitate the party's escape; and therefore it is to be so contrived, that it is not instantly to take fire. He told the witness he lodged at Mrs. Boxell's one night, but she was a very impudent woman, for she had opened his bundle during his absence. The tin machine, he said, was a curious construction of his own invention; and in that we all go along with him; it most certainly is a curious invention; and it is only a pity that it was for such a purpose. He told him he had a wooden box, which was made with a hole in the centre, to put a candle into it; and in that box he put tar, turpentine, and hemp. He said the canister fitted the box so well, that when the candle was put in, nobody could perceive any light: then he told him, that on the 6th of December, he went into the yard, and got into the Hemp-house, where there was a deal of hemp, so tight matted, that he could hardly get it apart---that he pulled his coat off to work at it; and then, after lightening the hemp, he placed the canister over the box with a small candle in it. Now, gentlemen, you will recollect that Mrs. Boxell told you he was very desirous of having a candle, when he went away from her house, and that she told him he might take one as he went down stairs. He said he sprinkled some turpentine about the hemp that was round it; and when he had done that, it was some time before he found his coat; and when he found it, there was a good deal of hemp sticking about it, which he endeavoured to get off; he then went out of the Hemp-house, and got into the Rope-house; and he laid down a quart bottle of spirits of turpentine upon its side, with hemp in it instead of a cork: he said close to the hemp he laid a piece of paper, with dry gunpowder in it, and to the paper, where the powder was, one of these matches; and over the powder he laid some hemp lightly strewed, and a quart of turpentine poured all about it. Now, gentlemen, if you believe the fact upon this account, to be sure it is impossible to conceive, that any man could take his measures more effectually for doing complete mischief. He said, that as soon as the fire of the match touched the powder, it would set it all of a blaze presently; and that by cutting these matches into pieces, it would answer to any time, so that he might make his escape. He told him, that the next day, which was the 7th, he went from Mrs. Boxell's, and took two other lodgings, one at a public house, the other at a private house; and he took particular notice before he took the lodgings, which houses had the most wood about them, and he said he had these combustibles ready for setting those two houses on fire, on the same day that he set fire to the Rope-yard, in order that he might keep the engines engaged: he told the woman at the lodgings he took on the Common, that he was going to Petersfield, and begged her to take care of his bundle---that bundle you have an account of, after that he went into the Dock-yard in order to set fire to the Hemp-house, and the Rope-house. He first, he said, went into the Hemp-house, and struck a light; but the matches were very damp, and he could not get the sulphur to take, and he wasted in the trial the whole box full of tinder, and blew at it till he almost burnt his lips: then he went away from the Hemp-house, in despair of setting fire to that, and procured some better matches; and he returned, and got into the Rope-house; and then he set fire to the match that led to the powder. This is the account he gave of the manner in which he perpetrated this crime: he said he had bought a halfpenny worth of matches the day before of a woman; that woman, you see, is called, in the subsequent part of the evidence, and confirms Baldwin in this circumstance too of his relation. The day he put the preparations in, he said, he was so long about it, that he was locked into the Hemp-house, and could not get out; he tried at several doors, he went then up stairs, and pulled off his shoes, and tried whether he could get out; finding that he could not, he came back to the same door, where hearing somebody, he hollowed; being asked how he came there, he said it was curiosity; a person on the outside of the door directed him at last

which way he should get out; this too is confirmed so far, that a person was locked in, but who that person was, is not positively proved. He said, when he came out, he was much vexed that he could not set the Hemp-house on fire; and also vexed because he could not go to Portsmouth Common, where he had left a parcel; which, you will observe, he told him, and it is very material, contained, among other things, a pistol, an Ovid's Metamorphoses, a book entitled The Art of War, and making Fire Works, and a passport from the French king; all of which you see are found in it. And in that passport, he said, was his real name, which vexed him more than any thing; but, however, as it was in French, he did not imagine that the people at the lodging could read or understand it; but he expressed his surprize that this bundle had not been found. He said, after setting fire to the Rope-house, he made the best of his way towards London; and that he was so sorry he could not get the matches to light, that he had a good mind to shoot at the windows of the woman where he had them: he said, that he burnt the bills and the letter (which you will remember he told him before he brought over from Silas Deane) on account of the behaviour of Mrs. Boxell, for he evidently suspected that she entertained some doubt of him; and, therefore, lest the person to whom the letter was addressed, or the bills might lead to a discovery, he prudently burnt them all. He said, soon after he left the yard, he jumped into a cart, and desired the woman to drive quick; this, you see, is positively confirmed by the woman who drove the very cart; he rode in it two miles, and gave her sixpence to go quick; that he had near four miles to go before he passed the sentries, and therefore was very desirous of getting past them; and that two minutes after he had passed them, he looked back and saw the flames, and the very elements seemed in a blaze; he walked all the way to London; and in the road between the last sentry, and Kingston, two dogs barked at him; he shot at one of them, and believed he killed or wounded him. The next morning, being Sunday, he got to Kingston, and waited there till near dusk; he then came in the stage to London, and waited upon the great man, the merchant in the city; and he told him that he had a letter and bills upon him from Silas Deane at Paris, but which he had been obliged to burn. The merchant, he said, seemed very shy of him, and said he had received no such accounts from Paris; he answered, that he might think what he pleased, but that he was an enemy to Great Britain, and a friend to America; and that he had set fire to the Rope-house at Portsmouth, which he would see in the papers on Monday. Baldwin said he could not get the name of the merchant from him, but the prisoner said the merchant appointed to meet him at a coffee-house, and the gentleman waited there accordingly for him; they discoursed a little together, but the gentleman seemed still shy of him, and another gentleman in the coffee-house taking particular notice of him, he did not care to stop long: he was so angry that the gentleman would not believe him, that he got up and went to Hammersmith, from whence he wrote to him, and said, he was going to Bristol, where he would hear more of his handy works; and you will remember there is a subsequent evidence, Mason, the painter, who tells you he saw him at Bristol. He said, he arrived at Bristol a few days before Christmas; that he got leave of a painter there to grind some charcoal upon a colour-stone of his, and that the painter took notice he was long about it: that painter, you recollect, has been called, who tells you that the prisoner did apply to him for the purpose of grinding charcoal upon a colour-stone, and he did according so grind it. Then the witness says, that he gave an account of this from day to day, to lord Temple and lord George Germain, and he mentioned that the 16th was the first day that the prisoner disclosed any of the particulars to him. Now, gentlemen, you see from this man's evidence, there is an exceeding clear, intelligible, and consistent history given; but if this account, clear and consistent as it is, were unsupported by other evidence, one might perhaps entertain some doubts about it; but where you find it confirmed in almost every material passage, where you find it not contradicted in any one circumstance, you must then, I think, feel it, when so authenticated, to be a very strong body of evidence indeed.

Edward Evans, who is one of the dragoons, says, that he was at Canterbury from October till the 1st of February. But you will observe, that he does not pretend to swear positively to the prisoner; for he says the man is much altered since he saw him, though he believes him to be the same. He says it was about the end of October, or beginning of November, that he saw him there, and that too you see is contradictory to the other evidences; as to the precise time they do not agree, as I told you before; but, however, he agrees in this material article, which came from the prisoner's own mouth to Mr. Baldwin, that he was there at the time when he had a quarrel with him; in fact, the witness says he had a quarrel with him (supposing the prisoner to be the person) at Canterbury, and he then says that the prisoner had on a brown surtout coat, but he did not see what was under his coat.

The next witness is James Wilson, the comrade of the last witness, who was there at the same time, and who says that he really thinks the prisoner is the same person, though he will not positively swear to him, and that the dress was the same as he is in now; he remembers that there was a dispute between his comrade and him, and he says he did observe something white under his coat which glistened like tin.

John Fisher lives at Mr. Tuck's at Canterbury, who is a tinman: he says he thinks he has seen the prisoner, and he believes it to be about six or seven weeks before Christmas that

he saw him in his master's shop; you see they all vary a little as to the time: he says the prisoner ordered two canisters, and he ordered them to be made of a long square shape; and one of them being produced now to him, he believes it to be the same; and he says he does not know why the prisoner did not take them away, but he left them at their shop: however, he says, the prisoner called once for them, but they were not then completed. Now, gentlemen, upon this man's evidence you will naturally make this observation, that the person, be he who he may, that wanted this tin box, certainly wanted more than one; why he did not bespeak them all at the same shop, cannot well be accounted for, unless it be that he thought so many at one place might lead to some suspicion. However, the fact turns out to be, that he did not stay for these two being made; they were left behind, and he only carried off that which has been found.

William Baldy is next called; and he proves the prisoner not only in the Dock-yard, but in this very building, on the 7th of December. The witness says he is a rope-maker, that he has seen the prisoner in the Dock-yard; he says he saw the prisoner in the Rope-house on the lower floor, about a hundred yards from the east end of it, on Saturday the 7th of December, between eleven and twelve o'clock, which was the day of the fire. He says he saw the prisoner come down from the upper part of it. Now that too confirms the story that Baldwin has told; for the prisoner said he was first in the lower part, that he could not get out there, and then he went into the upper part; the witness mentions an immaterial passage, which I need not repeat to you, about picking up a small stone, and he had a little discourse with him: that was only asked to satisfy you that he was so long in conversation with this prisoner, that he could not make any mistake about his person, but that he was the man; he stayed five or six minutes with him, and then left him: he says he saw him about ten minutes or a quarter of an hour after this at the east end of the same floor coming down stairs; and then one William Weston being with the witness, the prisoner said to Weston, "How do you do?" holding out his hands to him; and he, thinking him to be an acquaintance of his, did not stay to hear his conversation with him, but went away. He closes his evidence with saying, that, from seeing him at these different times, he is certain he is the man.

William Weston says, that to the best of his recollection he saw the prisoner in the Rope-house the day the fire was.—He had very little conversation with him at that time; but he is positive it was the same man; for he had seen him, he says, seven weeks before walking about in the Dock; he did not however see him come down stairs: these two witnesses, as far as their evidence goes, prove him to have been in the Dock-yard, and in that very building in the Dock-yard, upon the day when the fire happened.

Edward Carey, a shipwright, says he was at Portsmouth the day before the fire; and that night he remembers a person being shut up in the Rope-house; he heard a person making a noise in the Rope-house, who said he was locked in, and desired him to let him out; the witness said he could not, and went away; so that little circumstance too, mentioned by Baldwin, you see is confirmed by this witness; he remembers a person being locked up in the Rope-house, but you will observe that he does not pretend to say that person was the prisoner.

Then Ann Hopkins is called. She is the woman that drove the cart that day from Portsmouth, into which you recollect he told Baldwin that he got. She says she saw the prisoner the day that the Dock was on fire at about four or half an hour past four in the afternoon. At that time she was coming from the market; she saw him first between the Bull and Cosham, she did not see him till he came up close to her; he stopped her and asked her where she was going? She said, a little way; he said he would give her any thing to give him a lift, for he was going to Petersfield that night, and was afraid he should be belated; and intreated her to drive as fast as she could. When he came into the cart she observed he was much out of breath; she told him she was to stop to buy a pair of pattens; she did accordingly stop at a shop; she was to pay a shilling for them; the prisoner threw down sixpence, and then he said, he wished he could get a returned chaise; and when she stopped a little before she came to her own house to give her horse some drink, he jumped out, and ran away along the London road. Now, with respect to this evidence to be sure, any person, totally unconcerned in any guilty deed, might be anxious to get to Petersfield; might be afraid of being benighted; might wish her to drive very fast; all that might happen very naturally without any imputation upon the party; but, as I said before, you are to take this case with all its circumstances together; and every little circumstance weighs something; and if you should trace the prisoner to the very place, almost to the moment of the fire, if you trace him leaving the place immediately after, and being in this state, out of breath, eager to get off, pressing the woman to drive on, anxious to get a returned chaise, jumping out, and running forward when she stopped; laying these circumstances together, with all the others, to be sure you will be justified if you entertain some suspicions about his motive. But all this you will weigh together with the many various circumstances of the case.

Elizabeth Gentell says, she lives on Portsmouth Common. She saw the prisoner at her house the day before the fire; he came there and asked her for a halfpenny-worth of matches. That you see, gentlemen, is another circumstance that has been proved to you, as coming from himself to Baldwin; that he

bought a halfpenny worth of matches of a woman at Portsmouth. She says he asked particularly if the matches would take quick? He took a bundle and tried one or two of them, and then he took out some money, and paid her a halfpenny. She says she is sure he is the same person. Now, upon this evidence, it is for your consideration whether a man, going to buy matches, would or would not shew such an anxiety about their being particularly well made; and there is one more observation, which I would make to you, that the man who goes to buy a halfpenny worth of matches for his own use, is hardly such a man as could afford to express a desire of meeting with a post chaise to carry him to Petersfield.

The next witness is John Illenden, who is a surgeon and apothecary. He says, that as far as human possibility can go, the prisoner is the person whom he saw at Canterbury, three or four days before or after the 20th of November; and that he is particularly clear that he is the man, because he came to his shop to buy two ounces of spirits of turpentine, and a quarter of a pound of saltpetre. Now, gentlemen, these things you will feel a man might innocently buy, at the time you are recollecting that these materials have been found upon the spot, and that they are materials necessary for combustion.

Mary Bishop says, that the prisoner was at her house at Canterbury, between Michaelmas and Christmas; so that she speaks very vaguely about the time; she cannot be positive when it was, but she remembers one circumstance (believing it to be the prisoner) that he told her he had been interrupted by, that is, that he had had a quarrel with a dragoon at the White Horse, and he told her in conversation, that he came from America, on account of the disturbances; but he asked her a material question, and that was whether he could get a wooden thing made, which she did not know what name to give to; but the wooden engine, that is produced, being shewn to her, she says, upon her directing him to some man, who could make it for him, that she saw something which a Mr. Overshaw's apprentice brought for the prisoner in the afternoon of the same day, and that he put it under his coat, wishing not to have it seen. The counsel very properly asked the woman what was become of the apprentice? because undoubtedly they ought not to have stopped short, without calling the apprentice; but the apprentice, she says, is dead, therefore we cannot have any clearer or fuller evidence upon this matter. Then, upon looking on this wooden machine, she says, it is as near, as she can guess, like that thing she saw brought to the prisoner.

John Dalby is the person who apprehended the prisoner, and he is called to prove what he found upon him; he says the prisoner had upon him a pistol primed and loaded with shot; he had a pistol tinder-box, which was also primed; and he had a snuff-box full of tinder. Now, gentlemen, that is a little circumstance that is uncommon; a man's carrying about with him a pistol tinder-box to strike a light may very well be; but he seldom carries more tinder than that pistol tinder-box will hold; for if ever you saw one of these, you must know there is a part of it made to hold tinder in; but, however, over and above that, he had a snuff-box full of tinder, and he had a powder-horn with some gunpowder in it. He says, he had also two bundles of matches. You remember he was discontented with the matches which he tried, and went out of the Dock-yard and bought others.

Thomas Mason says, he lives at Bristol, and is by trade a painter; that the prisoner called on him the day after Christmas-day, and asked him to let him grind a piece of charcoal upon his colour-stone, which he did; this is only material to shew that he was at Bristol, as Baldwin mentioned he was, and that he knew, in fact, what use the colour-stone could be applied to.

Then, gentlemen, the only remaining evidence is the contents of the bundle. The bundle has been opened, and in it is found the passport from the French king, about which he expressed so much anxiety, lest it should lead to a discovery. That passport is dated the 13th of November; it is in the common form, to grant him free permission to go out of the kingdom, and to continue in force for one month from the date. Besides that, there was Ovid's Metamorphoses, and a Treatise of the Arms and Engines of War and Fireworks, and the Justin, the books he mentioned to Baldwin, and the pistol, and some few other things. This, gentlemen, is all the evidence in support of the prosecution.

The prisoner has called no witnesses, but he has rested his defence chiefly upon the credit that you ought to give to the evidence of Baldwin; because he says, that a man who was capable of drawing out this evidence from him, ought not to receive credit in a court of justice. Gentlemen, I have told you before, and I ought to tell you now, that, in point of law, there is no objection to this man's testimony; and from the manner in which he came by the knowledge, which he has now furnished us with, I do not see that there was any thing which can lead you to suppose that Baldwin was the first mover with him, or that he prevailed upon the prisoner to disclose the secret; but it should seem as if it came from the prisoner himself, though it was undoubtedly upon the idea that this man was his friend: because, if you do not suppose that, you must suppose him madder than any man that ever was born. He certainly thought him his friend, and he therefore did disclose all this to him.

Gentlemen, one has only to say further, that if this point of honour was to be so sacred, as that a man who comes by knowledge of this sort from an offender, was not to be at liberty to disclose it, the most atrocious criminals would every day escape punishment; and therefore it is, that the wisdom of the law

knows nothing of that point of honour; if the man is a legal witness, you are bound to receive his testimony; giving it, however, that weight only which you think it deserves: for it is always in the breast of the jury, to consider of the degree of credit they will give to every witness. Let him be in all lights a legal witness, you are still to be the judges of his credit; if you think that a man, because he listened to this tale so many days, and disclosed it as he heard it, to the great officers of state, and has disclosed it now in a court of justice, is a man to whom belief cannot be given, in that case to be sure you will set aside his testimony; but if you see no ground to suppose that the man has spoke untruth, you cannot then reject his testimony.

Gentlemen, the trial has lasted already very long; the summing up has also been long. I have endeavoured, as I have gone on, to lay together some of the many circumstances of this case for your consideration; and I do assure the prisoner, as well as you, that if I had found myself enabled in my conscience to have stated any thing more favourably for him, I would have been the first to have done it. But I am sitting here to do equal justice between the public and the prisoner; and I was therefore bound to make those observations which I have done, because they strike my conscience, as being necessary and material. I thank God, however, gentlemen, that you are to judge of these circumstances; you are to lay them all together, and draw your conclusion from them; and if you believe that there is such a train following one another, I had almost said so irresistibly, as that you cannot doubt that in the first place the fire did happen by these combustibles, and then that the prisoner was the person who laid those combustibles there, I should suppose you can have no doubt but that he set this building on fire wilfully and maliciously. If on the other hand you should feel, though there are a great number of circumstances tending in some degree to the proof of the fact, that your minds are not satisfied that it comes home to the prisoner, if you are of that opinion, you ought to exercise the jurisdiction which you have, and acquit the prisoner.

I will say one thing more, and only one; you are bound by your oaths to give a true verdict; and if the circumstances of the case appear to you decidedly strong, you will of course give your verdict on that side on which they preponderate; but if you should think that they are still so doubtful, as that you cannot satisfy your minds this was the very man who did the fact, in that case, in favour of life, you ought to acquit him.

The Jury almost immediately pronounced the Prisoner, GUILTY.

The Prisoner was then asked, in the usual form, what he had to say why sentence of death should not be passed upon him, to which he replied, "I have nothing to say."

SENTENCE.

Mr. Baron *Hotham.* Prisoner; You have been indicted, tried, and convicted of a crime, which the law of this country has thought fit to make capital, and now the most painful moment that I have undergone in the course of this trial is arrived; for it is my duty to pass upon you that dreadful sentence. I shall not interrupt those feelings, which I trust you have, by talking to you of the enormity of the offence which you have committed; because it is impossible for me, or any man who hears me, to add a word by way of aggravation to it: and it has this in particular about it, that it cannot have been committed from any motives of private malice, revenge or lucre. It can have proceeded only from a general malignity of mind, which has broke out in a desire and a design, not only to ruin one devoted individual, but to involve every one of this audience, nay the whole English nation, perhaps, in immediate ruin. You cannot therefore be surprised that the law has thought fit to punish such a crime with death. You can as little be surprised, if, after you have been convicted upon the clearest evidence of this offence, I can give you no hope of pardon.* It is impossible for me to say a word in your behalf: and therefore I must entreat and conjure you, in the most solemn manner, to prepare yourself during the few days you have to live, to meet the great God in another world, and to ask him there for that pardon, which you could not receive in this; there it will be worth receiving: and atrocious as your crime has been, short as the time is that you have to live, a sincere repentance now on your part, may, and, I hope in God, will procure you mercy at his hands. I say all this not to taunt or distress you in your present unhappy situation, but merely from motives of humanity and religion. For you cannot be suffered to live in this world; you must die, and that within a very few days. And therefore, before you go into eternity, for your soul's sake, do what you can, that that eternity may be an eternity of bliss instead of misery. I have only now to pronounce the painful† sentence of the law, which I am bound to do, and I accordingly adjudge and order that you be hanged by the neck until you shall be dead, and the Lord have mercy upon your soul.

Prisoner. My lord, I am exceedingly well satisfied.

* The prisoner said, "I do not look for it, my lord."

† When his lordship mentioned the word "painful," the prisoner said "joyful."

THE PRISONER'S CONFESSION.

City of Winchester;

The voluntary CONFESSION *of* JAMES AITKEN, *commonly called* JOHN *the* PAINTER, *now a Prisoner in the County Gaol of Southampton, and under Sentence of Death, for burning the Dock-yard at Portsmouth, taken the seventh Day of March, 1777;*

Saith, that he was born at Edinburgh, the 28th of September, 1752, his mother now living, as he believes. Curiosity led him to Virginia, in America, at the age of twenty-one, as an adventurer to seek his fortune—Left America in March, 1775.

In October, 1775, by the name of James Boswell, inlisted a private soldier in the thirty-second regiment at Gravesend—marched to Chatham next day, from whence he soon deserted; was not concerned in the fire in Temple-street, Bristol, nor privy to it.—Broke into Mr. Morgan's warehouse at Bristol alone; no person concerned with him in that, or any other accident, that ensued in that city.—He intended to set fire to two houses in Portsmouth, in order to employ the engines, whilst the fire might spread in the Rope-yard.—Broke into Mr. Morgan's warehouse at Bristol, in order to burn it, that the engines might be there employed, whilst the shipping were burning and the quay, for which purpose, he left a lighted candle burning in the said warehouse; and, because that fire did not take effect, he afterwards set fire to the warehouse in Quay-lane, by getting over the top of the door.—Mr. Deane told him, when the work was done (meaning burning the Dock-yards at Portsmouth, Woolwich and Bristol harbour, but not the houses) he should make his escape, and come, if possible, to him at Paris, and he should be rewarded. As a reward, his own expectations prompted him to hope, that he should be preferred to a commission in the American army.

When after setting fire to the Rope-yard, he left Portsmouth (to wit) the next night, being Sunday—he reached London, and went to Doctor Bancroft, No. 4, Downing-street, Westminster, to whom he had a verbal recommendation from Mr. Deane, who gave him at Paris the doctor's name in writing, and place of abode; but the doctor would give him no countenance, and therefore did not relate the particulars of the mischief he had done to him, but hinted to him, that he would soon see or hear by the papers of an extraordinary accident that had happened.

And he afterwards wrote such an account in a letter to him, which he left himself at the doctor's house with a person who came to the door, which for the sake of truth he relates, and without intention of casting any slur on the character of an innocent man.

That he saw the doctor the day following in the Salopian coffee-house, and told him that he would do all the prejudice he could to this kingdom; to which the doctor replied, "he could not be of opinion with him in that respect, for that he got his bread in this kingdom, and therefore would not be concerned with him." And seeing that the doctor did not approve of his conduct, he hoped he would not inform against him, to which the doctor said, "he did not like to inform against any man." When at Paris, he was assisted by Mr. Deane with twelve six livre pieces; he asked for no more, neither did he receive from him any bank bill, draft or note whatever.

After leaving London (to wit) at High Wycomb, he broke into a house, and took away a few linens, consisting of caps, handkerchiefs, but nothing of value. He then went to Oxford, from thence to Abingdon, where he attempted to break into two houses, silversmiths or watchmakers, but without effect. From thence he went to Fairford, where he broke into a house, and took from thence a number of stockings and handkerchiefs, and a metal watch, and near fifty shillings in silver and halfpence: the watch he pledged for sixteen shillings, in the name of James Hill, at a pawnbroker's in Castle-street, Bristol. After this, without attempting any thing, but having prepared some of his ingredients, he went from Bristol to Plymouth, with intent to set fire to the Dock-yard there; twice he reached the top of the wall, but the watchmen being so near, he could hear them talk together, especially the last night, therefore he desisted; he never committed, or attempted to commit any robbery, but when he was like to be drove short of money.

After leaving Plymouth, he returned once more to Bristol, with a determined resolution, then, to set fire to the shipping in the harbour and in his way to Bristol, at Taunton, he attempted to break into the house of a silversmith, or watch-maker, without effect.

He attempted the shipping a second time, but on account of the vigilance and strictness of the watch, then kept on the quay and in the ships, his attempt proved abortive. He likewise attempted on the Saturday morning, but in vain, to get into a stable or coach-house on the quay, in order to set fire to it; but seeing a man lying in a cart near the place, he desisted.

On the Sunday morning following, he set fire to the warehouse in Bristol, in Quay-lane, which he effected in the following manner; (to wit) he bought some coarse flax on the quay, and some turpentine at another place; but where he cannot remember, and with those and charcoal matches and gunpowder, and striking a spark of light on tinder, to which he set a paper match, he effected his purpose. The match was made of touch paper, and as that consumed to the end, the powder being laid, and wrapt up, likewise, in touch paper, it of course took fire, and so he presumes it instantly mounted into a blaze. Then he left the town,

but seeing no fire behind, he returned back part of the way, till at last, hearing the city was on fire, he then went on to Sodbury, and so crossing the country to Marshfield, and to Chippenham and Calne. But the first night after the fire, he slept at Sodbury; the second night, he broke open the door of an out-house near it, where he slept, and left behind him in the morning a dark lantern. On the Wednesday night he went to Calne, and being near short of money, broke open Mr. Lowe's house; which robbery, as it is known, he has no occasion to enlarge upon it. He left a parcel, with a pistol and other things in the parcel, in the church porch of Calne.

At Bristol, he first broke into Mr. Morgan's warehouse, and there prepared the combustibles, for setting fire to the shipping.

He never was in the 45th regiment; neither did he go to America in any regiment.

He never said, that one Brooks, or any other prisoner in Newgate would be hanged, as was sworn against him upon his trial; neither doth he know any man by the name of Brooks.

His father was a blacksmith at Edinburgh, and he was apprenticed to a painter there, served his time out, and then had his indentures delivered up, which he usually carried about in his pocket, and afterwards burnt them; which gave rise to the story of his destroying papers to the value of 300*l.*

Those were the things of value, which he meant to express by what he had burnt.

As to any merchant in London, or any other person, except Dr. Bancroft, he had no recommendation to, or conversation with, respecting the many unhappy accidents before related.

That he stopt a post-chaise between Portsmouth and Petersfield, with a gentleman and lady in it, some considerable time before the fire, and robbed them of 9*s.* 6*d.* of which he returned 2*s.*

The latter end of December, 1775, he inlisted at Chard in Somerset, into the 13th regiment, with a recruiting serjeant, and a few days after deserted.

At Titchfield, as has been publicly mentioned, he followed the trade of a painter, also at Birmingham with Mr. Robinson, at Warrington, and many other places.

That he had committed, and attempted to commit several other robberies and burglaries; but of no material account to mention.

Declares that all the acts herein mentioned of a public, as of a private nature, were of his own motion, and that he was not advised or instigated thereto, by any person whatever, except what is before related, and that he had no accomplice.

One other circumstance strikes his present recollection which he is desirous to mention; and which happened in the city of Norwich, at the house of Mr. Mark, where he stole two silver table spoons, and a pair of silver buckles in the spring of 1776. JAMES AITKEN.

Signed by JAMES AITKEN, and protested by him to contain the truth only, in the presence of us this 7th day of March, 1777.—GEORGE DURNFORD, N. P. SMITH, two of his Majesty's Justices of the Peace, in and for the city of Winchester.—J. LAWRENCE, of the Bear Inn, Devizes.

The following ACCOUNT of his EXECUTION was furnished by Mr. Commissioner Gambier.

The Prisoner was carried from Winchester gaol on the 10th to Portsmouth, where it was appointed he should be executed at the Dock gate; and the following is an exact account of his behaviour from the time of his arrival to the time of execution.

Having been carried in an open cart by the Hemp-house and round the ruins of the Rope-house, when he came opposite the commissioner's house, he desired to speak with the commissioner, who thereupon went up close to him: he said,

"Sir; I acknowledge my crime, and hope for forgiveness from God, through the merits of my Saviour Jesus Christ.

"I ask pardon of you, Sir, and hope your forgiveness." Upon the cart's moving, he said, "he had one thing more to observe as a caution to all the commissioners of the dock-yards throughout England; to be more vigilant and strictly careful of them for the future, because it is in the power of a determined and resolute man to do a great deal of mischief."

As the cart stopped at the end of the Rope-house, he looked attentively at the place of his perpetration, and said, "I acknowledge my crime, and am sorry for it."

Just before he returned out of the Dock-yard, upon being asked there if he had any thing more that he wished to say to the commissioner, he said, "No, only I recommend great care and strict vigilance at the dock yards at Chatham, Woolwich, Deptford, Portsmouth, and Plymouth; and particularly at the Rope-house at the latter."

Just before he was turned off, he said, "I acknowledge the justice of my sentence, and hope for forgiveness, as I forgive all the world; I wish success to his majesty king George and his family, and all his loyal subjects; and I hope for forgiveness for all the transactions that I have been guilty of from the year 1772 since my apprenticeship; and that the world would be satisfied about him, as his life would be very soon in print."

ADDENDA TO VOLUME XX.

Extremely bad health, and frequent unavoidable absences from London, have disabled me from causing to be inserted in their proper places the following articles.

ADDENDA

TO THE

REPORT, given in a Note to SOMMERSETT'S CASE, of the NEGRO CASE in France. See pp. 12, *et seq.*

NOTWITHSTANDING the profuse and high sounding declamations of the French lawyers in the case of 'La liberté réclamée par un nègre contre son maitre' (see pp. 13, *et seq.*) concerning the incompatibility of slavery with the soil or with the air of France, certain it is that many persons (the 'serfs' or 'main-mortables—they had other denominations) in different parts of that country continued until its convulsive revolution to exist in a condition, which, if it were not strictly speaking slavery, undoubtedly bore a very strong resemblance to that status.

By an edict of August 1779, during M. Neckar's first administration, the benevolent Louis 16 abolished the right of 'main-morte' on the royal domains, and removed in all other parts of his kingdom one of the greatest grievances incident to that right—*le droit de suite.*

In the Encyclopédie, tit. Main-morte, there is a copious account, composed, as it appears, by M. Henrion, of this feudal institution. Into that account is incorporated the edict of Louis 16, from which I will here insert the preamble. It is an interesting historical document; and furnishes an authentic exhibition of some important characters of the 'Main-morte.' Henrion denominates the edict, 'un des plus beaux monumens de la sagesse de nos rois.'

"Louis, &c. A tous, &c. Constamment occupés de tout ce qui peut intéresser le bonheur de nos peuples, et mettant notre principale gloire à commander une nation libre et généreuse, nous n'avons pû voir sans peine les restes de servitude qui subsistent dans plusieurs de nos provinces; nous avons été affectés, en considérant qu'un grand nombre de nos sujets, servilement encore attachés à la glèbe, sont regardés comme en faisant partie, et confondus, pour ainsi dire, avec elle, que, privés de la liberté de leurs personnes, et des prérogatives de la propriété, ils sont mis eux-mêmes au nombre des possessions féodales; qu'ils n'ont pas la consolation de disposer de leurs biens après eux; et qu' excepté dans certains cas rigidement circonscrits, ils ne peuvent pas même transmettre à leurs propres enfans le fruit de leurs travaux; que des dispositions pareilles ne sont propres qu'à rendre l'industrie languissante, et à priver la société des effets de cette énergie dans le travail, que le sentiment de la propriété la plus libre est seul capable d'inspirer. Justement touchés de ces considérations, nous aurions voulu abolir sans distinction ces vestiges d'une féodalité rigoreuse: mais nos finances ne nous permettant pas de racheter ce droit des mains des seigneurs, et retenus par les égards que nous aurons dans tous les temps pour les loix de la propriété, que nous considérons comme le plus sûr fondement de l'ordre et de la justice, nous avons vu avec satisfaction, qu'en respectant ces principes, nous pouvions cependant effectuer une partie du bien que nous avions en vue, en abolissant le droit de servitude, non-seulement dans tous les domaines en nos mains, mais encore dans tous ceux engagés par nous et les rois nos prédécesseurs; autorisant à cet effet les engagistes qui se croiroient lésés par cette disposition, à nous remettre les domaines dont ils jouissent, et à réclamer de nous les finances fournies par eux ou par leurs auteurs.

"Nous voulons de plus, qu'en cas d'acquisition ou de réunion à notre couronne, l'instant de notre entrée en possession dans une nouvelle terre ou seigneurie, soit l'époque de la libertié de tous les serfs ou main-mortables qui en relèvent; et pour encourager, en ce qui dépend de nous, les seigneurs de fiefs et les communautés à suivre notre exemple; et considerant bien moins ces affranchissemens comme une aliénation, que comme un retour au droit naturel, nous avons exempté ces sortes d'actes des formalités, et des taxes aux-quelles l'antique sévérité des maximes féodales les avoit assujettis.

"Enfin, si les principes que nous avons développés nous empêchent d'abolir sans distinction le droit de servitude, nous avons cru cependant qu'il étoit un excès dans l'exercice de ce droit, que nous ne pouvions différer d'arrêter et de prévenir; nous voulons parler du droit de suite sur les serfs et main-mortables, droit en vertu duquel des seigneurs de fiefs ont quelquefois poursuivi, dans les terres franches de notre royaume et jusques dans notre capitale, les biens et les acquêts des citoyens éloignés depuis un grand nombre d'années du lieu de leur glèbe et de leur servitude; droit excessif que les tribunaux ont hésité d'accueillir, et que les principes de justice sociale ne nous permet-

tent plus de laiser subsister. Enfin, nous verrons avec satisfaction, que notre exemple, et cet amour de l'humanité, si particulier à la nation françoise, amènent, sous notre règne, l'abolition générale des droits de main-morte et de servitude, et que nous serons ainsi témoins de l'entier affranchisement des nos sujets, qui, dans quelque état que la providence les ait fait naître, occupent notre sollicitude, et ont des droits égaux à notre protection et à notre bienfaisance."

To P. 16, *Note.*

Rymer (A. D. 1574, Pat. de diversis Annis Eliz. Reg. m. 32, 31, d.) has inserted the following article:

"De Commissione ad Manumittendum.

"ELIZABETH, by the Grace of God, &c. To our right trustie and well-beloved counsellor, sir W. Cecill of the Garter knighte lord Burghley and Highe Treasorer of England, and to our trustie and right well-beloved counsellor, sir Walter Mildmay knight, chauncellor and under treasorer of our exchequer, greetinge.

"Whereas divers and sundrie of our poore faithfull and loyal subjectes, beinge borne bonde in blode and regardaunt to divers and sundrie our manors and possessions within our realm of England, have made humble suyte unto us to be manumysed enfraunchised and made free with theire children and sequells, by reason whereof they theire children and sequells may become more apte and fitte members for the service of us and of our common wealthe.

"We therefore, having tender consideration of their said sute, and well consideringe the same to be acceptable unto Almightie God, who in the beginninge made all mankinde free, for the tender love and zeale whiche we beare to our saide subjects, and for the speciall trust and confidence whiche we have in your approved wisedomes and fidelities, do name and appoynte you two our commissioners, and do by these presents, for us our heires and successors, give full power and aucthoritie to you two our said commissioners, that you, either by your warrant in writing subscribed with your own hands and seales, or otherwise by commission from us and in our name, under the seale of our courte of exchequier, shall and may accordinge to your discretions nomynate and appoynte any person or persons, for us and in our name, to enquire of all or any our bondmen and bondwomen with theire children and sequells, and of all theire goodes chattells lands tenementes and hereditaments within the severall counties of Cornwall Devon Somersett and Gloucester, and of what valewe the same be of, and that suche person and persons, so by you named and appointed to enquyre as aforesaid by force or virtue of any suche warrante or commission as aforesaid, shall within convenient tyme make or cause to be made return of every suche warrant and commission, with true certificates in writinge under their handes and seales, of all their doings concerning the premisses unto our said courte of exchequier:

"And do commytt and give unto you full power and authoritie by these presentes, to accepte, admitte, and receive to be manumysed, enfraunchised, and made free, suche and so many of our bondmen and bondwomen in blood, with all and every their children and sequells, theire goodes, landes, tenementes, and hereditaments, as are now apperteynynge or regardaunte to all or any of our mannors, landes, tenements, possessions, or hereditaments within the said several counties of Cornwall, Devon, Somersett, and Glouc. as to you by your discretions shall seme meete and convenient, compoundinge with them for suche reasonable fines or sommes of money to be taken and received to our use for the manumyssion and enfraunchisement, and for the possessions, and enjoying of all and singuler theire landes, tenements, hereditaments, goodes and chattells whatsoever, as you and they can aggree for the same after your wisdomes and discretions, and our further will and pleasure is, that thereupon you our said commissioners shall have full power and aucthoritie from tyme to tyme, untill such tyme as we shall declare unto you our pleasure to the contrarie, to make warraunt under youre handes in writinge, to the Lord Chauncellor or Lord Keeper of the great seale of England for the tyme beying, to passe and suffer to be passed under the said greate seale of England, suche and so manye graunts, manumyssions, and enfraunchisments to any suche person or persons as you shall so compounde or agree withall, and to you shall be thought mete and convenient, with full power, aucthoritie, and libertie to possesse and enjoye all and singuler their mannors, mesuages, landes, tenements, hereditaments, goodes and chattells whatsoever, the tenor or the like in effecte of which said manumissions, graunts, and enfranchesements shall be in suche order and forme and of such like effecte as is here in these presents conteyned and sett forth, or els in suche other order, manner, and forme as you our said commissioners shall think meete and convenient to be passed from us; that is to say,

"Elizabetha, Dei Gratia, Angliæ, Franciæ, et Hiberniæ Regina, Fidei Defensor, &c. omnibus ad quos, &c. Salutem.

"Cum ab initio omnes homines natura liberos creavit Deus, ut postea jus gentium quosdam sub jugo servitutis constituit, pium fore credimus et Deo acceptabile, Christianumque charitati consentaneum, certos, in villenagio nobis hæredibus et successoribus nostris subjectos et servitute devinctos, liberos penitus facere.

"Sciatis igitur quod nos, pietate moti gratiosa et in libertate optime affecti de Gratia nostra speciali, ac ex certa scientia et mero motu nostris, pro nobis hæredibus et successoribus nostris A. B. C. D. &c. et omnes et singulas sequelas tam procreatas et imposterum procreandas et eorum quemlibet, Manumisimus et liberos facimus et ab omni jugo servitutis et servilis conditionis liberamus et exoneramus imperpetuum per præsentes, ita, videlicet, quod

nec nos nec hæredes nec successores nostri nec aliquis alius pro nobis seu nomine nostro aliquod juris seu clamei in prædictis A. B. C. D. &c. nec in progeniis aut sequelis suis nec in progeniâ vel sequelâ alicujus eorum jam procreatâ sive imposterùm procreandâ nec in catallis suis aut eorum alicujus ad quascúmque mundi partes diverterit exigere clamare seu vendicare poterimus nec debemus in futurum sed ab omni actione juris et clamei indè simus exclusi imperpetuùm per præsentes ac ab omni jugo servitutis eos et eorum quemlibet exoneramus acquietamus et dimittimus pro nobis hæredibus et successoribus nostris imperpetuùm.

"Damus etiam, et uberiori Gratia nostra speciali, ac ex certa scientia et mero motu nostris prædictis per præsentes, pro nobis hæredibus et successoribus nostris, concedimus præfatis A. B. C. D. &c. et eorum culibet, mesuagia terras tenementa et hæreditamenta sua quæcumque, necnon bona catalla et debita sua quæcumque, tam mobilia quam immobilia, ac tam reales quam personales, cum eorum pertinentiis universis de quibus seisiti seu possessionati jam existunt, aut eorum aliquis jam existit.

"Habendum tenendum et gaudendum omnia et singula mesuagia terras tenementa bona catalla debita et cætera hæreditamenta sua cum pertinentiis universis, præfatis A. B. C. D. &c. hæredibus et successoribus suis ac executoribus cujuslibet eorum imperpetuum, secundum separales status seu interesse in præmissis, absque compoto seu aliquo alio proinde nobis hæredibus vel successoribus nostris quoquomodo reddendo solvendo vel faciendo, ratione servitutis seu servilis conditionis, sive aliqua lege statuto actu proclamatione consuetudine seu præscriptione, aut aliqua alia re causa vel materia quacumque, antehac editis ordinatis promulgatis fatis seu provisis in contrarium inde non obstantibus; Salvis tamen nobis hæredibus et successoribus, tam liberis tenuris et hæreditamentis nostris omnium customariarum terrarum et tenementorum, de quibus illi aut eorum aliquis seisiti existunt et de nobis tenent, aut eorum aliquis tenet per copias sive per copiam curiæ, et servitiis consuetudinibus redditibus, et aliis casualibus pro eisdem seu eorum aliqua reddendis solvendis vel faciendis, quam redditibus et servitiis nobis tanquam capitali dominæ feodi reddendis pro aliquibus terris seu tenementis liberæ tenuræ, de quibus ipsi aut eorum aliquis seisiti existunt vel existit.

"Eo quod expressa mentio, &c.

"In cujus rei, &c.

"And so our expresse will and pleasure is, that every suche person, so compoundinge and agreeinge as is aforesaid, shall and may have a sufficient manumyssion, graunte, and enfranchesment for such matters as in forme aforesaid, shall be compounded and agreed for before you oure said commissioners.

"And our further will and pleasure is, that every bill or warrant that hereafter shall be made for any such manumission, graunte, and enfraunchesment, as you shall thinke mete and convenient to be made and passed from us, for any suche compositions and agreements as is abovesaid, shall be subscribed by you as above is said, and our will and pleasure is, and by these presents we do graunte, that every such bill or warrant so to be made, and so by you subscribed, shall be a sufficient and immediate warraunt to the said Lord Chancellor or Lord Keper of the greate seale of England for anytyme beinge, for the making and passage of every such manumyssion, graunte, and enfranchesment, in due order and forme, under our said great seale of England, according to the tenor and effecte of the said bill or warrant, without any further warraunt for the same to be had or pursued, payinge only for all manner of fees at the Greate Seale twentee six shillings, eight pence, and not above, and these our letters signed with our hande shall be to you sufficient warrant and discharge in this behalfe at all times hereafter, being pleased and contented that you shall take this our writinge under our great seale of England at your owne pleasures and willes for the full execution of the premises, to the benefit of the persons that shall receive this manumyssion.

"Witness our self at Gorhambury, the third day of April in the sixteenth yere of our raigne.

"Per ipsam Reginam."

The preceding I take to be the Commission intended by lord Kames in his 'Sketches of the History of Man,' book 1, sk. 5, vol. 1, p. 300, edit. of 1807.

To the Note ending p. 21.

See more concerning the Act for preventing Wrongous Imprisonment, vol. 19, p. 52; and concerning the Habeas Corpus Act, see something in vol. 18, p. 1362.

In Dodson's Life of sir Michael Foster, which I had not seen when the Case of Pressing Mariners, vol. 18, p. 1323, was printed, is the following passage:

"I cannot forbear to observe, that in Hilary term, 30 Geo. 2, 1757, a difference of opinion appeared in the court of King's-bench on a very constitutional point; I mean in respect to the writ of Habeas Corpus. This affair excited great attention a considerable time, and in consequence of it a bill was brought into the House of Commons for giving a more speedy remedy to the subject upon the writ of Habeas Corpus; but sir James Burrow in his Reports is totally silent in regard to this business.

"As we have not, to my knowledge, any good account of this important affair in print, I will give the best account which I can extract from Mr. Justice Foster's notes and papers. It appears by his note book, that in that term motions were made to the Court for several writs of Habeas Corpus in favour of men impressed for soldiers under the statute 29 Geo. 2, c. 4,

upon affidavits intended to shew the men not to be within the description of the statute; that the Court, instead of granting the writs, made rules for shewing cause why the writs should not go, for notice to be given to the solicitor of the Treasury, and for the keeper of the Savoy not to suffer them to be removed in the mean time; and that afterwards in the same term the men were discharged by the Court with the consent of Mr. Solicitor-General Yorke. These cases are severally entitled the King against Hayward; and in them Mr. Justice Foster expressed his sentiments concerning the writ of Habeas Corpus, and in particular declared it to be his opinion, that the return to the writ is not in all cases conclusive to the Court or to the parties, but that men, wrongfully impressed into the public service by sea or land, are by law entitled to, and ought to have, an easier and speedier remedy than an action for a false return, which may afford to them not the least relief. Among his papers I find in his own hand-writing a copy of a letter which he wrote to Mr. Solicitor-General Yorke; the date of which he hath neglected to preserve in his copy, but from internal marks it was manifestly written in the former part of the year 1758:

"Sir;

"The practice of granting writs of Habeas Corpus in the vacation in cases not within the Habeas Corpus act having long prevailed, I confess that I did not entertain any sort of doubt touching the legality of it; though possibly there might have been some room for a doubt, if the passage in lord Hale (2 Hale, 145) which you mentioned, and that in 2 Inst. 53, had been considered independently of the practice. But as I always considered the case of a barely wrongful detention as not within the Habeas Corpus act, but merely at common law, I thought a legal sound discretion ought to be used, and generally expected an affidavit, on behalf of the party applying for the writ, setting forth some probable ground for relief upon the merits of his case. This method I constantly observed in the case of men pressed into the service: and that the public service might not suffer by an abuse of the writ, I ordered notice to be given to the proper officers of the crown, of the time at which the party was to be brought before me, with copies of the affidavits. In this way several were discharged: and I must say, that in some instances I saw so much oppression on the part of those concerned in that service, that I am satisfied the subject ought to have some better relief than what the pressing acts have provided.

"About the latter end of Michaelmas-vacation-was-twelve-month, applications for the writ coming very thick upon me, I began to see the difficulty of steering properly between the liberty of the subject and the necessities of the public; and accordingly desired the advice and assistance of the other judges of the court. We met at my chambers a few days before [illegible]; when I found that the doubt which I have mentioned had operated strongly. This determined me, the term being at hand, to proceed no farther than the discharging of one or two upon recognizance for their appearance in the term. What passed in court upon motions for the writ is well known.

"I sent to you the other day the copy of the return in the case of the Queen and Chamberlain. When you shall have got it transcribed, you will return it to me. I have no note of that case, nor of any others relating to this matter, in the late queen's time, though I attended Westminster-hall a little more than five years before her death. There was no act for pressing in the last reign; and I think, that all the acts of that kind in the present have been made since I was on the bench. From the few notes which I have relating to that matter I find, that the Court hath not granted the writ as of course, and within the Habeas Corpus act, but hath required affidavits on behalf of the party applying for it, setting forth the merits of his case: and, on the other hand, though proper returns in point of form may have been made, the Court hath not given entire credit to them, and put the party complaining to his remedy by action for a false return; but hath constantly entered into the merits of the case upon affidavits, and either discharged or remanded the party, as the case hath appeared.

"This was done in Trinity term, in the 19th or 20th of the king, in the case of one Reynolds *; and in Easter term, in the 29th of the

* "After writing this letter, the author drew up a fuller account of this case, which I will here give:

"The King against White.

"Saturday next after the octave of the Holy Trinity, in the 19th year of king George 2, a writ to major Thomas White in the Tower of London or his deputy, for Thomas Reynolds. Major White, by the name of Richard White (for his Christian name was mistaken in the writ) returns, "That Reynolds was committed to his custody, as a person impressed according to the act (18 Geo. 2, c. 10.) then lately made for recruiting his majesty's land forces and marines, which is the cause of his detention; and he brings his body into court." The return seems to be sufficient in point of form.

"Monday next after three weeks of the Holy Trinity, in the 19th year of the king, Reynolds being brought into court in the custody of Richard White, it is ordered by consent of counsel on both sides, that the name Thomas White mentioned in the writ be made Richard White: and it is farther ordered, that the said writ and return be filed, and that the said White bring into court the said Reynolds on Wednesday next. And upon reading the several affidavits of Thomas Kell, &c. &c. it is farther ordered, that Thomas Bedwell, &c. &c.—(the commissioners for putting the act in execution, who acted in the affair)—shew cause to-morrow,

king, in the case of one Hamilton; and in the following term, in the case of one Worald,—all pressed men; and of one M'Nown a supposed deserter, but in truth an out-pensioner of Chelsea; and in a few other cases, of which I find no notes. In some of these cases the parties complaining were discharged in court; in others they entered into recognizances, with the consent of the counsel for the crown, to appear the next term, and were then discharged, the king's counsel either consenting or not opposing.

"If what I have written will either give you light into the matters about which you enquired, when I had the favour of a visit from you, or afford you any amusement, you are heartily welcome to it. I am, &c. M. F."

"Excuse some rasures and after-thoughts; for transcribing a long letter, with thick ink, soft pen, and hard paper, is riding twice over a deep road upon a lame horse."

"On the 9th of May, 1758, the House of Lords, on the second reading of the bill from the Commons, entitled, An Act for giving a more speedy remedy to the subject upon the writ of Habeas Corpus, ordered the judges to attend the House, to deliver their opinions *seriatim*, with their reasons, upon ten questions, which may be seen in the Journal of the House of Lords of that day. On the 25th, 26th, and 29th days of May, many of the judges delivered their opinions on the questions proposed to them by the Lords; and on the 2d of June, after long debate, the bill was rejected by the Lords, who then ordered the judges to prepare a bill to extend the power of granting writs of Habeas Corpus ad Subjiciendum in vacation-time, in cases not within the statute 31 Car. 2, c. 2, to all the judges of his majesty's courts at Westminster, and to provide for the issuing of process in vacation-time to compel obedience to such writs; and in preparing such bill to take into consideration, whether in any and what cases it may be proper to make provision, that the truth of the facts contained in the return to a writ of Habeas Corpus may be controverted by affidavits or traverse, and, so far as it should appear to be proper, to insert clauses for that purpose, and to lay such bill before the House in the beginning of the next session of parliament.*

"About this time, May 15, 1758, lady Foster died after a long illness; and by this event Mr. Justice Foster was prevented from attending the House. However, on the 24th of that month, he wrote to chief baron Parker an excellent letter, of which he hath preserved a copy in his own-handwriting:

"My Lord; *May* 24, 1758.

"When we met at lord chief justice Willes's house, I had the satisfaction to find, that you and I do not differ in opinion upon any of the questions proposed to us by their lordships, except the tenth. Upon that question, which your lordship sees is proposed in the strongest and most striking terms,† we did then seem to differ.

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why the said Reynolds should not be discharged out of the custody of the said Richard White. The affidavits above-mentioned were in behalf of Reynolds, in order to shew, that he was not a person within the description of the act, and that the impressing of him was a wicked scheme of one Robinson, and founded in malice.

"Wednesday next after three weeks of the Holy Trinity, in the 19th year of the king, Reynolds being brought into court by major White, gives his own recognizance in the sum of 100*l.* for his appearance in court the first day of next term, to answer to such things as shall be objected against him; and thereupon it is ordered, that he be discharged out of the custody of major White. On shewing cause, the above-mentioned affidavits were read on the part of Reynolds; and on the part of the commissioners, their own affidavit, and the affidavits of Robinson and some others, were read in support of what the commissioners had done in the affair; and the Court, upon consideration of the affidavits on either side, made the last rule: and upon the first day of the next term Reynolds appeared, and his recognizance was discharged, no opposition being then made on the part of the crown or of the commissioners.

"I was favoured by my brother Bathurst with copies of the rules, writ, and return, and of the affidavits filed in the office.

"I have an imperfect note of this case. Affidavits were read on both sides; and the Court said, that although it is not usual to enter into the truth of facts set forth in the return to a Habeas Corpus, yet in this case, as the party suing the writ hath no other remedy, it may be done: and that if Reynolds is not within the description of the act, the commissioners have no sort of jurisdiction over him: the whole proceeding is a mere nullity, as *coram non judice*."

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* "See the Lords' Journals, 29, p. 312. 322. 331. 337—341. 344—347. 349. 352. 353.

† "That question is in the following words: "Whether in all cases whatsoever the judges are so bound by the facts set forth in the return to the writ of Habeas Corpus, that they cannot discharge the person brought up before them, although it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice?"

"Mr. Justice Foster hath written in the margin; "God forbid that they should." But how is this question answered by some of the judges? Chief-baron Parker's answer is thus: "That in no cases whatsoever the judges are

"I agree with your lordship in the truth of the general doctrine, that a return to a writ of Habeas Corpus is conclusive in point of fact.

so bound by the facts set forth in the return to the writ of Habeas Corpus, that they cannot discharge the person brought up before them, if it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice; but by the clearest and most undoubted proof he understands the verdict of a jury, or judgment on demurrer or otherwise, in an action for a false return; and in case the facts returned to a writ of Habeas Corpus shew a sufficient ground in point of law for such restraint, he is of opinion, that the court or judge, before whom such writ is returnable, cannot try the facts contained in such return by affidavits." In nearly the same manner the question is answered by Mr. Justice Denison, Mr. Baron Smythe, Mr. Baron Adams, and Mr. Justice Wilmot. If the opinion of these judges be agreeable to law, the greatest injury, as Mr. Justice Foster observes, may be done to a man without a possibility of redress. Goldswain's case, which is reported in 2 Blackstone's Reports, 1207—1211, and which came before the court of Common Pleas, (De Grey, Gould, Blackstone, and Nares,) Pasch. and Trin. 18 Geo. 3, 1778, now deserves the greatest attention. He was illegally pressed into the sea-service, and Mr. Justice Gould said,—"I do not conceive, that either the court or the party are concluded by the return of a Habeas Corpus, but he may plead to it any special matter necessary to regain his liberty. St. John's case, 5 Rep. 71, was a case of this kind. One Gardener was convicted and imprisoned for carrying a handgun, and this cause being returned on Habeas Corpus, he pleaded to it, that he was a sheriff's officer, and as such entitled to carry a handgun; which plea being confessed, he was discharged. It is said in the Queen and Burnaby, Ld. Kym. 900. Salk. 181, that the record of St. John's case cannot be found; owing perhaps to a mistake of the year, which is in Coke 34 Eliz. whereas in Cro. Eliz. 821, it is reported under the name of Gardener's case in 43 Eliz. and there is a copy of the record in Tremaine 354, which is said to be P. 43 Eliz. rot. 49." The learned reporter adds,—"The Court declared they could not wilfully shut their eyes against such facts as appeared on the affidavits, but which were not noticed on the return. They were inclined to think it their duty immediately to discharge the party, and should therefore in some measure do it; but still with a reserve to any question of law, which the Admiralty meant seriously to argue. They therefore discharged Goldswain on his own recognizance of 20*l.* to appear in court the second day of the next, being Trinity, term; and in the mean time recommended it to the

It cannot be traversed*; the Court is bound by it, and the injured party is driven to his action. This, I admit, is the general rule; but I think that it is not universally true. Cases may be put which are exceptions to it; and exceptions do not, as your lordship well knows, destroy, but rather establish, a general rule. The case of persons pressed into the service is, I conceive, one of them, for this plain reason, that if the party cannot controvert the truth of the facts set forth in the return, he is absolutely without remedy. An inadequate ineffectual remedy is no remedy; it is a rope thrown out to a drowning man, which cannot reach him, or will not bear his weight. It is the offering of baubles to the children of one's family, when they are crying for bread. In common cases, in every case where the general rule is laid down, the injured party must wait with patience till he can falsify the return in a proper action. This, it must be confessed, is a great misfortune; but, till the day of his deliverance comes, he continues at home in the custody of the law, and under its protection. This, your lordship knows, is not the case of a man pressed into the service by land or sea, supposing him to be no object of the law. He is taken from the Exchange, or from behind his counter, no matter whence, and thence to the Savoy, or aboard a tender; and if his friends happen to have time enough to procure a Habeas Corpus, a sufficient return to the writ is immediately made, (there are precedents enough in the crown-office, and they are soon copied) and the man is sent away, in due form of law, to take his chance, for some years perhaps, amidst the perils of the sea, and the disasters of war. But it is said, that he is not without a remedy. What remedy? An action against a man perhaps not worth a groat. But how responsible soever the officer may be, what satisfaction in damages is equal to the injury? or, if that were possible to be had, what becomes of the action, if the plaintiff should be knocked on the head in the service? Why, truly, *moritur cum persona*. In short, he hath, in this view of the case, no remedy, unless you give him what I call the specific remedy, a right to controvert the truth of the return before it is too late.

"In the case of the King and White, which was mentioned at our last meeting, the Court

counsel for the Admiralty to consider, whether they would amend their return: in default of which the Court would consider whether to quash it for insufficiency, or admit Goldswain to plead to it according to the precedent cited by Gould, justice; or to take it up in a more summary way, by taking *pro confesso* the matters stated in the original affidavits. And now on the second day of this term, being the 20th of June, Goldswain appeared on his recognizance, and was finally discharged, by consent of Davy, counsel for the board of Admiralty."

* "See Goldswain's case, cited in the preceding note.

considered the matter in this light, and in the end the man was discharged upon reading affidavits on both sides. The like hath since been done in other cases of like nature. It matters not with me, what method the Court took to come at the merits of the question in point of fact. The principle which they went upon is what I rely on: and the principle, as I take it, was, that though in common cases the return is conclusive in point of fact, yet these special cases, as they come not within the general reason of the law, are not within the general rule. The parties are without remedy, if they are not to controvert the truth of the return in a summary way; and therefore they shall do it.

"You may be surprised to receive so long a letter from me at this time; but, to confess a serious truth, while I am thinking of these indifferent matters, I feel that my mind is employed upon something which doth not give me pain. I am, &c. M. F."

"To this letter the Chief Baron, May 27, 1758, returned the following answer:

"Good Brother;

"I am favoured with your letter, and am very sorry for your late great loss. As you agree to the general principle, that the return of a Habeas Corpus cannot be contradicted in that proceeding, so I must confess, that your reasons are very strong to shew the present to be an inadequate remedy; but I am afraid, that the parliament only can apply a quicker and more effectual remedy. As to the case of the King and White, and several subsequent cases, I entirely approve them, but consider them as collateral proceedings, founded on the general power of the court of King's-bench, to correct the acts or misdemeanours of all inferior jurisdictions to the oppression of the subject. We have gone as far in delivering our opinions as my brother Smythe, and are to proceed on Tuesday, so that it must be left to your own discretion, whether you will give your opinion or not; but if you should not choose to appear, I have taken care that my lord-keeper shall excuse your absence to the Lords.

"I am, with true respect, Sir, your most obliged brother, and obedient servant,

"T. Parker."

"*Bedford-row, May* 27, 1758."

"While this business was depending in the House of Commons, Mr. Justice Wilmot wrote to Mr. Justice Foster the following letter;

"*Ormond-street, April* 9, 1758.

"Dear Brother;

"I herewith send you a State and some Reasons, which lord Mansfield and I have put together, to explain and support the Court's proceedings upon the present act.

"We desire that you will be so good, as soon as possible, to look them over, and to correct them as you think proper, and to add such other reasons as occur to you in support of what we were all of opinion to do; and I own, that I am still strongly of the same opinion. If you should think, that, supposing the construction of the act wrong, yet what we did was right, that may properly be added, and is an argument *à fortiori*.

"You recollect that this happened but just before Hilary term. The parliament was sitting, and in the new bill might have laid down what rule they pleased before the vacation.

"I am, dear brother, your most faithful friend, and most obliged humble servant,

"Eardley Wilmot."

"Mr. Justice Foster the next day returned an answer to Mr. Justice Wilmot, which, as I am informed by his son, John Wilmot, esq. one of the masters of the court of Chancery, is not found among his papers. I give it from a copy in my possession in the author's handwriting:

"Dear Brother; *April* 10, 1758.

"Lord Mansfield did me the favour of a visit on Saturday, and told me of the paper which I received from you yesterday, and now return. He told me, that it was intended as a justification of the rule which we made in Hilary-term-was-twelve-month: but in what manner it is to be made use of, I know not.

"It will undoubtedly be a full justification of that measure, if it be known, that even a majority of the judges have put the construction on the act which you contend for. They, if they are well founded, need no better justification; and the judge who differed desires no better than to say, that he came into the measure, as the only expedient, which, all things considered, offered to let the subject into a proper defence against the abuse of the powers given by the act.

"I have made some marks with my pencil on your paper, which I will now explain.

"P. 1.* The first consideration was, whether a writ of Habeas Corpus might issue in the vacation in cases not within the Habeas Corpus act, and the passages in Coke and Hale were mentioned: but that matter, upon farther enquiry, is now put out of doubt. I indeed, out of pure deference to what I took to be the opinion of the majority, have declined granting the writ in the vacation, but sorely against my own judgment. I am informed, that writs have issued in the vacation since that time.

"P. 2.*†‡ p. 3.* p. 8.* In these places, and perhaps in some others, which I have not marked, you speak of the judges in general; you should confine yourself to the major part, which, I suppose, is the case.

"P. 8.† Here all the judges concurred.

"P. 9.* The words struck out should be inserted: and you will be pleased to consider, whether this rule, and that which we grounded upon it, do not go on a supposition, that the adjudication of the commissioners is not final to all intents and purposes. With regard to those who are the real objects of the law it is final; and with regard to the persons to whose cus-

body pressed men are delivered till they can be otherwise disposed of, and likewise to the officers who receive them and treat them as soldiers enlisted, it is a full indemnity for what they do under the authority of the commissioners. This construction the act will bear, and the strong wording of it, which you have very properly pointed out, plainly leads to it, and, I think too, is sufficiently satisfied by it: but that the adjudication of the commissioners should be conclusive to the parties, whether objects of the law or not, I can never admit. You argue from the intention of the act. I know no better rule of construction than attending to the intention of the legislature. Be pleased to try your leading principle by this rule. Was it the intention of the legislature to repeal Magna Charta; to put every man in the kingdom into the power of two or three commissioners met over their liquor at an ale-house or a tavern; to send the best man among us food for powder to North America? This, I am sure, was not their intention; and yet, if the adjudication of the commissioners be conclusive to the party, and a proper return be made to the writ, this may be the consequence.

"P. 9.* I do not recollect this circumstance. I did not sufficiently attend to all which passed that day.

"I have spoken my mind freely to you. I have, you know, spoken to the same effect more than once on the bench; and I have seen no reason to alter my opinion. I hope that I shall have no occasion to say any thing more on the subject in public: for at a time when the world is full of jealousy, and running mad after popularity, one would not wish to see judges divided on points, where the liberty of the subject is so nearly concerned. I am, &c.

"M. F."

"Whether the paper mentioned in these letters be now in existence or not, I am unable to say. On a view of the facts and reasons here brought together, it is natural to wish, that the bill, which the judges drew* with great care and attention by order of the House of Lords, had been brought into the House, and passed into a law; for although Mr. Justice Blackstone in his invaluable Commentaries on the Laws of England (book 3, c. 8.) asserts, "That

* "It is in the following words: "Whereas the writ of Habeas Corpus ad Subjiciendum hath been found by experience to be the most expeditious and effectual method of restoring any person to his liberty who hath been unjustly deprived thereof; and whereas extending the remedy of such writ, and enforcing obedience thereunto, and preventing delays in the execution thereof, and ascertaining the proceedings thereupon, will be greatly beneficial to the subject: Be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons, in this present parliament assembled, and by the authority of the same, that where any person shall be confined or restrained of his or her liberty, otherwise than for some criminal or supposed criminal matter, it shall and may be lawful for the lord chancellor, lord keeper, lords commissioners of the great seal for the time being, or any one of them, or any one of his majesty's justices of the one bench or the other, or the barons of the Exchequer of the degree of the coif, and they are hereby required upon complaint made to them by or on the behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation (in cases where by law an affirmation is allowed) that there is a probable and reasonable ground for such complaint, to award in vacation-time a writ of Habeas Corpus ad Subjiciendum, under the seal of such court whereof he shall then be one of the judges, to be directed to the person or persons in whose custody or power the party so confined or restrained shall be, returnable *immediatè* before the person so awarding the same, or before any other judge of the court under the seal of which the said writ issued.

"And be it farther enacted by the authority aforesaid, that if the person or persons to whom any writ of Habeas Corpus shall be directed in pursuance of this act, upon service of such writ, either by the actual delivery thereof to him, her, or them, or by leaving the same at the place where the party shall be confined or restrained with any servant or agent of the person or persons so confining or restraining, shall wilfully neglect or refuse to make a return or pay obedience thereto, he or she shall be deemed guilty of a contempt of the court under the seal whereof such writ shall issue; and it shall and may be lawful to and for the said lord chancellor, lord keeper, lord commissioner, justice, or baron, before whom such writ shall be returnable, upon proof made of such service, to award in the vacation-time process of contempt under the seal of such court against the person or persons guilty of such contempt, returnable before himself in the vacation-time, who shall proceed thereon as to law and justice shall appertain.

"Provided, that if such writ shall be awarded so late in the vacation by any one of the said justices or barons, that in his opinion obedience thereto cannot be conveniently paid during such vacation, the same shall and may at his discretion be made returnable in his majesty's court of King's-bench at a day certain in the next term: and the said court shall and may proceed thereupon, and award process of contempt in case of disobedience thereto, in like manner as if such writ had been originally awarded by the said court.

"Provided also, that if such writ shall be awarded by the court of King's-bench in term, but so late, that in the judgment of the said court obedience thereto cannot be conveniently paid during such term, the same shall and may, at the discretion of the said court, be made returnable at a day certain in the then next va-

the remedy is now complete for removing the injury of unjust and illegal confinement," yet it is manifest from the observations of Mr. Justice Foster, and from the bill drawn by the judges, that this assertion is not well founded, and that farther relief in some cases is desirable. These letters, and the answers of Mr. Justice Denison and Mr. Justice Wilmot to the tenth question proposed by the House of Lords to the judges, with the other evidence above-adduced, seem to prove, contrary to the assertions in 4 Burrow, 2395 and 2582, that on this occasion there was a final difference of opinion in the court of King's-bench."

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cation before any judge of the same court, who shall and may proceed thereupon, in such manner as by this act is directed concerning writs issuing in and made returnable during the vacation.

"And be it farther enacted by the authority aforesaid, that in all cases provided for by this act, although the return to any writ of Habeas Corpus shall be good and sufficient in law, the said lord chancellor, lord keeper, lord commissioner, justice, or baron, before whom such writ shall be returnable, shall, as soon as conveniently may be, proceed to examine into the truth of the facts set forth in such return, and into the cause of such confinement or restraint, by affidavit, or by affirmation (in cases where an affirmation is allowed by law) and shall do therein as to justice shall appertain. And if such writ shall be returned before any one of the said justices or barons, and it shall appear doubtful to him on such examination, whether the material facts set forth in the said return, or any of them, be true or not, in such case it shall and may be lawful for such justice or baron to let to bail the said person so confined or restrained, upon his or her entering into a recognizance with one or more sureties, or in case of infancy or coverture upon security by recognizance in a reasonable sum, to appear in the court of King's-bench, upon a day certain in the term following, and so from day to day as the court shall require, and to abide such order as the court shall make in and concerning the premises; and such justice or baron shall transmit into the same court the said writ and return, together with the said recognizance, affidavits, and affirmations; and thereupon the said court shall proceed, order, and determine, touching the discharging, bailing, or remanding the party, as to justice shall appertain, either in a summary way by affidavit or affirmation, or by directing one or more issues for the trial of the facts set forth in such return, or any of them, whereupon such proceedings shall be had as in other cases of issues directed by that court.

"And be it farther enacted by the authority aforesaid, that the like proceeding shall be had in the same court for controverting the truth of the return to all writs of Habeas Corpus awarded for or on behalf of any person confined or restrained of his or her liberty, otherwise than for some criminal or supposed criminal matter, by affidavit, affirmation, or otherwise, although such writ shall be awarded by the said court, or be returnable therein.

"And be it farther enacted by the authority aforesaid, that it shall and may be lawful for the court or judge proceeding on any writ of Habeas Corpus ad Subjiciendum awarded in cases of confinement, not for a criminal or supposed criminal matter, to make such order in regard to the payment of the charges and expences of bringing up the party so confined or restrained, and for carrying him or her back to his or her place of confinement in case of remanding, as to such court or judge shall upon examination thereof seem meet; and for non-payment thereof to award process of contempt, whereupon such proceedings shall be had as in other cases of contempt for non-payment of costs,

"And be it declared and enacted by the authority aforesaid, that an Habeas Corpus, according to the true intent and meaning of this act, may be directed and run into any county palatine, the cinque ports, or any other privileged places within that part of Great Britain called England, dominion of Wales, and town of Berwick-upon-Tweed, and the isles of Jersey, Guernsey, and Man; and also into any port, harbour, road, creek, or bay, upon the coast of England or Wales, although the same should lie out of the body of any county, any law or usage to the contrary in any wise notwithstanding.

"Provided always, that nothing in this act contained shall extend to discharge out of prison any person charged in debt or other action, or with process in any civil suit.

"And be it farther enacted by the authority aforesaid, that the several provisions made by this act touching the making writs of Habeas Corpus issuing in time of vacation returnable in the court of King's-bench, or for making such writs awarded in term-time returnable in the vacation, as the cases may respectively happen; and also for awarding process of contempt in the time of vacation against the person or persons neglecting or refusing to make return of such writs, or to pay obedience thereto, shall extend to all writs of Habeas Corpus awarded in pursuance of a certain act passed in the 31st year of king Charles the second, intituled, An Act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas; in as ample and beneficial a manner as if such writs and the said cases arising thereon had been herein before specially named and provided for."

Case of the Island of Grenada,

pp. 239, *et seq.*

Edwards (Hist. of the West Indies, book 3, chap. 1) gives an historical account of the duty of four and one half in the hundred which gave rise to this case: and he observes that the clause in the Act of Assembly of Barbadoes, (see p. 251) which exempts the lands called the ten thousand acres, and also that which stipulates for the building a session house and a prison, and providing for all other public charges incumbent on the government out of the money to be raised by the act, have been equally disregarded by the crown. The former of those clauses is not set forth in the report of Campbell *v.* Hall. Edwards exhibits it as follows:

"Provided nevertheless, that neither this act, nor any thing therein contained, shall extend or be construed to bar his majesty, or his said excellency, from his or their right to any land granted, or any incroachments made upon the sea, since the year one thousand six hundred and fifty, or to any lands commonly called or known by the name of the ten thousand acres, the merchants land, granted by the late earl of Carlisle, or his father, unto Marmaduke Rawden, esq. William Perkins, Alexander Bannister, Edmund Forster, captain Wheatley, and others their associates, on certain covenants and conditions: Provided also, that the growth and produce of the said lands, mentioned in the preceding proviso, be not liable to any tax, impost, or custom, imposed by this act, any thing in the same seeming to the contrary notwithstanding."

In the House of Commons on Monday, March 16th, 1701-2, (eight days after the death of king William), upon reading the order of the day for the House to resolve itself into a committee to consider of the supply to be granted to her majesty for the better support of her majesty's household, and of the honour and dignity of the crown,

A Petition of the agents, planters, and merchants, concerned in, and trading to the island of Barbadoes, was presented to the House and read; setting forth, That there is a duty of four and a half per cent. on the commodities of the said island exported thence; which was granted by an act of the said island in September 1663, for the reparation and building of fortifications, and defraying all other public charges incident to the government there; which has been collected by officers appointed by the commissioners of the customs in England, and applied to other uses; whereby the fortifications are run very much out of repair, and other public necessary works are unbuilt, and their magazine unprovided, so that, in case of a war, the said island and all other the sugar plantations to the windward of Jamaica, would be in danger of being lost, if an enemy should attack it; which would be a vast loss to England: and praying, that the said duty of four and a half per cent. may be applied to the uses for which it was given, in order to the defence and security of the said island.

It was ordered, That the Petition lie on the table.

On the 24th of the same month, colonel Granvjlle, from the committee of the whole House to whom had been committed the Bill for the better support of her majesty's household and of the honour and dignity of the crown, reported, that they had directed him to move the House that an humble address may be made to her majesty, that the duty or impost of four and a half per cent. arising in Barbadoes and the Leeward Islands, subject to an annuity payable to the heirs and assigns of the earl of Kinnoule, be applied for the repairing and erecting such fortifications and other public uses for the safety of the said islands as her majesty shall direct; and that an annual account how the said duties shall have been expended, may be laid before the House of Commons. And such an address was ordered by the House.

And on the 30th, Mr. Secretary Vernon reported to the House that such address having been presented, her majesty was pleased to say that she would give directions accordingly.

It is observable, that the pensions granted in the early part of the reign of his present majesty (George the 3rd) to the family of the first earl of Chatham, and those subsequently granted to Mr. Burke, were charged upon this duty of four and a half per cent. Mr. Burke, in adverting to one of his Reform Bills (stat. 22 G. 3, c. 82), writes:

"This of the four and a half per cents does his grace" [the duke of Bedford] "imagine had escaped me, or had escaped all the men of business, who acted with me in those regulations? I knew that such a fund existed, and that pensions had been always granted on it, before his grace was born. This fund was full in my eye. It was full in the eyes of those who worked with me. It was left on principle. On principle I did what was then done; and on principle what was left undone was omitted. I did not dare to rob the nation of all funds to reward merit." Letter to a Noble Lord on the Attacks made upon Mr. Burke and his Pension, A. D. 1796. Burke's Works, vol. 8, p. 24, 25, 8vo edition.

The short-hand writer's report mentioned p. 239, contains of Mr. M'Donald's arguments only the reply, p. 308, 4, 5.

Upon the clause in the commission to general Melville (p. 247), which requires him to execute his office agreeably "to the instructions and authorities therewith given to him, or to such farther powers, instructions, and authorities, as should, at any time thereafter, be granted or appointed him under the king's signet and sign manual, or by his order in his

privy council," there are some valuable observations in the Canadian Freeholder, vol. 2, pp. 277, *et seq.* See, also, vol. 19, p. 1168 of this Collection.

It is observable, that the words 'in as much as' (they are printed thus separately in Lofft) which occur in the letters patent of July 20, 1764 (p. 250, last line but one), are somewhat ambiguous. They may mean 'in so far as,' and they may mean 'because' or 'since,' thereby affirming that the poll-tax mentioned in that clause of the letters patent was not contrary to the laws of Great Britain.

The clause in the argument (p. 291) at the bar, stating that the language of king Edward the 1st was, that every part of his dominions, not in his possession, was feudatory to him, is somewhat too strong; the passage referred to appears to relate to Wales only.

With respect to the proceedings in Quo Warranto (and also in Scire Facias) which were had against the North American provincial governments in the latter end of the reign of Charles the 2nd, and which are alluded to in Mr. Hargrave's argument, p. 299, see vol. 8, pp. 1067, *et seq.*

In p. 321, after the passage extracted from the Proclamation of October 7, 1763, it is material to refer to what follows that passage in the Proclamation as set forth in the special verdict, p. 244.

The observations inserted pp. 331, 332, upon lord Mansfield's judgment, were written by Mr. Serj. Marshall. As that learned gentleman is not one of the king's sworn serjeants, it is probable that Edwards called him 'one of his majesty's serjeants at law,' in contemplation of the king's writ, in obedience to which the learned persons to whom it is directed take upon themselves that degree. Concerning this, see Serjeant Wynne's Observations of the Antiquity and Dignity of the Degree of Serjeants at Law.

P. 334, l. 5. Mr. Baron Maseres has told me, he was informed by Mr. Justice Willes himself, that he did not concur in the doctrine which lord Mansfield in the case of Campbell *v.* Hall laid down, respecting the right of the crown to legislate antecedently to a renunciation of such right for a conquered colony.

Case of Horne,
pp. 651, *et seq.*

Perhaps the following extract from Dodson's Life of Sir Michael Foster may be thought to throw illustration on the turn of Mr. Thurlow's mind some years before this trial of Mr. Horne; and also on some of Mr. Horne's observations respecting the influence of an appointment to the office of Attorney General:

"At the Lent assizes for Surrey, in 1758, an indictment against Martha Gray, the keeper of East-Sheen gate in Richmond-park, of which park the princess Amelia, daughter of king George 2, was then the ranger, for obstructing at that gate a common footway through the park, was tried before Mr. Justice Foster, who greatly distinguished himself on the occasion by his firmness and integrity. I am happy to have it in my power to give a particular account of the proceedings at the trial, written at the time by a learned lawyer, who hath since filled the highest station in the profession. Mr. Thurlow, now lord Thurlow, wrote the following letter, the original of which is in my possession, to Mr. Ewen, a nephew of Mr. Justice Foster, then and for many years afterwards, clerk of the peace for Wiltshire:

"Dear Sir;

"I write at the hazard of your thinking me impertinent, to give you the pleasure of hearing that of your uncle which in all probability you will not hear from him; I mean the great honour and general esteem which he has gained, or rather accumulated, by his inflexible and spirited manner of trying the Richmond cause, which has been so long depending, and so differently treated by other judges. You have heard what a deficiency there was of the special jury, which was imputed to their backwardness to serve a prosecution against the princess. He has fined all the absenters 20*l.* a-piece. They made him wait two hours, and at last resort to a *tales*. When the prosecutors had gone through part of their evidence, sir Richard Lloyd, who went down on the part of the crown, said, that it was needless for them to go on upon the right, as the crown was not prepared to try that, this being an indictment which could not possibly determine it, because the obstruction was charged to be in the parish of Wimbleton, whereas it was in truth in Mortlake, which was a distinct parish from Wimbleton. They maintained their own poor, upheld their own church, and paid tithes to their own parson; and Domesday-book mentions Mortlake. On the other side, it was said, that Domesday-book mentions it as a baron's fee, and not as a parish; and that the survey in the time of Henry 8, mentions Wimbleton *cum capellis suis annexis*, and also that a grant of it in the time of Edward 6, makes a provision of tithes for the vicar to officiate in the chapel of Mortlake. The judge turned to the jury, and said, he thought they were come there to try a right, which the subject claimed to a way through Richmond-park, and not to cavil about little low objections, which have no relation to that right. He said, it is proved to be in Wimbleton parish; but it would have been enough if the place, in which the obstruction was charged, had been only reputed to be in Wimbleton, because the defendant and jury must have been as sensible of that reputation as the prosecutors; but had it not been so, he should have thought it below the honour of the crown, after this business had been depending three assizes, to send one of their select counsel, not to try the right, but to hinge upon so small a point as this. Upon which, sir Richard Lloyd made a speech, setting forth the gracious disposition of the king in suffering this cause to

be tried, which he could have suppressed with a single breath, by ordering a *nolle prosequi* to be entered. The judge said, he was not of that opinion. The subject is interested in such indictments as these for continuing nuisances, and can have no remedy but this, if their rights be encroached upon; wherefore he should think it a denial of justice to stop a prosecution for a nuisance, which his whole prerogative does not extend to pardon. After which, the evidence was gone through; and the judge summed up shortly, but clearly, for the prosecutors.*

"It gave me, who am a stranger to him, great pleasure to hear, that we have one English judge, whom nothing can tempt or frighten, ready and able to hold up the laws of his country as a great shield of the rights of the people. I presume that it will give you still greater to hear, that your friend and relation is that judge: and that is the only apology I have to make for troubling you with this. I am, dear Sir, your most humble servant, E. THURLOW."

"*Fig-tree-court, Inner Temple, April* 11, 1758."

Somewhat connected with what Mr. Thurlow reports Mr. Justice Foster to have said of the *noli prosequi*, are the following particulars, which I have extracted from the 3d volume of Mr. G. Woodfall's recently published edition of the Letters of Junius, and the 17th volume of the Parliamentary History.

Crosby, lord mayor (see his Case, vol. 19, p. 1137) Oliver and Wilkes, aldermen of London, having discharged a printer, who in the city of London, had been by a messenger of the House of Commons apprehended for breach of privilege of parliament, and having signed a warrant of commitment of the messenger (whom however they discharged upon bail) to one of the city prisons for assault and false imprisonment of the printer, the House of Commons ordered, "That James Morgan, clerk of the lord mayor, do at the table expunge the minutes taken before the lord mayor, relative to the messenger of this House giving security for his appearance at the next general quarter sessions of the peace;" and he accordingly at the table expunged the same.

"That no other prosecution, suit, or proceeding, be commenced, or carried on for, or on account of the said pretended assault or false imprisonment."

Junius (Miscellaneous Letters, N° 95, dated 9th April 1771, and signed A Whig) in relation to these transactions, writes, "I wish that grave and sober men would consider, independently of the other questions before us, how far this particular precedent may extend. If the House of Commons may interpose, in a single instance, between the subject, who complains, and the laws, which ought to protect, I see no reason why they may not, at any time, by their vote, stop the whole course of justice through the kingdom. Besides the injury done to the subject, their granting a *noli prosequi* is in effect an incroachment upon the royal prerogative."

And, in a Note to the Letter in Mr. Woodfall's edition is the following passage:

"The messengers were indicted in defiance of the resolutions of the House of Commons, and true bills were found against them, but further proceedings were stopped by the Attorney General entering a *noli prosequi*. As the arguments urged by Mr. Adair, who was of counsel for the printers, on shewing cause against this measure, are extremely curious, and not generally known, we shall subjoin them for the information of the reader, and for the better elucidation of this and other letters upon the subject of this important dispute.

"Mr. Adair, in pursuance of notice, attended the Attorney General, Mr. De Grey, on the 17th of May, 1771, and after the indictment and an affidavit of the defendant had been read, spoke as follows:—

"It requires no arguments to shew, that though the entering a *noli prosequi* on prosecutions at the suit of the king only, is an undoubted prerogative of the crown; yet like all other prerogatives, it is intended for the general good of the subject, and not for the hindrance or interruption of public justice.

"It is indeed a discretionary power, but it is to be exercised not according to an arbitrary but a sound and legal discretion. It is for this reason, Sir, that it is not left to the wanton caprice of a favourite, or the arbitrary will of a minister, to be executed at pleasure, but it is deposited as a public trust in the hands of the Attorney General, that the exercise of it may be directed by his knowledge of the laws and constitution of the kingdom.

"Many reasons may be suggested why this power should be most sparingly exercised in cases of prosecution by indictment.

"Though the king's name is necessarily used as the general guardian of the laws, there is another party concerned in indictments, the injured party, who is for the most part the real, as the king is the nominal prosecutor.

"The practice too of entering a *noli prosequi* on indictments is but of modern date.

"In the case of Goddard and Smith in the 6th Mod. 262, Holt, chief justice, said, 'He 'had known it thought very hard that the Attorney General should enter *noli prosequi* upon indictments, and that it began first to be practised in the latter end of king Charles the 2d's reign, and he ordered precedents to be searched, if any were, in Mr. Attorney Palmer of Nottingham's time; and at another day he declared, that in all king Charles the 1st's time there was no precedent of a *noli prosequi* on an indictment.

"I therefore submit to you, that (sitting here to determine upon the application of a power so recent in its commencement, and of which we

* "The defendant was convicted. See 2 Burr. 908, 909."

are told by so respectable an authority, that it has been looked upon as a hardship in itself,) you will require the most cogent reasons to induce you to exert it upon this or any other occasion.

"Those reasons must arise either from the conduct of the prosecutor, the personal situation and circumstance of the defendant, or the subject matter of the prosecution.

"I do not find from the affidavit of the defendant, which is the only information I have had of the grounds of his application to you, that he complains of any particular hardship or oppression, arising either from unnecessary delay, unusual rigour, or any other misconduct in the prosecutor: he must therefore expect the extraordinary interposition of the prerogative in his behalf in this instance either from something peculiarly favourable in his personal situation, which entitles him to the protection of the crown, or from the charge against him being totally groundless and unfit to be discussed in a court of justice.

"As to the first of these points, if we consider Mr. Whittam not being a magistrate's constable, or any other officer intrusted with the execution of the laws, but acting merely in a private capacity, as wantonly assaulting one of the king's subjects, in his own house, who was not even accused of any crime, and violently attempting to deprive him of his liberty; if, I say, we consider him in this point of view, he can hardly be thought a fit object of the royal favour and protection: but if we view him in the light in which he has thought proper to place himself by his own affidavit, he will be found, if possible, still less entitled to that exertion of prerogative for which he has applied. He tells you, Sir, that he is a messenger of the House of Commons, that in that character, and acting under the express orders and authority of that House, he did the fact with which he is charged in the indictment. Does he mean, Sir, that you should consider this as a reason for granting a *noli prosequi*? When was it heard before that an exertion of prerogative was necessary to support the authority and privileges of the House of Commons? When was that House known to sue to the servants of the crown to screen their officers from the laws, or protect them from the indignation of an inconsiderable printer?

"I believe when any of their privileges have been really invaded, they have never been found wanting either in power or inclination to support them; and I am satisfied that if the House were now sitting, Mr. Whittam would not have dared to make an application so manifestly tending to expose their privileges and authority to ridicule and contempt. But, Sir, I am persuaded that the honour and dignity of the House of Commons are safe in your hands, and that you will suffer no act to proceed from you that can throw even an oblique imputation upon them.

"If there is for these reasons nothing in Mr. Whittam's personal situation, or circumstances, which can entitle him to an extraordinary interposition in his favour, it remains only to be considered whether any motive can be suggested from the subject-matter of the prosecution to induce you to put a stop to it by an exertion of the royal prerogative.

"The charge set forth in the indictment, and not denied by the defendant's affidavit, is for assaulting and imprisoning the prosecutor, Mr. Miller. It will not be contended that there appears any thing upon the face of the indictment oppressive, illegal, unfit to come before a court of justice, or which affords any motive whatsoever for granting the *noli prosequi*; the reason, therefore, if any, must arise from the matters set forth by the defendant's affidavit. The affidavit states, that the defendant is one of the messengers of the House of Commons; that the Speaker's warrant for apprehending the prosecutor was issued by order of the House, and that in consequence thereof, the defendant, to whom the warrant was delivered, did make the arrest with which he is charged in the indictment, and that he used no violence in so doing other than seizing Mr. Miller by the arm, as is usual in arrests.

"I apprehend it is not incumbent upon me here to consider, as I submit it is not competent for you, Sir, to determine in this summary manner, whether the matters here set forth do or do not amount to a good defence, or legal justification. We are not now to try the cause; but you, Sir, I am confident, will not interpose the prerogative of the king to prevent our trying it in the regular course before the proper jurisdiction, unless the prosecution, as it now appears before you, is so clearly and manifestly groundless, and unfit for discussion in a court of law, that it would be an abuse and mockery of public justice to bring it to a trial. If the authority under which Mr. Whittam alleges himself to have acted was not competent to authorise the fact which he committed, or if that authority never was in fact delegated to him, in either of those cases the prosecution is well founded in law. If any doubt or question can be raised on either of these points, it is not so clearly groundless as to justify the putting a stop to it by prerogative before those questions are legally determined.

"It might well be questioned, whether the House of Commons has any power by the laws or constitution of this kingdom to authorise the issuing of such a warrant as that under colour of which Mr. Miller was apprehended.

"It might be said, and supported too by the greatest authorities, that they cannot by any act of theirs singly, create any new power or privilege to themselves. That there was a time when they evidently neither possessed nor claimed any such power as that in question; and when the authority of an act of parliament was thought necessary to punish even so undeniable a breach of privilege, as the assaulting the person of a member attending upon his duty in parliament. The statute, Sir, which I here allude to, is the 11th of H. 6, c. 11, which

was made to extend the provisions of 5th of H. 4, c. 6. for punishment of assaults on the servants of members of parliament when attending on their masters in their duty, to the persons of the members themselves. It might be urged, that the power in question has never been given them by any act of parliament, and that if there ever was a time when they did not possess it, they can by no other means have legally acquired it. All this and much more might be said, if it were necessary to dispute the authority of the House of Commons to issue the warrant for the commitment of Mr. Miller; but it is sufficient for me at present to contend, that whether they had, or had not the power, they never did in fact give the defendant any authority whatsoever to make the arrest in question.

"The warrant, Sir, under colour of which Mr. Whittam acted, is a warrant purporting to be issued in pursuance of an order of the House of Commons, and signed Fletcher Norton, Speaker. But, Sir, the order of the House, as it is recited in the warrant itself, is for taking Mr. Miller into the custody of the Serjeant at Arms, or his deputy; and Mr. Whittam is described in the direction of the very same warrant to be neither the one nor the other of these. No authority whatsoever can be conveyed to Mr. Whittam by virtue of an order, in which he is not named, and which particularly points out certain persons, in contradiction from all others. This warrant, therefore (so far as it relates to Mr. Whittam,) appears to be issued by the Speaker, merely of his own authority, unauthorised by any order of the House of Commons. Has the Speaker any power to commit, unless he derives it from the orders of the House? If he has not, which must be granted, he is bound strictly and literally to pursue that order which creates his authority: as far as he exceeds it, he acts without authority himself, and most clearly can convey none to any other person. Mr. Whittam, therefore, in this case, acting without any legal authority whatever, in the arrest of the prosecutor, a prosecution grounded upon that cannot be considered as totally void of foundation. But supposing for a moment that the prosecution was frivolous and ill-grounded, I submit that that alone would not be a reason for the extraordinary interposition of the crown. If it would in this case, it must in every other; every defendant who fancied himself unjustly prosecuted would apply for protection to the crown; and almost every indictment must first be tried by the Attorney General before it could come regularly into a court of justice. I presume you will conceive it was not for these purposes that this prerogative was vested in your hands; and that there must appear some strong reasons peculiar to the case to shew why it is improper and unfit for public discussion, besides merely that of the prosecution being ill-grounded, to induce you to make this extraordinary interposition. I submit to you, Sir, with great deference, that there appears no such reasons in this case. Every motive of policy and prudence seems to weigh on the other side. The question to be tried is the most important that can well be conceived. The privileges of the House of Commons on the one side, and the liberties of the people of England on the other, are said to be materially affected. Perhaps indeed it might have been wished that this great question had never been started, or brought to the public view, by issuing the warrant in question. But when it has been already so much agitated, and has engrossed the attention of the public, it seems necessary, for the satisfaction and quiet of the kingdom, that it should proceed to a solemn and legal determination in a court of justice. If, therefore, Sir, the House of Commons had no authority by law to authorize Mr. Whittam to make the arrest upon the prosecutor, or if, in fact, no authority was delegated to him, in either of these cases he has illegally assaulted an innocent man, and deprived him of his liberty; and the entering a *noli prosequi* would be no obstruction of public justice. If on the other hand the House of Commons had a legal authority, and regularly delegated the execution of it to Mr. Whittam, the public should be convinced of it by a discussion and determination in a court of law. And the granting the *noli prosequi* in that case would tend to mislead many people into an opinion that it was done to screen an offender from the laws, who had no legal justification in a court of justice: I therefore submit to you, Sir, for these reasons, that you, as Attorney General, will not think proper in this case to grant a *noli prosequi*."

"*Mr. Attorney General.* Do you produce any evidence?"

"*Mr. Adair.* We offer no other evidence than what appears in the affidavit of the defendant himself, and the warrant to which it refers."

"*Mr. Attorney General.* You are extremely right in this, that it is not at all a fit thing for the Attorney General to try either the fact upon which the defendant is indicted, or to determine the law. The only question is this, whether it is fit for the king to interpose as the prosecutor of this offence? That, I take it, should be the ground of your argument, and the point upon which I expected satisfaction. The affidavit itself states the messenger of the House of Commons to be acting under the authority of the House of Commons; and if this was the only way in which that question could be brought before a court of law, I should be obliged to give an opinion whether it ought, or whether it ought not.

"The only point I have to consider is, whether it be fit for the name of the crown to appear in prosecuting one who appears to be the messenger of the House of Commons, and to be armed by the authority of that House for doing the very thing he has done under the orders of the House? I don't mean to pass over the objection which has been made, that the Speaker of the House, by orders of the House, directing the warrant to a person not

named in such order, whether that order extends only to arresting the prosecutor, and taking him into the custody of the Serjeant at Arms, or his deputy: I dare say I take Mr. Adair's objection perfectly right; the order of the House is for taking him into the custody of the Serjeant at Arms or his deputy; and the objection is, that the person in whose custody the prosecutor was originally taken, is neither the Serjeant at Arms, or his deputy; and the doubt you raise upon it is, whether the Speaker of the House of Commons can authorize another person to arrest and bring him into the custody of the Serjeant at Arms, or his deputy; for the Serjeant at Arms, or his deputy, is the proper and the only custody I know of belonging to the House, and the gentleman's argument is, that in point of the arrest it cannot be made without the Serjeant, or deputy Serjeant, with respect to the orders of the House of Commons, and the direction of the warrant by the Speaker, which is a question of law to be sure. It has been constant in point of practice for the messengers to be employed (in the orders of the House, and for other than messengers to be employed) upon the very same occasion. There is nothing so constant as the messengers all to be employed: there are some few instances where more than the messengers have been employed upon these occasions. The difficulty upon it was, whether they should or not be inserted in the warrant: or whether if they were not inserted in the warrant, it could be construed under the general description of the Serjeant at Arms, or his deputy; or whether that authority could go to warrant those which might be appointed by the Serjeant at Arms, or his deputy, upon that occasion. It was thought more proper to make a warrant directed to the person to be employed, though it was mentioned in the orders of the House that the custody was to be that of the Serjeant at Arms, or his deputy, according to the usual form of their orders.

"But the only point for me to consider is, how far it is fit the king should be the prosecutor of a servant of the House of Commons in the exertion of a privilege which they now claim, which they have claimed for ages, and have been in the possession of for ages, and that the king should be brought into a proceeding against the servant of the House as a prosecutor. The *noli prosequi* is called a prerogative right of the crown; it amounts to no more than this, that the king makes his election whether he will continue or not to be the prosecutor upon an indictment, and the *noli prosequi* is entered in the same words in case of the crown as of a private person. The entry upon the record is exactly the same by the Attorney General as by a private plaintiff upon record in any civil suit.

"I did expect that you would have given me some reason for entertaining an opinion, that it was decent and fit for the crown to continue and stand forth as a prosecutor for the messenger of the House of Commons acting under their direction, in maintenance of a privilege they have claimed and held so long. That is the only point I put it upon. The affidavit as made by the defendant makes it necessary to consider him as an officer of the House.

"I did not indeed expect any disputes upon it, or that it would be put upon so small a ground: the reason I expected was, that it was becoming an officer of the crown, in the name of the crown, to continue a prosecution by the crown against the messenger of the House of Commons acting under the authority of the House of Commons."

"Mr. Adair expressing a doubt whether it would be proper for him to make any reply to this, the Attorney General said he should be glad to hear him.

"Mr. *Adair*. With regard to what you have suggested, it is true the entry upon record is the same in the case of the crown as of a private person, yet in a prosecution by indictment the crown is not solely concerned. To make the case exactly similar, it should be an information *ex officio*, or any other really and truly a crown prosecution, and then the entering *noli prosequi* upon that, would be the same as upon private actions. But in the case of indictments the king being in fact a nominal prosecutor, though his name is necessary, and the injured party being the true prosecutor, who applies to the laws of his country for justice against the offender, who has violated those laws and particularly injured him: if in that case the king puts a stop to this prosecution by withdrawing his name from it, it is the same in effect, though not in form, as if he sent his mandate, and said that prosecution should not go on: because if he withdraws his name from it, that prosecution cannot by the laws go any further, the prosecutor himself cannot proceed in his own name; the withdrawing that name has the same effect as the actual interposition of prerogative by the Attorney General, and operates the same as a pardon. Mr. Whittam being alleged to have acted under the authority of the House of Commons, to have had a warrant directed to him; the question is not whether the warrant is legal or not, but whether it is proper for the crown to put a stop to that prosecution, and whether the privileges of the House of Commons being said to be concerned, any interposition of the crown be necessary to support their authority. If Whittam has acted in pursuance of the order of the House, if those orders are such as the House has a competent authority to make, I submit that it cannot be a doubt that that matter pleaded or brought in a regular manner before a court of justice would be a sufficient defence. If the courts of law are of opinion that the House has that authority, and that it was regularly delegated to Whittam, they would necessarily be of opinion to acquit him; and upon that ground there appears to be no necessity for the crown withdrawing itself from a prosecution, which by no possible means can prove oppressive or injurious to the defendant. If he has acted under

a legal authority, he must be legally acquitted in a court of justice. But if the authority is not sufficient, or not regularly conveyed, it is proper, for the sake of justice and the liberty of the subject, that judgment should be pronounced upon it in a court of law. I believe the prosecutor does not contend, that the defendant has been guilty of that kind of offence, for which he means to prosecute him with any rigour; he don't mean to oppress him, or proceed for the sake of punishment only; whether it is 5*l.* or 5,000 is indifferent to him; the only thing he wishes is to have the question decided by a legal competent jurisdiction. If it comes regularly before the Court, though perhaps upon this indictment it could not, but if it does, the question is, whether the Speaker of the House of Commons had a sufficient legal authority to authorize that arrest, or whether the defendant has actually acted under that authority, such as it was; and I submit to your consideration, whether, upon that point, such interposition appears to be necessary in this case, either upon behalf of the defendant, or of the privilege of the House of Commons."

"Mr. *Attorney General.* I don't put it upon the tenderness to Mr. Whittam, or the point of privilege of the House of Commons, but merely upon the foot of decency, as the circumstance of the crown taking a part in the prosecution (which they must do if they go on with it) against the messenger of the House of Commons, acting under the authority of the warrant of the Speaker, pursuant to an order of the House."

Mr. De Grey, the Attorney General, was afterwards Chief Justice of the Common Pleas, and Mr. Adair, subsequently, Recorder of London.

I am sorry to find in Mr. Gilbert Wakefield's Memoirs of his own Life the following passage respecting the Richmond Park transactions:

"By one of those scandalous *monarchical* encroachments which have distinguished the present reign at Richmond, and essentially impaired the beauty and convenience of that terrestrial Paradise, the footway through Richmond Park to Wimbledon, East Sheen, and Kingston, was shut up, and no passage allowed without a ticket." (8vo. 1792, p. 245).

It has been seen that the obstruction was made in the reign of king George 2. I have no suspicion that Mr. Wakefield designed any misrepresentation. I observe that Dr. Disney, in his preface to Dodson's Life of Foster, cites a second edition (1804) of Wakefield's Memoirs: that edition, I believe, I never saw.

P. 687. Since writing this note, I have found in vol. 2, p. 44, of Mr. Stephens's Memoirs, that Mr. Horne assumed the additional name of Tooke in the year 1782.

P. 689. For more concerning the indelible character of the clergy, see bishop Horsley's speech (April 13th, 1804) in a debate, in Dom. Proc. upon the Bill (stat. 44 Geo. 3, c. 43), to enforce the due observance of the canons and rubric respecting persons to be admitted into the sacred orders of deacon and priest. Horsley's Speeches in Parliament, pp. 424, *et seq.* 8vo. 1813. The case of a clerk abandoning his clerical character, and entering on a lay profession, or exercising a lay calling, was noticed by serjeant Glynn, in the course of the proceedings in the House of Commons respecting a publication defamatory of the Speaker (sir Fletcher Norton). See 17 New Parl. Hist. 1024.

P. 719. The allusion to the treatment of the Presbyterians by the arebbishop of York, I apprehend, relates to the Sermon which, on February 21, 1777, was preached by archbishop Markham, before the incorporated Society for propagating the Gospel in Foreign Parts, which sermon, in compliance with the request of the Society, was published by the preacher.

END OF VOL. XX.

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